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COURT DECISIONS

RELATING TO THE

NATIONAL LABOR RELATIONS ACT

VOLUME 38

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COURT DECISIONS

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NATIONAL LABOR RELATIONS ACT

VOLUME 38

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Harold L. Wakefield v. NLRB

779 F.2d 1437 (9th Cir.), January 7, 1986—274 NLRB 459

On appeal from supplemental Board Order

Before DUNIWAY, ANDERSON, and PREGERSON, Circuit Judges

PREGERSON, Circuit Judge: On February 10, 1978, the National Labor Relations Board ("Board") issued a decision and order finding, *inter alia,* that Greyhound Taxi Co. ("Greyhound Taxi") had violated the National Labor Relations Act because its agents had physically assaulted Harold Wakefield for his union activities, resulting in his constructive discharge. *Greyhound Taxi Co.,* 234 NLRB 865 (1978). The Board's order required Greyhound Taxi to offer Wakefield reinstatement and to make him whole for any loss of earnings he might have suffered as a result of the company's unfair labor practices. On February 27, 1985, the Board issued a supplemental decision and order determining the period for which Wakefield was owed backpay. *Greyhound Taxi Co.,* 274 NLRB No. 60 (1985) ("Order"). This latter order is the subject of this appeal.

FACTS

In October 1974, after six years of steady work as a cab driver with Greyhound Taxi, Wakefield broke his arm while resisting an attempted robbery by a customer. Wakefield alleged that during the three months he was disabled, he was harassed by Greyhound Taxi officials who believed that he was malingering. Wakefield responded by stepping up his union activities and his relationship with his employer continued to deteriorate. In December 1975, the General Counsel finally filed an NLRB action on behalf of Wakefield charging Greyhound Taxi with unfair labor practices.

In February 1976, before the NLRB action was heard, Greyhound Taxi's animosity towards Wakefield culminated in a physical assault by the company's agents. Wakefield, who sustained minor injuries (a sore back and sprained ankle, primarily) in the attack, did not return to work at Greyhound Taxi. Soon afterwards, he developed a severe post-traumatic anxiety neurosis that required medical treatment and prevented him from working for more than five years.

On February 10, 1978, the Board issued an order finding that Greyhound Taxi had committed unfair labor practices by its harassment, assault, and constructive discharge of Wakefield. *Greyhound Taxi Co.,* 234 NLRB 865 (1978). On October 7–8, 1981, supplemental hearings were held before an Administrative Law Judge ("ALJ") to determine the amount of backpay due Wakefield as a result of Greyhound Taxi's unlawful conduct. The primary issue at the hearing was whether Wakefield was psychologically disabled from working, and, if so, whether Greyhound Taxi was responsible for the disability. After careful consideration of the evidence presented, the ALJ found that "Wakefield's disability resulted solely from the circumstances surrounding his attack and unlawful termination."

On February 27, 1985, the Board issued its supplemental decision and order adopting the ALJ's findings with modifications. While agreeing that Wakefield was disabled, the Board, in a split decision, held that his psychological disability was the result of a preexisting mental condition and was not, therefore, caused by Greyhound Taxi's unfair labor practices. Accordingly, the Board concluded that Greyhound Taxi's liability for backpay terminated when Wakefield recovered from the minor physical injuries incurred in the assault. In support of its conclusion, the Board cited Wakefield's erratic employment history, previous psychiatric treatment, and the perceived weaknesses in the testimony of Dr. Groesbeck, the primary witness called by the General Counsel. Order at 3.

Wakefield, appearing *pro se,* appeals the supplemental order as modified. The Board also seeks enforcement of its supplemental order.

DISCUSSION

We must affirm if the Board has applied the correct legal standards and there is substantial evidence in the record as a whole to support its findings and conclusions. *Local Union No. 76 v. NLRB,* 742 F.2d 498, 501 (9th Cir. 1984). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Mercy Peninsula Ambulance Service,* 589 F.2d 1014, 1018 (9th Cir. 1979) *quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59

S.Ct. 206, 216–17, 83 L.Ed. 126 (1938). The standard of review does not change when the Board and its ALJ disagree in their findings or conclusions. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 468–69, 95 L.Ed. 456 (1951).

We cannot enforce the Board's supplemental order because it fails to apply the correct legal standard. The Board overlooked the time-honored legal principle that a wrongdoer takes his victim as he finds him when it held that Wakefield's predisposition towards mental illness relieved Greyhound Taxi of responsibility for his psychological disability. *See* W. Prosser, *Law of Torts* 262 (4th ed. 1971). Dissenting Board member Dennis stated the law correctly when she concluded: "The uncontradicted psychiatric testimony establishes, at the very least, that [Greyhound Taxi's] unlawful conduct aggravated Wakefield's nondisabling mental condition into a disabling one. Such aggravation of a preexisting condition is all the proof the Board requires." Order at 5.

We are also unable to enforce the Board's decision because it fails to base its findings on substantial evidence in the record. The Board rejected the ALJ's findings of causation in large part because of perceived weaknesses in the testimony of the General Counsel's primary witness, Dr. Groesbeck. The Board found Dr. Groesbeck's testimony equivocal because he did not conclude that the assault "standing alone" triggered Wakefield's disability. Order at 3. The Board also thought that many of the workplace incidents Dr. Groesbeck identified as contributing to Wakefield's illness were, in fact, "entirely lawful." *Id.* In making these arguments the Board fails to appreciate that the assault was not the only unfair labor practice attributable to Greyhound Taxi and thus

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need not be shown to be the sole cause of Wakefield's disability to hold the company entirely responsible for Wakefield's lost wages since his unlawful discharge.

The undisputed record shows that Greyhound Taxi began harassing Wakefield because of his union activities in early 1975. By fall, the campaign had intensified to include threats and intimidation. The assault and constructive discharge followed in February 1976. In the underlying unfair labor practice proceeding, the Board considered this evidence and accepted the ALJ's findings that Greyhound Taxi's unlawful conduct included imposition of "intolerable working conditions which eventuated in a physical assault. . . ." Dr. Groesbeck identified the particular incidents surrounding the physical assault on Wakefield as the primary cause of his condition. Contrary to the view of the Board majority, this opinion does not undercut the ALJ's conclusion that Greyhound Taxi's overall pattern of unlawful conduct—including threats, harassment, or intimidation, and finally the physical assault—caused Wakefield's psychological disability. Indeed, as quoted by the Board majority, Dr. Groesbeck stated that "the primary element of causation was the work situation and the variety of incidents that had taken place that built up over the previous two years." Order at 3.

Moreover, two additional psychiatrists, representing interests adverse to Wakefield, concurred in Dr. Groesbeck's diagnosis of Wakefield's disability and his identification of the disability's cause. Because these concurring evaluations were uncontradicted, the Board could not reasonably conclude, contrary to the judgment of the ALJ, that Greyhound Taxi's unfair labor practices did not cause Wakefield's psychological disability.

Because we agree with the ALJ's finding that Greyhound Taxi's unlawful conduct caused Wakefield's psychological disability, we deny enforcement of the Board's supplemental order and remand the matter to the Board to reassess the amount of back pay due to Wakefield.

NLRB v. Allcoast Transfer, Inc. and Ward Moving and Storage, Inc.

780 F.2d 576 (6th Cir.), January 9, 1986—271 NLRB 1374

On petition to enforce Board Order

Before MERRITT and CONTIE, Circuit Judges; and WEICK, Senior Circuit Judge

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CONTIE, Circuit Judge: The National Labor Relations Board (Board), seeks enforcement pursuant to 29 U.S.C. § 160(e) of its decision and order issued against Allcoast Transfer, Inc. (Allcoast) and Ward Moving and Storage, Inc. (Ward Moving). The Board found that Ward Moving is the alter ego of Allcoast and Albert E. Ward, Inc. (A.E.

Ward) and is therefore obligated to honor the collective bargaining agreement between A.E. Ward and Local 392 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). For the reasons that follow, we grant the petition for enforcement.

I.

Robert G. Harris purchased A.E. Ward, an Ohio corporation engaged in the moving and storage business, in 1976. Harris at all times was A.E. Ward's president and chief operating officer and owner of at least ninety percent of the company's stock. A.E. Ward essentially handled three types of moving business. First, it transported goods interstate under the authority of its own license issued by the Interstate Commerce Commission (ICC). Second, it transported goods intrastate under the authority of its own license issued by the Public Utilities Commission of Ohio. Third, it transported goods interstate as an agent for Atlas Van Lines, Inc. (Atlas) under the authority of an ICC license issued in Atlas' name. When the company acted in the capacity of Atlas' agent, it represented itself as "Atlas Van Lines." Otherwise, it operated under its corporate name, Albert E. Ward, or its trade name, Ward Moving and Storage. All truck drivers employed by the company, irrespective of whether they performed Atlas business or independent business,[1] were represented by Local 392.

In February 1982, Atlas adopted a new corporate policy which prohibited companies acting as Atlas agents from having their own independent ICC licenses. Atlas instructed its agents that they could "shelve" their independent operating authority or they could transfer it to a separate corporation which could operate under that authority as long as the business and equipment were not associated with Atlas. In order to preserve A.E. Ward's independent authorities, Harris opted to create a new corporation in a manner similar to that which Atlas suggested.

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On December 10, 1982, Harris incorporated a new company to operate as the Atlas agent. The new company's name was Ward Moving and Storage, Inc. (Ward Moving), which was the trade name previously utilized by A.E. Ward. Harris transferred the Atlas agency relationship to Ward Moving, enabling Ward Moving to operate under Atlas' interstate operating authority. A.E. Ward, however, retained its own operating authorities to transport goods interstate or intrastate. At all times since Ward Moving's inception, Harris has been its sole officer and sole shareholder.

On January 18, 1983, Harris changed the corporate name of A.E. Ward to Allcoast Transfer, Inc. This change was also necessitated by the new Atlas policy that the name of the corporation not acting as the agent for Atlas could not be "similar to or otherwise identifiable with the name of the Atlas agent." Allcoast succeeded to A.E. Ward's independent authorities to transport goods and Harris continued to be president, chief operating officer and at least ninety percent shareholder of Allcoast.

Following these corporate changes, the headquarters of Allcoast was relocated to a separate nearby facility. Several pieces of equipment were repainted, so they would not be identified with Atlas, and were moved to this new facility. No clerical employees were transferred there. The new location had a maintenance facility at which both Allcoast and Ward Moving trucks were maintained and repaired. The new facility only remained open, however, for nine or ten months whereupon the Allcoast operation was reconsolidated with Ward Moving and both companies again operated from the original facility.[2]

When Allcoast moved to the new location, Harris informed all of the employees who had worked for A.E. Ward that they had to choose the corporation for which they wanted to work, Allcoast or Ward Moving. Four A.E. Ward drivers continued to work as drivers for Allcoast and two others were hired to drive for Ward Moving. A.E. Ward's clerical employees were retained by Ward Moving.

On January 25, 1983, the Union notified Harris that it considered both Allcoast and Ward Moving to be bound by the collective bargaining agreement between A.E. Ward and the Union. Harris replied that A.E. Ward had changed its name to Allcoast and that Allcoast would comply with the agreement. However, Harris denied that Ward Moving was bound by the agreement, stating that Ward Moving was a completely separate corporation from A.E. Ward/Allcoast.

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[1] Atlas Van Lines required that drivers had to be certified according to its standards in order to handle Atlas shipments. Non-certified drivers could not be assigned to Atlas jobs.

[2] Harris testified before the ALJ that he had moved Allcoast to a separate location to "prove a point" that Allcoast and Ward Moving were two separate, distinct businesses. However, when he did not receive the business he had hoped for, Harris decided "there was no reason to go bankrupt to prove a point, to look good and play the game," so he returned the operation to the original facilities.

On May 16, 1983, the Union filed an unfair labor practice charge against both Allcoast and Ward Moving. After a hearing, the administrative law judge (ALJ) determined that Allcoast and Ward Moving are alter egos of A.E. Ward and of each other and therefore found that Ward Moving violated §§ 8(a)(5) and (a)(1) of the National Labor Relations Act (Act) (29 U.S.C. §§ 158(a)(5), (a)(1)) by repudiating the collective bargaining agreement A.E. Ward had with the Union. The Board affirmed the ALJ's finding in its decision reported at 271 N.L.R.B. No. 210 (1984). The Board ordered Allcoast and Ward Moving, jointly and severally, to cease and desist from their unfair labor practices. It also required the companies to compensate the Ward Moving employees for losses incurred due to the failure to honor the collective bargaining agreement and ordered the companies to post appropriate notice.

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The Board seeks enforcement of the terms of its order.

II.

The alter ego doctrine was developed to prevent employers from evading obligations under the Act merely by changing or altering their corporate form. The doctrine "will be applied, when appropriate, to treat two nominally separate business entities as if they were a single continuous employer." *Alkire v. NLRB.*, 716 F.2d 1014, 1018 (4th Cir.1983). To determine whether application of the doctrine is appropriate, the circumstances surrounding a change in corporate form must be examined to determine whether the change resulted in a "*bona fide* discontinuance and a true change of ownership" or was merely a "disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942). A determination of alter ego status is a question of fact, *id.*, and therefore the Board's conclusion must be enforced if supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

This appeal focuses on which criteria should be used to determine whether a successor corporation is merely the alter ego of its predecessor. This court and various other circuit courts have recognized that factors relevant to a finding of alter ego status include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir.1981), citing *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976); *Goodman Piping Products Co., Inc. v. NLRB*, 741 F.2d 10, 12 (2d Cir.1984); *NLRB v. Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir.1983); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553–54 (3d Cir.1983), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984); *Amalgamated Meat Cutters & Butchers Workmen v. NLRB*, 663 F.2d 223, 226–27 (D.C.Cir.1980). We also have observed that it is the Board's function to "strike a balance among each of the criteria" set forth above. *Nelson*, 638 F.2d at 968.

The respondents do not dispute that these control and operational factors are relevant inquiries, but argue instead that an additional factor is a prerequisite for imposition of alter ego status. They assert that the Board must find the existence of unlawful intent on the part of the employer, either anti-union animus or intent to evade obligations under the Act, in order to conclude that one company is the alter ego of another. The respondents further contend that the record fails to show such intent, arguing that the change in corporate form was necessitated solely by Atlas' policy change. Based on these arguments, the respondents conclude that Ward Moving cannot be considered the alter ego of A.E. Ward.

A.

Neither this circuit nor the Supreme Court has addressed the issue raised by the respondents.[3] Accordingly, we are not bound by any precedent in deciding the intent issue today. The circuits which have considered this issue have disagreed as to its appropriate resolution.

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[3] In *Nelson*, this court merely set forth the control and operational factors as "guiding criteria" without mentioning an intent element. Further, *Nelson* relied on a decision of the Board, *Crawford Door Sales Co., Inc.*, 226 NLRB 1144 (1976), which failed to address the intent issue. As a result, we conclude that this court has not been presented with this issue and therefore we are free to decide it at this time.

The First Circuit and the Eighth Circuit have expressly adopted the approach urged by the respondents, holding that "[u]nlawful motive or intent are critical inquiries in an alter ego analysis."[4] *Penntech Papers,*

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Inc. v. NLRB, 706 F.2d 18, 24 (1st Cir.), *cert. denied,* 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983); *Iowa Express Distribution, Inc. v. NLRB,* 739 F.2d 1305, 1311 (8th Cir.), *cert. denied,* —— U.S. ——, 105 S.Ct. 595, 83 L.Ed.2d 704 (1984) (citing *Penntech*); *but see, NLRB v. Campbell-Harris Electric, Inc.,* 719 F.2d 292, 295 (8th Cir.1983) (previous Eighth Circuit opinion stating "a finding that two companies are in fact alter egos is proper if based upon substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers, and supervision," without mention of an intent inquiry). Under the approach advocated by the First and Eighth Circuits, the Board would have to find intentional employer evasion before imposing alter ego status.[5]

A Third Circuit opinion, *NLRB v. Scott Printing Corp.,* 612 F.2d 783 (3d Cir.1979), has been cited as limiting imposition of alter ego status to instances where intent to evade union obligations is found. *See e.g., Alkire,* 716 F.2d at 1019. In *Scott Printing,* the court "[a]ssum[ed] without deciding that . . . the General Counsel must prove [the employer] intended to evade its duty to bargain." *Scott Printing,* 612 F.2d at 787. It is unclear, however, whether the Third Circuit has adopted intentional evasiveness as a prerequisite to a finding of alter ego status. We first note that one judge dissented in *Scott Printing* because the court extended the alter ego doctrine "to a situation where no evidence of anti-union animus appears on the record." *Id.* at 789. The dissent argued that a finding of intent to evade labor obligations or antiunion animus is essential in alter ego cases, and that the court erred in not requiring such a finding. *Id.* at 790. We also observe that a more recent opinion indicates the Third Circuit does not consider a finding of anti-union animus or intentional employer evasiveness to be essential in an alter ego analysis. In *NLRB v. Al Bryant, Inc.,* 711 F.2d 543 (3d Cir.1983), *cert. denied,* 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984), the court cited to *Scott Printing* but merely set forth the control and operational factors as the criteria relevant to a determination of alter ego status. *Id.* at 553–54. The court did not mention any intent element. Therefore, we doubt whether the Third Circuit has adopted an intent element as an essential inquiry under an alter ego analysis.

The Second Circuit has expressly rejected the argument that a finding of anti-union animus or an intent to evade is a prerequisite to holding that one company is the alter ego of another. In *Goodman Piping Products, Inc. v. NLRB,* 741 F.2d 10 (2d Cir.1984), the court observed "[t]he cases . . . show that anti-union animus may be 'germane,' . . . or even a sufficient basis for imposing alter ego status . . . ; they do not establish that anti-union motivation is necessary." *Id.* at 12 (citations omitted).

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The court instead determined that "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership" were the "key" inquiries and, in light of those criteria, found substantial evidence to support the imposition of alter ego status. *Id.* at 11.

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[4] A similar, but purportedly broader, approach was adopted by the Fourth Circuit in *Alkire v. NLRB,* 716 F.2d 1014 (4th Cir.1983). There the court set forth a two-step analysis with an emphasis on the employer's motivation for changing its corporate form. The court stated:

> When business operations are transferred, the initial question is whether substantially the same entity controls both the old and the new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.
>
> Without some future benefit reasonably accruing from the employer's action, then the "force" of the action ends with the transfer itself, and the transfer of ownership is *bona fide.* If, however, the transfer, by eliminating an NLRB-imposed duty, provides a continuing benefit to the old employer, then the force of the closing survives the transfer. To the extent that obtaining the benefit was a motive for the transfer, or was a reasonably foreseeable effect, the result represents a disguised continuance of the old employer. *Id.* at 1020. The court further asserted that "[l]inking employer motivation for the transfer of its business to obtaining a future benefit represents a broader standard than does requiring '[a]ntiunion animus or intent to evade labor obligations,' . . . and better strikes a balance between the notion of limited corporate liability and the protection of those employee rights embodied in the national labor laws." *Id.* (citation omitted). One circuit judge dissented from the court's approach, asserting that it was not necessary to show that an employer intended to evade the purposes of the Act in order to find alter ego status. *Id.* at 1022.

[5] Both *Penntech* and *Iowa Express* cited the Note, *Bargaining Obligations After Corporate Transformations,* 54 N.Y.U.L.Rev. 624 (1979), as support. The Note asserts that "for an alter ego finding . . . the employer must act from anti-union animus." *Id.* at 639.

Finally, we note that some circuits have given substantial weight to, but stopped short of making a prerequisite of, employer intent in determining alter ego status. The Tenth Circuit first observed in *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir.1980), that there is no "hard-and-fast rule" in determining whether a successor employer is the alter ego of its predecessor, and that many factors are relevant. *Id.* at 270. The court then listed the considerations it believed were important, including the relationship between the management of the two companies, continuity of the workforce, continuity of equipment and location, similarity of customers and accounts, similarities in the type of work, and the assumption of liabilities by the successor company. *Id.* As to employer intent, the court stated:

> If an employer makes changes in its business operation to deliberately get rid of the union, then the employer is more likely to be an *alter ego.* If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor to the first. In connection with this particular aspect, we think evidence of anti-union sentiment by an employer, occurring either before or after the change in the structure of the business, is germane.

Id. Accordingly, the court found that the employer's intent is relevant, but did not hold it to be essential to imposing alter ego status.[6] The D.C. Circuit considered the elements relevant to a finding of alter ego status in *Fugazy Continental Corp. v. NLRB,* 725 F.2d 1416 (D.C.Cir.1984). The court listed the same control and operational factors this court set forth in *Nelson* and added, "the Board will give weight to evidence that the motive for the transaction was to evade statutory and contractual duties under the NLRA or to escape the reach of the Board's remedies." *Id.* at 1419. A finding of motive or intent was not classified as a prerequisite, however.

Upon analyzing these opinions of our sister circuits, we conclude that a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider, along with the well-established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership, in determining alter ego status. We note that the essential inquiry under an alter ego analysis is "[w]hether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942) ("If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience."). This essential inquiry does not require the Board to find that an employer intended to evade obligations under the Act in order to impose alter ego status. Instead, deciding whether a successor corporation is really the predecessor corporation by another name merely requires an examination of all the circumstances of each case, and a weighing of all the relevant factors. This conclusion is consistent with the cases discussing the alter ego doctrine since they generally recognize that the alter ego analysis should be flexible. *See, e.g., Goodman Piping Products, Inc. v. NLRB,* 741 F.2d 10, 11 (2d Cir.1984) ("[T]he cases explain that the test of alter ego status is 'flexible.' "); *J.M. Tanaka Construction, Inc. v. NLRB,* 675 F.2d 1029, 1033 (9th Cir.1982) (In an alter ego analysis, "[n]o factor is controlling and all need not be present."); *NLRB v. Tricor Products, Inc.,* 636 F.2d 266, 270 (10th Cir.1980) ("There is no hard-and-fast rule."). Under a flexible approach, no one element should be come a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together. *See, e.g., Tanaka,* 675 F.2d at 1035 (Holding that common ownership is but one factor to be considered by the Board and it "is not a necessary prerequisite to an alter ego finding.").

Our rejection of the argument that the Board must find an intent to evade union obligations or anti-union animus before imposing alter ego status furthers the purpose of the alter ego doctrine. As we stated earlier, the doctrine was developed to prevent employers from evading obligations under the Act by merely changing or altering their corporate form. If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations. Our flexible approach will discourage such attempts at circumvention by allowing the Board to weigh all the relevant factors instead of requiring it to always show the employer's intent to evade. Accordingly, even when purportedly legitimate reasons support an alteration in structure, the Board can prevent an employer from avoiding obligations under the Act.

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[6] We note, however, that both *Penntech* and *Iowa Express* cited to *Tricor* in holding that unlawful motive or intent is a critical element in an alter ego analysis. We disagree that *Tricor* supports such a holding.

B.

Having set forth the standard by which this court will analyze application of the alter ego doctrine, we now examine the imposition of alter ego status in the present case. This case involves a situation in which one predecessor employer, A.E. Ward, divided into two successor employers, Ward Moving and Allcoast. Since the respondents do not dispute that Allcoast is the alter ego of A.E. Ward,[7] we only examine the Board's findings regarding Ward Moving.

We conclude that there is substantial evidence to support the Board's finding that Ward Moving is the alter ego of A.E. Ward. The two enterprises have substantially identical management and supervision. Harris always managed A.E. Ward and he currently manages both Ward Moving and Allcoast. Harris formulates the operational and labor relations policies from his out-of-town office and instructs a supervisor at the companies' facility to implement the policies. Although the supervisor is officially only the supervisor of Ward Moving, he acts as an agent for Harris, the official supervisor of Allcoast, with regard to Allcoast's operations.[8]

The business purpose and operations of A.E. Ward and Ward Moving are also substantially identical. As part of its business, A.E. Ward performed interstate moves on behalf of Atlas Van Lines. Ward Moving's business is essentially the same, operating as an agent for Atlas under Atlas' ICC authority. The equipment and the employees of the two companies likewise are substantially identical. Even though Ward Moving and Allcoast cannot use their trucks interchangeably due to the Atlas policy prohibiting trucks bearing its logo from performing non-Atlas work, Ward Moving primarily obtained its equipment from A.E. Ward and currently leases the original A.E. Ward trucks from Allcoast. Accordingly, equipment used by Ward Moving is the same which was used by A.E. Ward. Also, Ward Moving hired two

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of A.E. Ward's truck drivers as well as A.E. Ward's clerical staff.

Based on the above criteria there is clearly substantial evidence to support the Board's finding that Ward Moving is the alter ego of A.E. Ward without a determination of Harris' intent. When the circumstances so strongly support a finding of alter ego status, as they do here, the Board can properly weigh all of the factors and infer that the employer intended to evade union obligations. An inquiry into employer intent may be appropriate in other situations involving application of the alter ego doctrine but here it simply is not necessary.[9]

Accordingly, the Board's petition for enforcement is GRANTED.

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[7] Allcoast had consistently complied with the collective bargaining agreement executed by A.E. Ward and the Union.

[8] Ward Moving's supervisor could not officially be the supervisor of Allcoast since by working for Ward Moving he is a non-union employee and Allcoast is a union shop. However, in his capacity as Harris' agent, he essentially acts as Allcoast's supervisor.

[9] We note, however, that even though the Board made no finding regarding Harris' intent, the record shows some evidence of anti-union animus. At the hearing before the ALJ, Harris testified "I don't want it [the union], I'll be honest with you, who needs it, who wants it." While a finding of intent is unnecessary in the present case, this statement indicates that Harris viewed a change in corporate structure as the opportunity to evade unwanted obligations under the Act.

NLRB v. Carpenters Union Local No. 1622, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

786 F.2d 903 (9th Cir.), January 21, 1986—262 NLRB 1211

On petition to enforce Board Order

Before GOODWIN, ALARCON, and POOLE, Circuit Judges

PER CURIAM: The National Labor Relations Board seeks enforcement of a broad cease and desist order against Carpenters Local 1622 for secondary picketing at two different construction sites. We hold that substantial evidence supports the Board's finding of violations and grant the Board's application for enforcement.

The Union initiated pickets at construction sites against nonunion general contractors Specialty Building Company ("Specialty") and Robert Wood & Associates, Inc. ("Wood") in 1981 at their respective projects. Several subcontractors were also at work at the sites. Both general contractors ("primaries") responded to the pickets by setting up reserved gate systems, designating separate gates for their own employees and suppliers, and for those of the other employers at the site.

The Board adopted the administrative law judge's finding that the Union picketed all entrances at both sites indiscriminately. The Board held that the Union's failure to honor the separate gate systems violated § 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(1982), which prohibits a Union from pressuring indirectly an employer with whom it has a labor dispute by picketing neutral or "secondary" employers and their employees who deal with the primary. *See Sailors' Union of the Pacific (Moore Dry Dock),* 92 N.L.R.B. 547, 549 (1950) (articulating criteria for evaluating legality of common situs picketing); *Local 761, International Union of Electrical Workers v. NLRB,* 366 U.S. 667, 680–681, 81 S.Ct. 1285, 1293–1294, 6 L.Ed.2d 592 (1961) (creating exception to general rule against secondary picketing where, as at a manufacturing plant, primary exercises such control that neutral subcontractors essentially only service or promote the regular business of the primary).

The Board found that the Union failed to honor the separate gate system, picketing all entrances indiscriminately.

A. *Picketing at the Specialty Building Company site*

Even though Specialty employees performed some of the work, oversaw the project, and arranged and paid for certain equipment and services for the project, the construction site was not like a manufacturing plant. The Board found that Specialty's role on the project was "relatively common" in the construction industry. The Board thus correctly invoked the rule, consistently applied to Union activities at construction sites, that picketing must be restricted to designated primary gates. *See, e.g., Markwell and Hartz, Inc. v. NLRB,* 387 F.2d 79, 82–83 (5th Cir.1967), *cert. denied,* 391 U.S. 914, 88 S.Ct. 1808, 20 L.Ed.2d 653 (1968); *Allied Concrete, Inc. v. NLRB,* 607 F.2d 827, 831 (9th Cir.1979) (ambulatory picketing rejected where a neutral gate was established and it was feasible for the union to confine its activities to the primary gate to avoid interrupting the neutrals); *Carpenters Local 470, United Brotherhood of Carpenters v. NLRB (Mueller-Anderson, Inc.),* 564 F.2d 1360, 1362 (9th Cir.1977).

Further, while neither party disputes that Specialty's gate system was tainted prior to July 23, 1981 because Specialty employees used the neutral gate, Specialty successfully reestablished the system at that point. Accordingly, the picketing at the primary gate after July 22 constituted an unfair labor practice in violation of § 8(b)(4).

The Board found that Specialty posted new signs at the jobsite entrances clearly designating the primary and the neutral gates, that a Specialty foreman policed the system to ensure that it remained intact, and that Specialty sent the Union a mailgram on July 22 advising the Union of the reestablishment and tendered a copy of the notice to a Union picket. Further, after July 23 no Specialty employees or suppliers used the neutral gate. These actions, all of which are supported by substantial evidence in the record, constitute effective rehabilitation of the gate system. *See Carpenters Local 470 (Mueller-Anderson),* 224 N.L.R.B. 315, 316 (1976), *enforced,* 564 F.2d 1360 (9th Cir.1977) (reserved gate system reestablished where primary updated signs, Union was notified of the changes, and primary's employees and suppliers thereafter used only the primary gate).

B. *Picketing at the Robert Wood site*

Signs used to establish a separate gate system are sufficient if they clearly specify which gate the primary employees and suppliers are to use. *See NLRB v. National Association of Broadcast Employ-*

ees and Technicians, Local 31, 631 F.2d 944, 951–52 (D.C.Cir.1980).

The Union's allegations that Wood's signs were inadequate are unfounded. Wood set aside an entrance clearly designated for the exclusive use of Wood employees and suppliers; there is no record that Wood's employees or suppliers used any other entrance; and the Union was notified of the establishment of the reserved gates.

Further, the primary gate was prominently located. Thus, even if the record supported the Union's charge that the neutral gate was located in an obscure site, the pickets would not have been entitled to stray from the primary gate. *See Plumbers and Steamfitters Local 398,* 261 N.L.R.B. 482, 486 (1982); *cf. United Brotherhood of Carpenters and Joiners, Local 354,* 268 N.L.R.B. 382, 386–87 (1983) (pickets need not confine their activities to obscure primary gate where picketing would be ineffective), *review dismissed,* 767 F.2d 934 (9th Cir.1985).

C. *Propriety of broad orders*

Where "a Union has demonstrated a 'proclivity' to violate the secondary boycott provisions of the Act," the Board acts within its discretion in issuing broad remedial orders which are not limited to the parties

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or the dispute involved in the particular case. *NLRB v. Sequoia District Council of Carpenters,* 499 F.2d 129, 129 (9th Cir.1974) (per curiam).

The § 8(b)(4)(i) and (ii)(B) violations by Local 1622 against Specialty and Wood, coupled with violations which were the subject of a 1981 settlement stipulation, constitute the propensity necessary to justify a broad cease and desist order.

The 1981 stipulation settled charges of secondary picketing violations at *three* additional sites against *two* additional employers. The agreement stated that it could "be considered as though it were an adjudicated determination of the Board, enforced by an appropriate United States Court of Appeals, that the Union has engaged in the conduct alleged in the complaints."

The Board has not exceeded its discretion in ordering the Carpenters Local 1622 to cease and desist from impermissible secondary picketing. We therefore grant the Board's application for enforcement.

International Longshoremen's & Warehousemen's Union, Local 62-B v. NLRB

781 F.2d 919 (D.C. Cir.), January 21, 1986—271 NLRB 1291

On petition to review Board Order

Before MIKVA and STARR, Circuit Judges, and McGOWAN, Senior Circuit Judge

Opinion for the Court filed by Senior Circuit Judge McGOWAN

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McGOWAN, Senior Circuit Judge: In this case, the National Labor Relations Board ("Board") held that the International Longshoremen's and Warehousemen's Union, Local 62-B ("Union") violated the National Labor Relations Act, § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1982) and § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1982), when members of the Union, who are employed by a stevedoring company, picketed in the area of a timber company's docking facilities. We hold, however, that § 8(b)(4)(D) of the Act does not apply in this situation. We therefore enforce the Board's order only insofar as it relates to § 8(b)(4)(B) of the Act.

I. *Background*

A. *The Dispute*

The Alaska Timber Corporation ("ATC"), formed some 15 years ago, produces heavy lumber at its facilities on Prince of Wales Island, Klawock, Alaska. ATC owns a dock facility at Klawock from which it ships its products. Prior to 1981, ATC contracted with its customers to sell its products "FAS," or "free along side." Pursuant to these contracts, ATC would deliver lumber to the docking facilities at Klawock. ATC's customers were responsible for loading the lumber onto ships for transportation to the customer's port. ATC's customers would ordinarily contract with a longshore service company, South East Stevedoring Company ("SES"), to load the ships for transportation. The stevedoring company, in turn, employed members of the Union.

In late 1980, ATC President Edward Head informed SES that ATC was changing its method of billing and shipment from FAS to "FOB" ("free on board"). Under this method, the price of lumber would include delivery from ATC's sawmill to the dock and subsequent loading on the customers' ship. The obvious result was that SES would no longer perform a function in the loading operation.

On January 9, 1981, the *Eastern Hope,* which had been chartered by the Yuasa Trading Company of Japan to pick up a load of lumber from ATC, arrived at Klawock. The *Eastern Hope* was the first ship to be loaded under ATC's new FOB policy. To help with the loading of the ship, ATC recalled some employees who had been laid off due to lack of work.

On January 10, 1981, Jay Browne and Larry Cotter, officials of the Union, called Mr. Head of ATC. Browne and Cotter told Head that they wanted Union members to load the *Eastern Hope.* Head explained that ATC had changed its sales policy from FAS to FOB, and thus refused to accept the proposal to have Union members load the ship. The Union officials then informed Head that the Union would picket the ship when loading began.

ATC began loading the *Eastern Hope* on January 11, 1981. The loading operation, performed by ATC's sawmill employees, took about nine days. As the loading began, the Union commenced picketing the ATC facility. The picketing took place at the facility's two entrance gates and lasted from 7 a.m. to 6 p.m. The pickets carried signs which read "Picket Informational/ATC Unfair Substandard/ ILWU 62-B."

On January 18, as the loading neared completion, the Union commenced a waterbased picket. A small boat patrolled along the outboard side of the *Eastern Hope* carrying the same picket signs as the landbased pickets carried. At night, the boat remained beside the ship. The boat picketed from January 18 through January 22.

ATC employees completed the loading of the ship on January 19. On January 20, the pilot hired to take the ship out of port arrived at one of ATC's entrance gates. The pilot, a member of the South Eastern Pilots Association, refused to board the vessel after seeing the picket line. On January 21, the pilot returned, but again refused to cross the picket line. The next day, ATC employees cut the *Eastern Hope* adrift from the dock. The pilot then crossed the picket line, boarded a tugboat, and performed his duties. The Union ceased picketing when the pilot boarded the ship.

B. *Board Proceedings*

On January 21, 1981, ATC filed an unfair labor practice charge against the Union. The Regional Director investigated ATC's charges but declined to issue a complaint. ATC filed an appeal. On May 22, 1981, the General Counsel for the Board sustained ATC's appeal in part, and remanded the case.

On June 8, 1981, the Regional Director issued a complaint which alleged that the Union had violated § 8(b)(4)(B) and § 8(b)(4)(D) of the Act. Section 8(b)(4)(B) generally prohibits secondary boycotts, and § 8(b)(4)(D) prohibits picketing in certain jurisdictional disputes between labor groups.[1] With respect to the § 8(b)(4)(D) charges, the Regional Director also gave notice of a hearing, pursuant to § 10(k) of the Act,[2] to resolve the alleged jurisdictional dispute.

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[1] In Section 8(b) of the Act, 29 U.S.C. § 158(b) (1982), Congress has provided, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work[.]

[2] Section 10(k) of the Act, 29 U.S.C. § 160(k) (1982), provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The § 10(k) hearing took place on June 25, 1981. Based on that hearing, a three-member panel of the Board, on May 27, 1982, issued its "Decision and Determination of Dispute." *International Longshore Workers Union, Local No. 62-B (Alaska Timber Corp.),* 261 NLRB 1076 (1982). The Board found reasonable cause to believe that § 8(b)(4)(D) of the Act had been violated, *id.* at 1077-78, and held that the employees of ATC were entitled to perform the work of loading lumber for shipment from ATC's docks. *Id.* at 1079.

On June 2, 1982, pursuant to the Board's decision, the Compliance Officer for the Region asked the Union to notify him whether the Union would comply with the Board's determination. The Union did not respond. Thereafter, on June 18, 1982, the Regional Director issued a consolidated complaint, which alleged that the Union had violated both § 8(b)(4)(B) and § 8(b)(4)(D) of the Act. The Union filed an answer to the complaint, and the case was assigned to an Administrative Law Judge ("ALJ").

On September 23, 1983, the ALJ issued his decision, holding that the Union did not violate § 8(b)(4)(B) of the Act, but that it had violated § 8(b)(4)(D). *International Longshoremen's & Warehousemen's Union Local 62-B (Alaska Timber Corp.),* 271 NLRB 1291, 1294 (1984) (Appendix, ALJ Decision). Both the Union and ATC filed exceptions to this decision. On August 30, 1984, a three-member panel of the Board issued a "Decision and Order," which adopted the ALJ's conclusion as to the § 8(b)(4)(D) charge, but rejected the conclusion as to the § 8(b)(4)(B) charge. *Id.* at 1291 (NLRB Decision and Order). The Board's order thus found the Union in violation of both § 8(b)(4)(D) and § 8(b)(4)(B). The Board ordered, *inter alia,* that the Union cease and desist from coercive efforts to force ATC to assign the disputed work to Union members. *Id.* at 1293. Thereafter, the Union petitioned this court for review of the Board's order and the Board cross-petitioned for enforcement of its order.

II. ANALYSIS

Although both the § 8(b)(4)(B) and § 8(b)(4)(D) charges arose out of the same dispute, the theoretical bases for each charge are different. We therefore consider the applicability of each section separately. We begin with the section that we find does not apply in this situation.

A. *The § 8(b)(4)(D) Claim*

In § 8(b)(4)(D), Congress generally prohibited efforts to coerce an employer to assign work to a particular labor organization where a jurisdictional dispute exists between labor groups. In enforcing this section, the Board is required to "hear and determine the dispute. . . ." Section 10(k), 29 U.S.C. § 160(k) (1982); *see NLRB v. Radio & Television Broadcast Engineers Union, Local 1212,* 364 U.S. 573, 586, 81 S.Ct. 330, 338, 5 L.Ed.2d 302 (1961) (indicating that Board may not decide unfair labor practice charge without first resolving jurisdictional dispute). The purpose of this hearing is to relieve the employer of the burden of choosing between employee groups that are competing for the assignment of work. *Id.* at 579, 81 S.Ct. at 334.

The Board followed the § 10(k) procedure in this case. In its May 27, 1982

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§ 10(k) order, the Board addressed the question whether there was reasonable cause to believe that § 8(b)(4)(D) had been violated. *International Longshore Worker's Union, Local No. 62-B (Alaska Timber Corp.),* 261 NLRB 1076, 1077 (1982). The Board found that there was such reasonable cause. The Board concluded, in particular, that the Union's object in picketing at ATC's docking facilities was to force ATC to assign the disputed work to the employees represented by the Union rather than to ATC's employees. *Id.* In addition, the Board found that the dispute was not simply a question of the preservation of work performed by Union members. Rather, according to the Board, the Union acted to satisfy objectives elsewhere. *Id.* at n.4. After finding that a jurisdictional dispute existed, the Board went on to hold that an assessment of the relevant factors in the case required assignment of the work to ATC employees. *Id.* at 1079.

Section 10(k) orders are not immediately reviewable. Instead, the order must be implemented by a request from the Board that the employee group comply with the jurisdictional award. If the employee group does not comply, this behavior may become the subject of an unfair labor practice proceeding under § 8(b)(4)(D).

In reviewing § 10(k) orders, as implemented by § 8(b)(4)(D) proceedings, we perform a limited inquiry. To the extent that the Board decisions reflect conclusions as to factual matters, for which there is "substantial evidence on the record considered as a whole," we must defer to the Board's conclusion. 29 U.S.C. § 160(e) (1982). To the extent that the Board decisions reflect a legal conclusion, however, we must determine whether the decisions were "arbitrary and capricious." *See NLRB v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local No. 741,* 704 F.2d 1164, 1166 (9th Cir.1983); *NLRB v. Local Union No. 584, International Brotherhood of Teamsters,* 535 F.2d 205, 207 n.4 (2d Cir.1976).

We find the Board's decision in the instant case invalid as both a factual and legal matter. Despite the Board's conclusion that the Union's objective was to require assignment of the disputed work to its members, and despite the Board's conclusion that the Union's objective was not limited to preserving work at ATC's Klawock facilities, the Board's analysis is incomplete. The Board simply did not find, and there is no evidence to establish, that a jurisdictional dispute existed in this case.

The essence of a jurisdictional dispute in the § 8(b)(4)(D) and § 10(k) sense is the existence of "a dispute between two or more groups of employees over which is entitled to do certain work for an employer." *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212,* 364 U.S. 573, 579, 81 S.Ct. 330, 384, 5 L.Ed.2d 302 (1961). Thus, for example, where one of two potentially competing unions explicitly disclaims a demand for the work at issue, no jurisdictional dispute exists. *See International Union of Operating Engineers, AFL–CIO, Local 925 (Bradshaw Industrial Coatings, Inc.),* 264 NLRB 962, 964 (1982). Similarly, even where such competing claims originally existed, no jurisdictional dispute remains once one of the competing unions renounces its claim to the work. *See Local 372, Service Employees International Union (Pepper Construction Co.),* 262 NLRB 815, 816 (1982). Moreover, once the competing claims between the employee groups have been resolved, no jurisdictional dispute exists, even if the employer protests the particular resolution. *See Teamsters, Warehousemen, Garage Employees & Helpers Union Local 839 (Shurtleff & Andrews Constructors),* 249 NLRB 176, 177 (1980).

The Board's treatment of cases where potentially competing groups of employees have renounced or resolved their claims is consistent with the purpose of § 8(b)(4)(D) and § 10(k). Congress enacted these provisions to allow for the peaceful resolution of competing claims between rival groups of employee. *See Highway Truckdrivers & Helpers, Local 107 (Safeway Stores),* 134

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NLRB 1320, 1322 (1961); *see also* 93 Cong. Rec. 3424 (remarks of Rep. Hartley) (providing example of jurisdictional strikes); 93 Cong. Rec. 3227–3228 (1947) (remarks of Sen. Lucas) (same). In such disputes, the employer ordinarily stands aloof. "[I]n most instances, [the quarrel] is of so little interest to the employer that he seems perfectly willing to assign work to either [group of employees] if the other will just let him alone." *Radio Engineers,* 364 U.S. at 579, 81 S.Ct. at 334. Thus, the central problem these provisions aim to solve embodies two characteristics: first, the employer faces a jurisdictional dispute that is not of his own making and in which he has no interest; second, the dispute is between two employee groups.

Application of these provisions is not without its subtlety. The Labor Board must decide whether cases that do not precisely fit the model of a jurisdictional dispute outlined above are nevertheless sufficiently like that two-part model to warrant intervention by the Board. Thus, the Board has found that a jurisdictional dispute existed even in cases where no dispute appeared at first glance. For example, the Board has determined that it does not matter that the dispute is between a union and a group of unrepresented employees. The purpose of relieving the employer from the potentially disruptive choice is still served. *See Millwrights, Piledrivers, Divers, Highway Construction, AFL–CIO, Local Union No. 1026 (Intercounty Construction Corp of Florida),* 266 NLRB 1049, 1051 (1983). In addition, the Board has held that, where certain employees were doing work and another group of employees demanded that work, these provisions applied. Even though the first group of employees may not have explicitly claimed the work, the fact that they were doing the work was evidence of their claim. *See International Union of Operating Engineers, Local 926 (Georgia World Congress Center),* 254 NLRB 994, 996 (1981). Indeed, such problems may turn on very close attention to both aspects of the model of a jurisdictional dispute. For example, in *International Longshoremen's and Warehousemen's Union, Local No. 8 (Collier Carbon & Chemical Corp.),* 231 NLRB 179 (1977), the employer originally received shipments of chemicals on a freighter which it owned and which was specially constructed for hauling the chemical. The employer unloaded the ship with its own employees. Some years later, the freighter sank. The employer began to receive shipments on vessels not specially equipped for transport of the chemical. The employer hired a stevedoring company, which employed union longshoremen, to unload these vessels. Thereafter, the employer bought a new, specially equipped vessel, and announced that it would once again use its own employees to unload the shipments. The Board held, *inter alia,* that, because the employers' employees had performed the work when there was a specially equipped vessel, they had evidenced their continuing demand for the work, and a work dispute existed. *Id.* at 180. In addition to noting that the dispute was between two employee groups, however, the Board emphasized that the employer was essentially disinterested in the dispute. *Id.*

By contrast, in cases where one or the other of the central characteristics of a jurisdictional dispute did not appear, the Board has held that § 8(b)(4)(D) and § 10(k) did not apply. For example, in *Highway Truckdrivers & Helpers, Local 107 (Safeway Stores, Inc.),* 134 NLRB 1320 (1961), Safeway employed three truck drivers, members of a union, at its Wilmington, Delaware, meat-processing plant, for 10 years. Safeway discharged the three drivers, and arranged for the driving to be done by other drivers, members of another union, who worked at Safeway's Landover, Maryland and Kearney, New Jersey, plants. The Board held that these circumstances did not present a jurisdictional dispute:

> Sections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved. Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a "jurisdictional dispute" exists within the meaning of the cited statutory provisions.

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Id. at 1322. The Board emphasized how far the *Safeway* case departed from the model of the ordinary jurisdictional dispute:

> In the normal situation, the Section 10(k) proceeding is designed to determine which of two competing employee groups is entitled to do the disputed work. In the normal situation also, the employer is willing to assign the work to either group if the other will just let him alone. We do not mean to suggest that this is the only kind of situation where Section 10(k) is applicable. But the normal situation demonstrates how far removed is the instant case where the employer by his unilateral action *created* the dispute, by transferring work away from the only group claiming the work.

Id. at 1323 (emphasis in original). The Board has also held that no jurisdictional dispute existed where an employer decided to lay off a carpenter, a plumber, a painter, and an electrician after the renovation program at a hotel, in which they were involved, ended. *Seattle Building & Construction Trades Council (Seattle Olympic Hotel Co.),* 204 NLRB 1126, 1127 (1973). Here again, the employer, not the employee groups involved, had created the dispute.

The facts of the case before us do not square with the model of a jurisdictional dispute. The first of the essential characteristics of a jurisdictional dispute does not appear in this case. The dispute was entirely of the employer's making, and the employer was not neutral in the dispute. The record is quite clear that ATC alone made the decision to change from FAS to FOB shipment, thus effectively reassigning the work from the stevedoring company to its own employees. *See* J.A. at 111 (statement of Edward Head, President of ATC) (indicating that ATC made the decision to change from FAS to FOB). In addition, the company clearly had an interest in assigning the work to its own employees. *See* J.A. at 112 (statement of Edward Head (indicating that the company decided not to use the longshoremen because of shortages in longshore crews); *id.* at 194 (statement of Edward Head) (indicating that, by giving loading work to company's mill employees, company hoped to retain employees that otherwise would be laid off).

As to the second factor in the model, although it is possible to characterize this case as a dispute between employee groups, we cannot consider one factor in isolation from the other. ATC's employees performed the work after ATC reassigned the work, and in that sense one could say that they demanded the work. This fact alone, however, does not establish that a jurisdictional dispute existed. Were that the rule, an employer could always create a jurisdictional dispute between employee groups by reassigning work. The result in *Safeway,* for example, would change. In that case, the driving was originally done by one group of employees. The employer reassigned it to another group, which began to perform the work. If we were to assume that the only significant facts were that one group was performing the work, and another group was demanding the work, then *Safeway* would have been a jurisdictional dispute case. The Board decision in *Safeway,* however, makes clear that we must also consider the origins of the dispute. Where, as here, the employer created the dispute, § 8(b)(4)(D) and § 10(k) do not apply.

In its § 10(k) opinion, the Board did not mention the problem we have outlined above. The Board may either have assumed that the problem did not exist or it may have concluded that the other factors present in the case (that the object of the Union's picketing was to force the assignment of work to it and that the Union's object was not limited to preserving bargaining unit work for employees at the Klawock operation) should control its decision. In the first case, as we have seen, the Board is wrong as a factual matter. In the second case, the Board is wrong as a matter of law. The question whether a jurisdictional dispute existed is a preliminary one, and can not be ignored.[3] Accordingly, to the extent that the Board's order is grounded in the § 10(k) decision, we will not enforce the order.

B. *The § 8(b)(4)(B) Claim*

In § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1982), Congress generally prohibited efforts by labor organizations to coerce any person to cease doing business with any other person. Congress made clear in this section, however, that a labor organization could engage in a "primary strike" or "primary picketing." The provision thus embodies twin congressional objectives: "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . shielding unoffending employers and others from pressures and controversies not their own." *NLRB v. Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

The Labor Board, in the instant case, found that the Union's picketing at the ATC facilities contravened the provisions of § 8(b)(4)(B). The Board reasoned that ATC was not the primary employer in the case, since the Union's members were employed by the stevedoring company, SES. *International Longshoremen's & Warehousemen's Union Local 62-B (Alaska Timber Corp.),* 271 NLRB 1291, 1292 (1984). Further, the Board noted, the Union had no intention of organizing the ATC employees. *Id.* In sum, according to the Board, "[o]n these facts, we conclude that the Respondent's [union's] action was not addressed to the labor relations of ATC vis-a-vis its own employees but rather that the Respondent's picketing was calculated to satisfy union objectives elsewhere." *Id.* at 36.

We agree with the Board's analysis of the problem. In doing so, we reject the two relevant arguments advanced by the Union. First, the Union argues that its picketing at ATC was primary because only ATC had the right to control the assignment of work in this case. Br. for Petitioner at 21; Reply Br. for Petitioner at 5. The main authority on which the Union relies for this proposition is *NLRB v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York & Vicinity, Local Union No. 638 ("Pipefitters"),* 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977). We find the instant case different in several material respects.

In *Pipefitters,* a subcontractor (Hudik) had a contract with a general contractor (Austin) for the heating, ventilation, and air-conditioning work in the construction of a home for the elderly. The subcontractor, in turn, employed members of a pipefitters union. The contract between Hudik and Austin specified that Austin would purchase certain climate-control units manufactured with internal piping that would be cut, threaded, and installed at the factory. The collective bargaining agreement between the subcontractor and the union, however, required that any pipe threading and cutting be done at the jobsite. When the units arrived on the job, the union members refused to install them. Following a complaint from Austin, the Board held that this work stoppage constituted unlawful secondary pressure in that Hudik, the primary employer, could not assign the work to the union, even if it wanted to do so. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York & Vicinity, Local Union No. 638 (The Austin Co.),* 204 NLRB 760 (1973). On petition for certiorari, the Supreme Court upheld the Board's view. *Pipefitters,* 429 U.S. at 532, 97 S.Ct. at 905.

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[3] Because we hold that the question of the existence of jurisdictional dispute is controlling in this case, we need not further address the rationale advanced by the Board on the § 8(b)(4)(D) claim.

The result in the *Pipefitters* case is hardly availing to the Union in this case, for several reasons. First, the Board and the

Court in that case did not use the right-of-control test to define once and for all the boundaries of legal primary activity and illegal secondary activity. Rather, the *Pipefitters* Court applied the right-of-control test to determine that the Union's goal in that case was secondary, even though its action was nominally against its employer. *Pipefitters* most assuredly does not establish the converse proposition, namely, that action against a business that is clearly not the primary employer is permissible primary activity simply because that business may have the power to fulfill the union's request. Second, the *Pipefitters* opinion explicitly stated that the right to control the assignment of work is but one factor in calculating whether the union has engaged in unlawful secondary activity. *Id.* at 524, 97 S.Ct. at 901. Finally, petitioner does not point to, nor have we found, any case in which the Board has applied *Pipefitters* to the effect that petitioner desires.[4]

The Union's second argument is that its members were, in effect, "employees" of ATC, since ATC's use of FAS contracts meant that the work would be assigned to the longshoremen. Br. for Petitioner at 21 n.14; Reply Br. for Petitioner at 8. In large part, this argument merely rehearses petitioner's right-of-control point. The Union argues that its picketing was not secondary because it was directed against the only entity that had the right to control the assignment of work. Alternatively, the Union argues that ATC was, in effect, the primary employer. The essential fact on which the Union relies is the same: ATC had the power to assign the work to the Union. The Board correctly found, however, that this fact did not make ATC the primary employer. The Union's members were employed by the stevedoring company, SES, which was hired by ATC's customers. There was no contractual relationship whatsoever between ATC and the employees represented by the Union.

III. CONCLUSION

The Labor Board, in its August 30, 1984, "Decision and Order," found that the Union had violated both § 8(b)(4)(B) and § 8(b)(4)(D). *International Longshoremen's & Warehousemen's Union Local 62-B (Alaska Timber Corp.),* 271 NLRB 1291, 1293 (1984). The Board concluded that the Union violated § 8(b)(4)(D) by picketing with the object of forcing ATC to assign work to employees represented by the Union. The Board concluded that the Union violated § 8(b)(4)(B) by picketing with the object of forcing ATC to cease doing business with Yuasa Trading Corp. (the owner of the *Eastern Hope*). On our analysis of the case, the Board's first conclusion must be invalidated. The Board's second conclusion must be upheld, but with a brief further comment.

It is clear that the Union's purpose in picketing at the ATC dock was to attempt to interfere with ATC's business relations so as to force ATC to either go back to its previous FAS contracts or to hire the employees represented by the Union to do the work then performed by ATC's employees. This interference specifically applied to ATC's relations with Yuasa only because Yuasa was the first customer to purchase from ATC under the new policy. We presume that the Board's order also extends to picketing involving customers other than Yuasa.

Based on the foregoing analysis, we grant petitioner's petition for review to the extent that it applies to the § 8(b)(4)(D) claim and we enforce the

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[4] Indeed, if the principle on which petitioner relies extended to this case, the principle could not rationally be limited. One can imagine that virtually any employee group that knows that the fortunes of its employer are tied to some other business' operations could picket at that other business whenever the other business materially changes its operations.

Board's order to the extent that it applies to the § 8(b)(4)(B) claim.

It is so ordered.

Arthur Eisenberg, Reg. Dir. v. Lenape Products, Inc.

781 F.2d 999 (3d Cir.), January 22, 1986

On petition for temporary injunction under Section 10(j)

Before GARTH, and BECKER, Circuit Judges, and HUYETT, District Judge *

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HUYETT, District Judge: Petitioner Arthur Eisenberg, the Regional Director of the Twenty-second Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, filed with the court below a petition pursuant to section 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(j),[1] for a temporary injunction, requiring respondent Lenape Products, Inc. to offer certain discharged employees interim reinstatement to their former positions. Concluding that imposition of an injunction was not just and proper under all of the circumstances, the district court denied the petition for injunctive relief. Because we find that the district court did not abuse its discretion in denying the petition for an injunction, we will affirm.

I.

In his petition for injunctive relief, petitioner Eisenberg alleged that respondent Lenape engaged in "unfair labor practices" within the meaning of section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by discharging employees who had "ceased work concertedly and engaged in a lawful strike." Pursuant to section 10(j) of the NLRA, 29 U.S.C. § 160(j), the National Labor Relations Board (NLRB or Board), through petitioner Eisenberg, sought injunctive relief pending final disposition of the case, and, in particular, sought an order requiring respondent to reinstate those employees who had been discharged pending a final adjudication by the board.

Respondent Lenape is engaged in the manufacture of ceramic products at four New Jersey locations, each of which constitutes a "division." This action arises from a series of events involving the day-shift employees at Division 3. At the relevant time, there were nine people employed on the day shift, and these individuals were not members of any union and therefore were not represented by a collective bargaining agent. Only the employees at Division 4 had union representation although there is some mention in the record that the employees in Division 1 are now unionized.

The events precipitating this action began on December 27, 1984. On that day, at approximately 10:15 a.m., Charles Bernhardt, Sr., an employee at Lenape and the unofficial spokesman for the day shift employees, telephoned Peter Hexter, the Chief Executive Officer for Lenape and told him that the employees were concerned about the working conditions at Division 3. He then demanded to meet with Hexter at 11:00 a.m. "or else we are going to walk out." Hexter responded that he was not available at 11:00 a.m. but that he could be there at noon. Hexter also suggested that it might be more convenient to meet after the holidays. Bernhardt rejected this suggestion claiming that Hexter was merely trying to give the employees the runaround.

Hexter arrived at the Division 3 plant at approximately 12:05 p.m. to find that the employees had left their jobs. The following day, the employees returned and were told that they were considered to have abandoned their positions and would be replaced by new employees.

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Prior to the December 27th employee walk-out, dissatisfaction among the employees over working conditions was mounting. Petitioner contends that the dissatisfaction was caused, in large part, by the hiring of Herman Glinecke as "production control manager" for all four divisions. Glinecke allegedly instituted certain changes including (1) new processes for treating ashtrays which caused employees to develop skin rashes and irritations; (2) changes in hours of work without notice; (3) institution of time studies; and (4) disregard for job classifications. Furthermore, the employees were becoming increasingly concerned about health and safety problems within the Division 3 facility including an increasing rat population and exposed electrical wires. Glinecke was allegedly advised of these concerns but never took any remedial action. Moreover, Bernhardt asked Glinecke to contact Hexter to arrange a meeting for the employees with Hexter to discuss employee concerns. Hexter never responded, and it is unclear whether Glinecke ever communicated the concerns of the employees to Hexter.

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* Honorable Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] Section 10(j) of the NLRA, 29 U.S.C. § 160(j) provides in pertinent part:

> Injunctions
>
> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

In early December 1984, the nine employees on the first shift decided to organize a union at Division 3. To this end, they contacted a representative of the Glass, Pottery, Plastic and Allied Workers of America and obtained and signed union authorization cards.

By December 27, the employees decided that they could not accept the working conditions any longer, and Bernhardt therefore placed the telephone call to Hexter. There is a dispute between the parties as to what, if anything, Hexter or other Lenape management personnel knew about the employees' dissatisfaction with the working conditions prior to the walkout. Even the petitioner Board does not contend, however, that Lenape knew that employee dissatisfaction had led to the beginnings of a unionization effort. At most, Hexter may have known, on December 27, 1984, that the employees were acting in concert when they threatened to leave their positions.

Following the walk-out of the nine employees, Hexter met with Helen Brown, President of Lenape to discuss the situation. They concluded that they had to "take a position that even if these people want to come back we cannot allow them back, otherwise we will have chaos with 117 employees, and people will be able to figure out that they can walk out anytime they want . . ." Record at 358. Letters were sent to each of the employees advising them that they had forfeited their positions and would be replaced. Despite requests by the employees that they be permitted to return to their previous positions unconditionally, Lenape management remained firm in its position on the dismissals.[2]

In response to charges filed by Charles Bernhardt, Sr., the Regional Director issued a complaint and notice of hearing and scheduled a hearing for April 17, 1985. On April 17, 1985, the NLRB authorized the petitioner to petition the district court for injunctive relief pursuant to section 10(j) of the NLRA, 29 U.S.C. § 160(j). Concluding that "[t]he evidence in the record, at least arguably, indicates that the employees were 'acting concertedly' " and therefore that there was reasonable cause to believe that a violation of the NLRA had occurred, the court nevertheless refused to grant injunctive relief on the grounds that the petitioner had not met the "just and proper" standard of section 10(j).

II.

Arguing that an injunction order is necessary to restore and maintain the status quo pending a Board adjudication in order to preserve the Board's ability to issue a meaningful remedial order, petitioner Regional Director, on behalf of the NLRB, contends that the district court abused its discretion in denying the petition for injunctive relief. Injunctive relief, including interim reinstatement of the discharged employees, plaintiff contends, was just and proper under all of the circumstances. Respondent, on the other hand, contends that there is an ongoing activity that must be protected in the interim.

In declining to grant the injunctive relief requested, the district court relied upon the provision in section 10(j) which states that when it is in the public interest, a court may grant "such temporary relief or restraining order as it deems just and proper." In reviewing the district court's determination that injunctive relief was not appropriate, we are limited to deciding whether the lower court abused its discretion. *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 907 (3d Cir.1981). As we have previously noted, when applying the abuse of discretion standard, we should not disturb the district court's factual findings unless they are clearly erroneous. Moreover, we should not reverse the decision of the district court unless the undisturbed factual findings do not substantially relate to the conclusion reached. *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 (3d Cir.1984).

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[2] At oral argument we asked counsel for petitioner to address in written form the reinstatement offer made by respondent and what effect, if any, that offer had on the need for injunctive relief. In response to this request, we received from counsel a letter dated October 31, 1985. As outlined in that letter, the reinstatement offer made by respondent was in response to the district court's efforts to achieve an informal settlement of the case. The reinstatement offer was extended to those employees who were unemployed at the time of the hearing. These employees would be reinstated to any available vacancies which existed at that time or which might arise later at any of the respondent's four divisions and for which the discharged employees were eligible. After review of the letter, we agreed with the Board's position that because the reinstatement offer was extended only to those employees who remained unemployed and was good only for positions which might be available and not for the positions from which the employees were discharged, it is not relevant to our present inquiry and does not address the concerns raised by the Board's petition.

We are satisfied, after applying this standard of review, that the district court engaged in a careful analysis of the circumstances giving rise to the petition and properly took into account the policies underlying section 10(j). In fashioning this provision, Congress sought to ensure that the Board would be able to exercise effectively its ultimate remedial power. Therefore, section 10(j) was included to provide interim relief in a situation in which the Board and courts believe that it is necessary to preserve the effective exercise of such remedial power. *Suburban Lines,* 731 F.2d at 1091. *See also* S.Rep. No. 105, 80th cong., 1st Sess. 8, 27 (1947). Section 10(j), however, was never intended to become the normal method for resolving labor disputes. *Suburban Lines,* 731 F.2d at 1092.

As previously noted, the standard for granting a section 10(j) injunction requires, first, that the district court decide whether there is "reasonable cause" to grant the injunction. This prong of the test is satisfied when, viewing the facts most favorably to the Board, there is sufficient evidence to support the legal theory of violation presented by the Regional Director, and when that theory is substantial and not frivolous. Second, having found "reasonable cause," the district court must find that the issuance of an injunction is "just and proper," i.e., that it is in the public interest to grant the injunction, so as to effectuate the policies of the National Labor Relations Act or to fulfill the remedial function of the Board. *See Eisenberg v. Wellington Hall Nursing Home,* 651 F.2d 902, 906–07 (3d Cir.1981); *Eisenberg v. Hartz Mountain Corporation,* 519 F.2d 138 (3d Cir.1975).

The district court was keenly aware both of its limited role in determining whether injunctive relief was appropriate and of the standards it was to apply in determining whether the "reasonable cause" and "just and proper" elements were satisfied.

The district court found that the petitioner had satisfied the "reasonableness" prong of the standard, but had not satisfied the "just and proper" requirement. Thus, it specifically concluded that the basic remedial function of the Board would not be frustrated by the denial of the injunction. In reaching this conclusion, the court found that there was no evidence that union activity would be "chilled" or that respondent had evidenced any anti-union animus.[3] The court further found that the size and intimacy of the group of the employees who walked out was such that if the Board ultimately orders reinstatement, its organizational efforts could be resumed.

In appealing from the district court's denial of injunctive relief, petitioner contends that the district court, in finding that the "just and proper" standard was not satisfied, failed to examine the effect of the discharges on the remaining employees, and in particular, failed to find that the discharges would have the effect of discouraging other employees from walking out to seek redress for their grievances.

It is well established that section 7 of the NLRA, 29 U.S.C. § 157, protects employees from discharge if they peacefully leave their jobs to protest working conditions, even if the employees have not engaged in any union activity and do not make a specific demand in advance upon their employer to the condition they find objectionable.[4] *NLRB v.*

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[3] Petitioner contends that the district court did not permit it adequate opportunity to develop the record as to the issue of the potential "chill" to union activity caused by respondent's actions. In response, Lenape notes that the district court precluded petitioner from introducing evidence as to the organizational drive at the hearing because respondent had never been charged with interfering with union activity. Moreover, petitioner had specifically requested that the district court rely upon the administrative proceeding as the record before it. We find that the district court's actions were justified.

[4] Section 7 of the NLRA, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protec-

Continued

Washington Aluminum Co., 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962); *Hugh H. Wilson Corp. v. NLRB,* 414 F.2d 1345 (3d Cir.1969), *cert. denied* 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970). For instance in *Wilson,* we held that employees who presented to their employer grievances arising from the employer's decision not to contribute to the profit-sharing plan were engaged in concerted activity sufficient to warrant protection from discharge.

Petitioner contends that because section 7 guarantees employees the right to seek redress of their grievances through concerted activity without union involvement, injunctive relief, including interim reinstatement, in this case was just and proper to ensure that the remaining employees would not be intimidated and discouraged from exercising their right to engage in concerted activity; the group's right to exercise their section 7 rights must be protected in its formative stages. In support of this contention, petitioner points to the fact that Hexter, the Chief Executive Officer, immediately after the walk-out, agreed with the President of Lenape that the discharged employees would not be reinstated because their actions could not be condoned or the remaining employees would also stage a walk-out whenever they wanted. Respondent's actions, petitioner contends, were, therefore, directly intended to have the effect of destroying "the bud of employee initiative aimed at bettering terms of employment and working conditions." *Hugh H. Wilson Co. v. NLRB,* 414 F.2d at 1347.

When filing a petition for injunctive relief pursuant to section 10(j), the Board acts not in the interests of the individual employees affected by the employer's actions but rather in the public's interest as embodied in the National Labor Relations Act. In *Eisenberg v. Wellington Hall Nursing Home,* 651 F.2d 902, 907 (3d Cir.1981), we concluded that interim reinstatement of the discharged employees was just and proper to maintain the integrity of the collective bargaining process. If the employees, who were all union supported, were not reinstated pending a final Board

adjudication, the bargaining representative's ability to represent other members of the bargaining unit would be undermined, adversely affecting employee interest in unionization. In *Suburban Lines,* we found that reinstatement of discharged employees was not necessary to preserve the collective bargaining process because the employees constituted a small, intimate unit which would be able to reconstruct itself if the Board ultimately ordered reinstatement.

The district court here addressed the employees' protected right to engage in concerted activity explicitly in connection with its discussion of the reasonable cause standard. The court also concluded that there was insufficient evidence to demonstrate that the employer's conduct would "chill" union activity. Consistent with that conclusion is the conclusion that there is insufficient evidence that there will be a "chill" of basic section 7 rights to engage in concerted activity for mutual aid and protection. *See* District Court opinion at 13.

In this case, we agree with the district court's conclusion that injunctive relief is not necessary to prevent harm to the employees' right to engage in concerted activity pending any delayed final relief. If the Board ultimately orders reinstatement, the individual employees will be able to return to their previous positions in the day shift at Division 3 and recommence their organization activities as well as any concerted activities contesting their working conditions. The district court's finding that the size and intimacy of this group, like the group in *Suburban Lines,* will enable them to start up where they left off is not clearly erroneous.

More important to our present analysis however, is the fact that there is no evidence in the record to establish that other employees will be discouraged from engaging in concerted activity in the interim. There is no evidence that management was aware of the employees' embryonic efforts to unionize their division, nor does the Board even contend that they were. This court has recently reiterated that the illicit intent of the employer is a necessary element of a section 8(a)(1) violation, and that knowledge of employee activity is necessary for such intent to exist. *Tri-State Truck Service, Inc. v. NLRB,* 616 F.2d 65, 69 (3d Cir.1980). Brown and Hexter clearly had knowledge, at the time they dismissed the employees if not at the time the employ-

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tion, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

ees walked out, that concerted activity was involved. But it is equally clear that Brown and Hexter did not know anything of the unionization drive in Division 3. Absent such knowledge, it cannot be said that this case is about "employer retaliation [intended to] destroy the bud of employee initiative aimed at bettering terms of employment and working conditions." *Hugh H. Wilson Corporation v. NLRB,* 414 F.2d 1345, 1347 (3d Cir.1969), *cert. denied,* 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970). For this reason, the public interest in safeguarding the collective bargaining process, both in its formative stages and subsequently, is not at stake here.

At least one, if not two, of the other divisions are presently unionized (divisions four and one). Moreover, despite Hexter's comments, the discharges were an isolated event in response to a particular action by the employees. Finally, we cannot agree with petitioner's contention that ultimate reinstatement would not eliminate any intimidation of present employees.

In considering a section 10(j) injunction petition, a district court must determine, on a case by case basis, what judicial action will be in the public interest and whether it is "just and proper" given the public interest that an injunction issue pending the NLRB's resolution of the underlying unfair labor practice. Because the district court's factual findings in this case are not clearly erroneous and substantially relate to the conclusion that injunctive relief was not just and proper in this instance, we conclude that the district court did not abuse its discretion in denying the requested injunctive relief. The judgment of the district court will be affirmed.

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Becker, Circuit Judge, dissenting: The district court held that injunctive relief is not necessary to prevent harm to the employees' right to engage in concerted activity pending delayed final relief, reasoning that the size and intimacy of the discharged group suggests that the employees will be able to pick up where they left off upon eventual reinstatement. I do not believe that the record supports this position, or that it supports the district court's alternative ground of decision—that Lenape's actions were not sufficiently egregious to justify equitable relief. Additionally, I disagree with the majority's view that Hexter's lack of awareness of a unionizing effort mitigates the need for injunctive relief.

Because I believe that the district court's conclusion that it was not "just and proper" to grant the relief requested by the Board is an abuse of discretion, I respectfully dissent.[1]

I.

The majority has accepted the district court's finding that the discharged employees could readily resume concerted activity upon an eventual reinstatement. I believe this factual finding to be clearly erroneous.

The average grievance concerning an unfair labor practice apparently takes the NLRB 15 months to adjudicate. *Kobell v. Suburban Lines,* 731 F.2d 1076, 1094 n. 32 (3d Cir.1984).[2] On the record before us, it is unlikely that the discharged employees would resume their concerted activity if they were not reinstated for over a year. Indeed, almost immediately after their discharge, the employees wrote management requesting reinstatement "unconditionally." It appears that the discharged employees were so intimidated that they were willing to drop their grievances if they could have their positions back.

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[1] The major cases in this circuit involving section 10(j) relief have involved an ongoing collective bargaining process, *see Kobell v. Suburban Lines,* 731 F.2d 1076, 1092 (3d Cir.1984); *Eisenberg v. Wellington Hall Nursing Home, Inc.,* 651 F.2d 902 (3d Cir.1981); and Lenape suggests that section 10(j) relief should be limited to such situations. The majority apparently rejects this proposition since it does not dispose of the case on this basis (though it does assert at one point that "the public interest in safeguarding the collective bargaining process . . . is not at stake here." Maj. Op. at 1005.) Because the majority's implicit holding on this point is significant, it is useful to amplify it.

In *Wellington Hall,* we held that the fact that the discharged employees could eventually be reinstated and given backpay did not render section 10(j) relief unnecessary. Rather, we held, section 10(j) relief was needed to prevent damage to a collective bargaining process. Lenape's suggestion that this holding is limited to cases involving a collective bargaining process is founded on neither logic nor policy. The rationale underlying *Wellington Hall* was that the public interest in employees' capacity to take collective action to improve their position would be defeated if improperly discharged employees were not reinstated during the lengthy period it takes the NLRB to adjudicate unfair labor practice claims. The discharged Lenape employees had embarked upon a campaign of concerted activity to improve their workplace conditions. From the standpoint of the public interest, it is as important that protection be given to this kind of activity as to a formal collective bargaining process. Indeed, it may be more important since, in the instant case, efforts to unionize were nipped in the bud by the employees' discharge. *See Maram v. Universidad Intraamericana De Puerto Rico Inc.,* 722 F.2d 953 (1st Cir.1983) (section 10(j) relief appropriate where employees in early stages of unionizing campaign were discharged).

[2] It is possible, of course, that this time period has changed since our recent decision in *Suburban Lines,* but it is unlikely that it has changed substantially.

The district court found that because the discharged employees are a small and intimate unit, they are likely to resume concerted activity upon eventual reinstatement. But the notion of a small and intimate group, culled from *Suburban Lines,* should not be invoked as a talisman that renders section 10(j) relief unnecessary. In *Suburban Lines,* the discharged employees had been members of a union for twelve years and had successfully bargained with management. It was a reasonable inference that such a long-standing and experienced group would, upon eventual reinstatement, be willing to resume their concerted activity. That inference does not apply in a case where an inchoate group is discharged upon its first collective action. Indeed, even in *Suburban Lines* we were reluctant to draw the inference that the discharged employees would reconstitute themselves as a group upon an eventual Board order of reinstatement, and did so only because there was no evidence to the contrary. I therefore believe that an injunction is necessary to preserve the Board's remedial powers in the face of what appears to be a serious section 8(a)(1) violation.

II.

In an effort to buttress its conclusion that the district court did not abuse its discretion in denying injunctive relief, the majority intimates that Lenape, because it lacked awareness of the unionization drive in Division 3, was not guilty of a section 8(a)(1) violation. Maj. Op. at 1005. I do not understand this argument. Section 8(a)(1) prohibits an employer from interfering with the exercise of Section 7 rights, which include concerted activities for mutual aid and protection. It seems clear to me that, contrary to the majority's assertion, Lenape's actions constituted "employer retaliation intended to destroy the bud of employee initiative aimed at bettering terms of employment and working conditions." *Hugh H. Wilson Corporation v. NLRB,* 414 F.2d 1345, 1347 (3d Cir.1969), *cert. denied,* 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970). The majority concedes that Hexter was aware that concerted activity was occurring. I see no reason why his lack of awareness that this concerted activity included a unionization drive alters the conclusion that a section 8(a)(1) violation took place. Nor do I understand the majority's view that because Hexter was unaware of the unionizing effort, "the public interest in safeguarding the collective bargaining process, both in its formative stages and subsequently, is not at stake here." Maj. Op. at 1005. The public interest in protecting concerted activity for mutual aid and protection, *see supra* note 1, especially in its formative stages, *is* at stake here—regardless of whether Hexter knew that a unionization drive had commenced.[3]

III.

The district court also found, as an alternative or supplemental ground for its decision, that Lenape's actions were not sufficiently egregious to justify the award of equitable relief. I agree with the district court that "some measure of equitable principles comes into play" in determining whether to grant section 10(j) relief. *Boire v. Pilot Freight Carriers,* 515 F.2d 1185, 1192–93 (5th Cir.1975). However, I disagree with the district court's assessment that Lenape's actions were not egregious. Upon the very first concerted activity of the Division 3 employees, activity which by all appearances is protected by law, Lenape reacted with the most severe sanction available to it—the immediate discharge of the employees. I do not condone the tactics of the employees in this case, nor do I deny that some sanction may have been appropriate. But Hexter apparently made no effort to learn about the conditions that led the employees to walk out; rather, as noted, he precipitously discharged the employees and subsequently refused their request to return to work. Indeed, Hexter conceded that his motivation for refusing their offer to return was the desire to discourage similar activity in the other divisions—activity that is also legally protected.

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[3] I note, too, my uneasiness about the district court's dismissal of the likely chilling effect upon the employees at the other Lenape divisions. In *Wellington Hall,* we observed that the "discharge of active and open union supporters . . . risks a serious adverse impact on employee interest in unionization." 651 F.2d at 907, quoting *Kaynard v. Palby Lingerie Inc.,* 625 F.2d 1047, 1053 (2d Cir.1980). Here, especially in light of Hester's expressed intent to discourage other concerted activity, *see* Maj. Op. at 1002, the inference seems as strong as in *Wellington Hall* that employees other than those discharged will be discouraged from concerted activity unless interim relief is granted.

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In my view, Lenape's conduct was plainly egregious. Thus equitable considerations incontrovertibly weigh in favor of granting section 10(j) relief. *See Kaynard v. MMIC, Inc.*, 734 F.2d 950 (2nd Cir.1984) (egregiousness of employer's conduct is a factor in determination of whether section 10(j) relief is appropriate).

IV.

For the reasons stated above, I believe that the law of this circuit and the purposes underlying section 10(j) command the conclusion that interim reinstatement is "just and proper" in this case. I believe the district court's conclusion to the contrary was based on clearly erroneous findings of fact, and constituted an abuse of discretion. Therefore, I respectfully dissent.

NLRB v. International Brotherhood of Electrical Workers, Local 340

780 F.2d 1489 (9th Cir.), January 22, 1986; cert. granted October 6, 1986—271 NLRB 995

On petition to enforce Board Order

Before Chambers, Tang, and Boochever, Circuit Judges

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Tang, Circuit Judge: The NLRB has petitioned for enforcement of its order holding the International Brotherhood of Electrical Workers, Local 340 ("the Union") in violation of Section 8(b)(1)(B) of the National Labor Relations Act ("the Act") 29 U.S.C. § 158(b)(1)(B) (1982). The Union had fined three of its members for violating a union bylaw prohibiting union members from working for nonunion employers. The Board held that two of the members were supervisors under Section 2(11) of the Act, 29 U.S.C. § 152(11) (1982) andor representatives of their employers for collective bargaining and grievance adjustment purposes within the meaning of Section 8(b)(1)(B) and that the Union discipline was thus an unfair labor practice ("ULP"). Although the Union had disclaimed interest in representing the employees of these employers, the Board held that it still had an intent to represent the employees, thus distinguishing the present case from *NLRB v. International Brotherhood of Electrical Workers, Local 73*, 714 F.2d 870 (9th Cir.1980) *(Chewelah)*. We refuse to enforce the order.

BACKGROUND

Royal Electric ("Royal") and Nutter Electric ("Nutter") are electrical contractors who belong to National Electrical Contractors Association, Inc. ("NECA"), an employer association authorized to bargain with the International Brotherhood of Electrical Workers, Local 340, the union of which the employees involved in this case are members. The collective bargaining agreement between NECA and the Union expired on May 31, 1981 and the Union struck on June 11, 1981. The Union disclaimed interest in representing NECA member employees on September 15, 1981 and NECA adopted the disclaimer the next day. The Union filed 17 representation petitions seeking to represent the employees of 17 NECA members in single employer units on September 25, 1981 but it did not then or subsequently file a petition with either Royal or Nutter. NECA signed a collective bargaining agreement with the National association of Independent Unions ("NAIU") on October 1, 1981 and Nutter and Royal adopted the contract that same day.

The unfair labor practice charges in these cases arise from the Union's imposition of fines on three members who worked for Royal and Nutter. In one case the Administrative Law Judge ("ALJ") ruled

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that the employee was not a supervisor within the meaning of the Act and thus the Union fine was not an ULP. The other two disciplinary fines are the subject of this petition for enforcement. The Union fined Albert Shoux a total of $8,200 based on a charge made December 20, 1982 that he was working for Royal, a nonsignatory employer. Shoux worked as a superintendent and had some supervisory or foreman responsibilities. The Union fined Ted Choate a total of $6,000 based on a charge made November 1, 1982 that he was working for Nutter, a nonsignatory employer. Choate was a vice president and estimator and the parties stipulated that he was a Nutter supervisor within the meaning of Section 2(11) of the Act.

The ALJ decided these consolidated cases on September 27, 1983. He found that Shoux and Choate were supervisors within the meaning of the Act and thus natural and potential representatives of their employers for the purposes of collective bargaining and adjustment of grievances. He found the Union fines of these members to be violations of Section 8(b)(1)(B), even though the Union had no existing collective bargaining relationship with Nutter or Royal because he held the Union had an intent to represent the employees of those employers. The Union filed exceptions to these findings and conclusions, the NLRB adopted the ALJ's order on August 14, 1984, and on November 8, 1984 it applied to this court for enforcement of its order.

DISCUSSION

There are two prongs to our analysis of a Section 8(b)(1)(B) violation in such a case of union discipline. First we must determine the employment status of the disciplined union members because there can be no Section 8(b)(1)(B) violation unless the employees are supervisors and representatives of their employers for the purposes of collective bargaining and grievance adjustment. Second, we must determine whether the union discipline restrained or coerced the employer in the selection of its representatives.

A. *Supervisor Status*

The question of supervisor status is a factual one and the determination of the Board is entitled to great deference and need only meet the substantial evidence test. *NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 862 (9th Cir.1984). Both parties stipulated that Choate was a supervisor within the meaning of the Act, as defined in Section 2(11). As to Shoux's status, the Union contends that his position was that of a working foreman lacking standard supervisory authority and that its fine thus fell within the acceptable parameters of discipline for doing bargaining unit work for a nonsignatory employer. *See Florida Power & Light v. IBEW*, 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 1970). The Board found that Shoux's duties of job assignments and lay-off decisions qualified him for supervisor status. There are specific evidentiary findings of Shoux's responsibilities supporting the determination of supervisor status. Thus, we affirm the Board's finding of supervisory status.

Supervisory status does not automatically mean that an employee is a representative of his employer for collective bargaining purposes. The Board's determination that Choate and Shoux were representatives derived from the application of two legal principles. One is that grievance adjustment is to be broadly interpreted to include adjustment of personal problems. *See Toledo Lithographers Locals 15-P and 272*, 175 N.L.R.B. 1072 (1969), *enf'd* 437 F.2d 55 (6th Cir.1971). Applying this principle, the Board held Shoux was a representative because he occasionally handled employees' personal problems on the job.

To find Choate a representative, the Board applied its "reservoir doctrine," which states that anyone who is a supervisor within the meaning of § 2(11) is a part of the "logical reservoir" from which an employer is likely to select his representatives for collective bargaining or grievance adjustment. The doctrine's development was explained by the Third Circuit in *Newspaper Guild, Erie Newspaper Guild, Lo-*

cal 187 v. NLRB, 489 F.2d 416 (3d Cir.1973), which noted that the doctrine does not mean that every "§ 2(11) supervisor *automatically* become[s] a § 8(b)(1)(B) representative. Every case requires an evidentiary basis from which § 8(b)(1)(b) status may be inferred." *Id.* at 422. (emphasis in the original). The Supreme Court limited the applicability of the reservoir doctrine in *Florida Power & Light*, 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1970). *See e.g. NLRB v. Rochester Musicians Association, Local 66*, 514 F.2d 988, 992 (2d Cir.1975) ("*Florida Power* effectively undermined [the doctrine's] conceptual basis."] Today the doctrine requires that the inquiry focus on whether union sanctions "may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B)." *American Broadcasting Companies, Inc. v. Writers Guild*, 437 U.S. 411, 430, 98 S.Ct. 2423, 2434, 57 L.Ed.2d 313 (1978) ("*ABC*"). We defer to the Board's factual findings on this issue and affirm that Shoux and Choate were representatives of their employers.

B. *Restraint or Coercion*

Fines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the services of his representative. ***ABC,*** 437 U.S. at 433–437, 436 n. 36, 98 S.Ct. at 2435–2438, 2437 n. 36. The general rule of ***ABC*** was announced in the context of an ongoing strike, and this court has held that when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives. ***NLRB v. International Brotherhood of Electrical Workers,*** 714 F.2d 870, 871–72 (9th Cir.1980) *(Chewelah).* We believe ***Chewelah*** controls and is dispositive of the issue in this case.

The central question is whether the union demonstrated an intent to represent the employees of the nonsignatory employers. This is a factual inquiry reviewable by the substantial evidence standard. ***Sonoma Vineyards,*** 727 F.2d at 862. Both parties agree that the Union did not have a collective bargaining relationship with Nutter or Royal. They disagree about whether it intended to represent their employees. The Union argues that it demonstrated a lack of intent to represent Nutter and Royal employees when it filed a disclaimer of interest on September 15, 1981. The Board held the Union demonstrated an intent to represent evidenced by the Union business manager's testimony that at the time the Union dissolved its collective bargaining relationship with the multi-employer group NECA, it wanted to bargain with a new association comprised of some former NECA members. Thus the Board attempted to distinguish ***Chewelah*** and found the Union's purpose in imposing the fines on its members was to force employers out of NECA and into bargaining with the Union on a different basis.

Although this factual inference is entitled to deference as "peculiarly the kind of determination that Congress has assigned to the Board," ***ABC,*** 437 U.S. at 432, 98 S.Ct. at 2435, even a deferential standard does not require us to accept an inference we find logically insupportable. We cannot follow the Board's leap from a general statement of organizing interest made in September 1981 and fines imposed in November and December 1982 to a conclusion that the Union thereby engaged in "a course of conduct designed to cause the 'good' employer-members of NECA to abandon NECA multi-employer bargaining and to bargain on a single employer basis or to form a new association" in violation of Section 8(b)(1)(B). We hold that where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employ-

er. We require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out opposition cards to find a desire to represent these particular employees. [1] Here there was no evidence of such an intent, but only a stale general statement, made at the time the collective bargaining relationship with NECA was terminated, that the Union would like to bargain with a new association. Since we might posit that a generalized desire to bargain is an essential characteristic of all unions, we require something more to support a specific finding of intent to represent.

C. *Judicial Notice*

We need not reach the final issue raised in the Union's appeal from the Board's order. The Union contends that the ALJ improperly took judicial notice of evidence contained in decisions reached in other cases arising from the same general situation and involving the Union and other contractors as parties. Because we have found the ALJ did not have sufficient evidence to support his conclusion about the Union's intent to represent, we need not decide whether he abused his discretion in relying upon the evidence developed in other hearings.

CONCLUSION

We deny enforcement of the NLRB's order because although we agree with the Board's determination of Choate's and Shoux's status as representatives of their employers, we do not find sufficient evidence of the Union's intent to represent the employees in this case.

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[1] The specified acts are cited as representative only and are not intended to be all inclusive.

NLRB v. Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

782 F.2d 46 (6th Cir.), January 23, 1986; rehearing en banc denied March 12, 1986—270 NLRB 1250

On petition to enforce Board Order

Before Martin and Contie, Circuit Judges and Peck, Senior Circuit Judge

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Contie, Circuit Judge: The National Labor Relations Board (NLRB or Board) seeks enforcement of its order requiring Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) to reimburse employees for lost wages resulting from their participation in a union instigated, but unauthorized, work stoppage. The NLRB held that Local 299 breached its statutory duty of fair representation, thereby committing an unfair labor practice in violation of section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A). For the reasons set forth below, we deny enforcement of the order.

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I.

McLean Trucking Company (McLean), a North Carolina corporation, maintains a motor carrier terminal in Detroit, Michigan. Local 299 was the exclusive bargaining representative for McLean employees during the time in question. The relevant collective bargaining contract was the Teamsters National Master Freight Agreement and local supplements, effective April 1, 1979 through March 31, 1982. This contract prohibited most work stoppages, and it specified that if a work stoppage was not authorized by the Union, McLean could suspend or discharge participating employees, and the employees would not have recourse to grievance procedures.[1] In the event of a work stoppage, the employer was obligated under the contract terms to notify certain union officials of this fact and to inquire as to whether the stoppage was authorized. If there is no response to these inquiries, the work stoppage was deemed to be unauthorized.[2]

In September 1979, Peter Jennings became the terminal manager at McLean's Detroit facility, his primary directive being to improve the facility's profitability. One of Jennings' plans was to eliminate job positions ("bids"), including daytime positions ("day-dock bids"). Jennings discussed this possibility in late 1979 with George Langkil, a Union business agent, and Murray Duncan, a Union steward, but did not implement any changes. However, in March of 1980, Jennings deemed it necessary to eliminate ten job positions and ten employees. Three of the ten positions were day-dock bids. The daytime employees affected would not be fired because of their seniority, but they would have been required to work different shifts.

On March 18, 1980, before these changes were officially adopted or announced, Jennings held a meeting open to all employees. The employees were allowed to voice their concerns over various company policies during this two-hour meeting, although they were not informed of the upcoming changes. Employees who attended the meeting were reimbursed for their time. Jennings obviously was not persuaded by the employees' arguments, however, to deviate from his plan. On March 19th, Jennings posted an announcement that, effective March 24, 1980, ten employees would be laid off and three day-dock bids would be eliminated. New starting times for affected employees were also posted.

On March 24th, the three employees who lost their day-dock bids arrived at McLean at 7:00 a.m. and were accompanied by several Union business representatives, including Langkil and Duncan. Jennings was asked to turn over the employees' time cards so they could punch in for work. Jennings refused, responding that the new working times were posted. Langkil then told Jennings that there was going to be a meeting, but Jennings insisted that there was work to be done and there was no time for a meeting.

However, as employees arrived for work and punched-in, Duncan advised them to go to the breakroom for a meeting. At 8:00 a.m. an automatic alarm signaling the shift to begin went off.

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[1] The employer had the right to suspend an employee for 30 days for participating in an unauthorized work stoppage lasting less than 24 hours, or to discharge an employee if the work stoppage lasted over 24 hours.

[2] Whether a work stoppage was authorized or not also determines whether a union can be held liable for an employer's damages resulting from the work stoppage.

Shortly thereafter, Jennings had the dispatcher announce on the public address system that the shift had begun. Jennings entered the breakroom at 8:05 and stated that he expected the workers for that shift to report to work. Jen-

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nings again informed Langkil, while in the conference room, that there would be no meeting and workers should report to work immediately. Langkil replied that no one would work until the three day-dock workers were placed back on the day shift. When another shift began at 8:30 a.m., these workers were also sent to the breakroom for a "meeting," the shift alarm rang and the dispatcher announced the beginning of the shift.

Later in the morning, pursuant to the collective bargaining contract, Jennings sent two sets of mailgrams to the Union's International President, the Chairman of the Central Conference of Teamsters, the Teamsters Conference Office and Local Union President Bob Lins. These mailgrams stated that a work stoppage was under way, asked whether it was authorized, and specified that it was contrary to the contract and created by Union business agents. Jennings informed Langkil that he had sent the mailgrams and then read the pertinent no-strike provision of the contract to him, including the possibility of suspension or discharge for participating employees. Langkil continued to maintain that the employees were merely holding a meeting and were not participating in a work stoppage. The Union never responded to the mailgrams. Neither Langkil nor Jennings told the employees that the company regarded the "meeting" as an illegal work stoppage or that they could be disciplined for participating in the work stoppage since the Union failed to authorize it.

Local Union President Lins arrived around 3:00 p.m. and met with Jennings; nothing was accomplished. Lins told Jennings that a Union meeting would be held that evening and that, "Nobody will be going back to work until I get back with you tomorrow morning to tell you how the bids are going to be."

At 10:00 p.m. a meeting was held at the Union hall and about 40 employees attended. One of the midnight shift employees asked if he should report to work. Lins responded in the affirmative and also stated, "You can stay out 23 hours and 59 minutes, and they can't do anything to you." Possible discipline was not mentioned at this meeting. The midnight shift reported to work.

McLean subsequently suspended for 30 days the employees who had participated in the work stoppage, a total of 58 people. The Union filed grievances on behalf of these employees alleging that the events on March 24, 1980 did not constitute a work stoppage in violation of the contract, but was merely a meeting.

The National Grievance Committee deadlocked with respect to whether the employees had participated in an unauthorized work stoppage. The grievances were then routed to the Michigan Joint State Arbitration Committee for resolution in October 1980. This Committee held that the activities constituted an unauthorized work stoppage, and that according to the terms of the contract the employees therefore were unable to avail themselves of the grievance procedures.

Gerald LaBond, a McLean employee, subsequently filed charges against the Union in a class action suit, [3] and a complaint was issued by the NLRB. A trial was held before an administrative law judge (ALJ), who held that the Union violated its duty of fair representation by placing the interests of three individuals above the interests of the Union as a whole and by failing to inform the employees about the possibility of discipline. [4] Applying the doctrine adopted by the NLRB in *NLRB v. Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir.1963), the ALJ concluded that the Union, by violating its duty of fair representation, engaged in an unfair labor practice in violation of section 8(b)(1)(A) of the National

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Labor Relations Act, 29 U.S.C. § 158(b)(1)(A). [5] The ALJ ordered that the Union cease and desist

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[3] McLean brought a civil suit against the Union as well which was settled out of court.

[4] The ALJ also noted that it was improper for the Union to use intimidating tactics in dealing with Jennings and to use the employees for leverage against the employer without informing them of possible consequences.

[5] In *Miranda Fuel*, the Board reasoned that a violation of the duty of fair representation was an unfair labor practice over which they had jurisdiction. Many circuits have recognized this doctrine, including the Second Circuit. *See, e.g., NLRB v. Local 282, International Brotherhood of Teamsters*, 740 F.2d 141 (2d Cir.1984); *Kesner v. NLRB*, 532 F.2d 1169 (7th Cir.), *cert. denied*, 429 U.S. 983, 97 S.Ct. 499, 50 L.Ed.2d 593 and 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976); *Kling v. NLRB*, 503

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from these practices and reimburse each employee for the loss suffered as a result of the disciplinary suspensions, including interest. The Union was also required to post the usual notifications of an NLRB order.

The Union appealed the ALJ's order to the Board. On review by a three-member panel, the Board adopted the ALJ's order but modified the conclusions of law. The Board reasoned that the Union's position that the events on March 24, 1980 was merely a meeting and not a work stoppage was never taken in good faith, and that the Union misled the employees as to the consequences of their actions. The Board also held that the Union's failure to authorize the work stoppage constituted arbitrary conduct, and that the employees "had a right to expect that the union would not encourage them to violate the contract in a way that would expose them to a loss of income or even employment." The Board concluded that the Union's lack of good faith and its arbitrary conduct amounted to a breach of its duty of fair representation in violation of section 8(b)(1)(A). The Board requested enforcement of its order pursuant to section 10(e) of the NLRA, 29 U.S.C. § 160(e).

II.

The Board's factual findings are conclusive if supported by substantial evidence judged by the record as a whole. 29 U.S.C. § 160(e).[6] *See also NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1027 (6th Cir.), *cert. denied*, 419 U.S. 828, 95 S.Ct. 47, 42 L.Ed.2d 52 (1974); *Laborers & Hod Carriers Local No. 341 v. NLRB*, 564 F.2d 834, 837 (9th Cir.1977). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938). Credibility assessments of an ALJ or the Board are generally not altered. *Cement Transport*, 490 F.2d at 1029 n. 5. Deference is also given to the Board's construction of the statute if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979). *See also Laborers & Hod Carriers*, 564 F.2d at 837; *NLRB v. Local 106, Glass Blowers Ass'n*, 520 F.2d 693, 696 (6th Cir.1975). However, federal courts are not to act as "a mere rubber stamp" for the National Labor Relations Board, *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1290 (6th Cir.1984), and enforcement has been refused where the Board applies the incorrect legal standard or applies a correct standard incorrectly, where the Board's interpretation of the Act is not consistent with the policies set forth by Congress, or where the Board attempts to regulate in an area Congress did not commit to it. *See Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849.

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In the case at bar, the Board again requests that this court adopt the *Miranda Fuel* doctrine which holds that a violation of the duty of fair representation is an unfair labor practice. *NLRB v. Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir.1963). Before we can reach the merits of this doctrine, however, we must determine whether the Union's actions in fact violated the duty of fair representation. If we determine that the Union's actions do not constitute a violation of this statutory duty, it will be unnecessary to reach the merits of the *Miranda Fuel* doctrine.

A union's duty to fairly represent its members was first recognized by the Supreme Court in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). *Steele*, which was brought under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, held that a union, as the statutory exclusive bargaining representative, had the obligation to represent *all* employees impartially and in good faith:

F.2d 1044 (9th Cir.1975); *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C.Cir.), *cert. denied*, 442 U.S. 942, 99 S.Ct. 2885, 61 L.Ed.2d 312 (1979); *Local Union No. 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir.1966), *cert. denied*, 389 U.S. 837, 88 S.Ct. 53, 19 L.Ed.2d 99 (1967). This circuit, like the Supreme Court, has not decided whether to adopt the *Miranda Fuel* doctrine. *See Journeymen Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225 (6th Cir.1983) (per curiam); *NLRB v. International Brotherhood of Electrical Workers, Local 575*, 773 F.2d 746, 750 n. 3 (6th Cir.1985) (per curiam); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 170, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983).

[6] Section 10(e) of the Act reads in pertinent part:

> The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order. . . . [T]he court shall . . . have jurisdiction of the proceeding and of the questions determined therein, and shall have power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

> [W]e think that Congress . . . did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

323 U.S. at 199, 65 S.Ct. at 230. Therefore, the union could not discriminate against employees on the basis of race in the collective bargaining process. *See also Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952). This duty, requiring exclusive bargaining representatives to wield their power in a nondiscriminatory manner, was subsequently read into section 9 of the National Labor Relations Act, 29 U.S.C. § 159.[7] *Ford Motor Co. v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); *Syres v. Oil Workers Local 23,* 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785 (1955).

The duty of fair representation has primarily been associated with contract negotiation[8] and the enforcement of that contract through grievance processing.[9] In *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), a case alleging that the union had arbitrarily refused to process a grievance, the Court stated:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177, 87 S.Ct. at 909. This circuit has held that *Vaca v. Sipes* set forth a three-prong test that a union must meet in order to fulfill its statutory duty to fairly represent its members:

> A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

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Ruzicka v. General Motors Corp., 523 F.2d 306, 309–10 (6th Cir.1975), *cert. denied,* 464 U.S. 982, 104 S.Ct. 424, 78 L.Ed.2d 359 (1983) (citing *Griffin v. International Union, UAW,* 469 F.2d 181, 183 (4th Cir.1974)).

The Board apparently argues that this statutory duty prohibits *any* bad faith or arbitrary action taken by a union. It further asserts that the duty of fair representation imposes an affirmative obligation on a union to inform its members of possible disciplinary consequences for participating in at least some forms of union activity. After careful review of the case law, we believe that there is no support for interpreting the duty of fair representation to encompass the fact situation before us.

The Board's position would require this court to take the *Vaca v. Sipes* test completely out of context. *Vaca v. Sipes,* and the Sixth Circuit case *Ruzicka,* involved a union's arbitrary handling of an individual's grievance. Therefore, the union in its unique role as exclusive representative was essentially singling out an individual for different treatment. Even though the complainants in those cases may not have been discriminated against in the classic sense, or even if the union had not acted in bad faith, they were still alleging disparate treatment from other union members—the inability to avail themselves of the grievance procedures.[10]

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[7] Section 9(a) provides that unions elected by the majority of employees "shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." (emphasis added).

[8] *E.g., Ford Motor Co. v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Brotherhood of Trainmen v. Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283.

[9] *See, e.g., Ruzicka v. General Motors Corp.,* 523 F.2d 306 (6th Cir.1975), *cert. denied,* 464 U.S. 982, 104 S.Ct. 424, 78 L.Ed.2d 359 (1983); *Kesner v. NLRB,* 532 F.2d 1169 (7th Cir.), *cert. denied,* 429 U.S. 983, 97 S.Ct. 499, 50 L.Ed.2d 593 (1976); *Griffin v. International Union, UAW,* 469 F.2d 181 (4th Cir.1972); *Wyatt v. Interstate & Ocean Transport Co.,* 623 F.2d 888 (4th Cir.1980); *De Arroyo v. Sindicato de Trabajadores Packinghouse,* 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877, 91 S.Ct. 121, 27 L.Ed.2d 115 (1970).

[10] This element of receiving different benefits than others is found in duty of fair representation cases that do not involve the processing of grievances, or which allege a duty to inform. *See, e.g., Robesky v. Qantas Empire Airways, Ltd.,* 573 F.2d 1082 (9th Cir.1978) (intentional failure to inform an individual that her grievance would not go to arbitration if she rejected the settlement offer violated duty); *NLRB v. American Postal Workers Union,* 618 F.2d 1249 (8th Cir.1980) (arbitrary revocation of assent for individual to temporarily change shifts violated duty); *NLRB v. Local 282, International Brotherhood of Teamsters,* 740 F.2d 141 (2d Cir.1984) (failure to inform some employees about arbitration award terms while informing others violated duty); *NLRB v. Hotel Employees' Union, Local 568,* 320 F.2d 254 (3d Cir.1963) (must inform members of obligation to pay dues, or cannot discharge for failure to pay without

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This position would require us to extend the duty to cover a situation involving a work stoppage rather than collective bargaining or grievance processing, and where a member or group was not singled out for different treatment. In other words, the duty would be expanded to include an undefined fiduciary duty which a union owes to its unit as a whole. Such a duty could impose on a union an obligation to authorize a strike, or any number of other affirmative actions. We decline to extend the duty so far, since we believe the duty of fair representation was never intended to be a "catch all" for undesirable union activity. Rather,

> [t]he duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any. . . ."

DelCostello, 462 U.S. at 164 n. 14, 103 S.Ct. at 2290 n. 14 (quoting *Vaca v. Sipes,* 386 U.S. at 177, 87 S.Ct. at 909).

We conclude, as a matter of law, that the duty of fair representation is implicated only when an individual or group is treated differently by a union—either

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through discriminatory, bad faith, or arbitrary conduct—than another individual, group or the collective. Since such differential treatment was not alleged in this case, we find that the Board was incorrect as a matter of law to find a violation of the duty of fair representation. We therefore decline to consider the *Miranda Fuel* question, and cannot grant enforcement on this basis.

III.

Since we hold that the Union's actions do not constitute a breach of its duty to fairly represent employees, we must determine whether the Union's conduct violates section 8(b)(1)(A) without the aid of the *Miranda Fuel* doctrine. We note that the issue is not whether the work stoppage itself constituted an unfair labor practice, but whether the Union's interactions with the employees did.

Section 8(b)(1)(A) of the NLRA states in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title. . . .

Section 7, in paraphrase, provides that an employee has the right to bargain collectively and to participate in concerted activities, as well as the parallel right to refrain from such activities. To support the Board's holding, therefore, the Union's act of maintaining that a meeting, rather than a work stoppage, was taking place, coupled with its failure to authorize the strike or to inform employees that they could be disciplined for participating in the stoppage, must be considered a restraint or coercion of the members' right to refrain from participating in the work stoppage.

The legislative history of section 8(b)(1)(A) indicates that the original concern was the use of threats and false promises during organizational campaigns, *see NLRB v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 186–202, 87 S.Ct. 2001, 2009–2018, 18 L.Ed.2d 1123 (1967); *NLRB v. Drivers Local Union No. 639, International Brotherhood of Teamsters,* 362 U.S. 274, 285, 80 S.Ct. 706, 712, 4 L.Ed.2d 710 (1960), "the central theme of which was . . . the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisals." *Drivers Local Union No. 639,* 362 U.S. at 287, 80 S.Ct. at 714. Section 8(b)(1)(A) "is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof . . .," *id.* at 290, 80 S.Ct. at 715, and does not encompass the "use by unions of methods of peaceful persuasion." *Id.* at 287, 80 S.Ct. at 714. In the case at bar, although the Union did use intimidation tactics with the employer, it did not use violence, intimidation or threats with respect to the employees. Rather, it told incoming

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violating duty to fairly represent); *Kling v. NLRB,* 503 F.2d 1044 (9th Cir.1975) (to strip individual of seniority rights was an arbitrary constructive discharge violating union's duty to fairly represent); *Retana v. Apartment Operators Union,* 453 F.2d 1018 (9th Cir.1972) (failure to provide Spanish speaking employees with translation of contract might violate duty).

workers that a meeting was taking place. There is little, if any, support to suggest that the employees believed they were merely participating in a meeting. Rather, the ALJ found that:

> While some employees may initially have believed that they were going to participate in a meeting similar to the one conducted on March 18, they were disabuse [sic] of this mistaken impression when Jennings did not engage in an exchange with them but rather asked them to work, when at least some of them were advised by a union representative that they were not working because they were "protest[ing] the elimination of the day-dock worker shift," when some of them either played or saw their fellow employees playing cards on company time, when some of them laughed at Jennings when he asked them to go to work, and when they left the terminal without permission on company time and attended a meeting at the union hall. . . . [M]ost, if not all, of the employees realized or should have realized that they were engaged in a work stoppage. . . .

ALJ's opinion at 11. The Board also stated that the activities clearly constituted a work stoppage, which would have been rec-

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ognized by anyone familiar with labor relations.

Although the employees were not specifically told that the work stoppage was unauthorized, they likewise were not told that it was authorized. Moreover, the work stoppage in question was not only unauthorized, it was illegal. Since it is well settled that a union cannot punish its members for failing to participate in an unlawful work stoppage, *Verville v. International Ass'n of Machinists,* 520 F.2d 615 (6th Cir.1975), the Union's inability to impose such punishment weighs against a finding of coercion. Therefore, since the Union did not threaten or intimidate members to secure participation in the work stoppage, the members knew or should have known that a work stoppage was in progress, and employees were free to not participate in the action instigated by the Union, we hold that the Union did not use restraint or coercion as contemplated by section 8(b)(1)(A).

Enforcement of the Board's order is, accordingly, DENIED.

NLRB v. Charles D. Bonanno Linen Service, Inc.

782 F.2d 7 (1st Cir.), January 24, 1986—268 NLRB 552

On petition to enforce Board Order

Before CAMPBELL, Chief Judge, BOWNES and TORRUELLA, Circuit Judges

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BOWNES, Circuit Judge: The National Labor Relations Board (Board) petitions for enforcement of a decision and order finding that respondent Charles D. Bonanno Linen Service, Inc. (Bonanno) committed certain unfair labor practices in violation of § 8(a)(1) & (3) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(1) & (3), and ordering *inter alia* that Bonanno reinstate four striking employees and put eight others on a preferential hiring list. Bonanno challenges the Board's decision and order on four grounds: first, that there was not substantial evidence on the record to support the Board's finding that the Union's economic strike was converted into an unfair labor

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practice strike; second, that the Board failed to follow settled principles when it ruled that permanently replaced economic strikers were entitled to the enhanced reinstatement rights of unfair labor practice strikers when the strike is converted to one for an unfair labor practice; third, that the Board's remedy exceeded the scope of the complaint before it; and fourth, that the Board impermissibly failed to explicate the basis for its conclusion.

I. *Background*

This case began in 1975 when Bonanno authorized a multiemployer group of which it was a member to bargain on its behalf with Teamsters Local Union No. 25 representing its drivers and those of the other employers in the group. After early negotiations proved unfruitful the Union began an economic strike in June 1975, and Bonanno hired permanent replacements for its twelve striking drivers. In November 1975 Bonanno withdrew from the multiemployer group and took no further part in the negotiations. The group and the Union eventually reached an agreement in April

1976. The Union then demanded that Bonanno execute the new collective bargaining agreement, but Bonanno refused on May 3, 1976. The rest of the multiemployer group's employees went back to work, but Bonanno's twelve drivers remained on strike. The Union subsequently filed an unfair labor practice charge, and Bonanno's refusal to execute the collective bargaining agreement was found by the Board to violate § 8(a)(5) & (1) of the Act. This finding was appealed by Bonanno to this court and to the United States Supreme Court, where enforcement was ultimately affirmed. *Charles D. Bonanno Linen Serv., Inc.,* 229 N.L.R.B. 629 (1977), *supplemented,* 243 N.L.R.B. 1093 (1979), *enforced,* 630 F.2d 25 (1st Cir.1980), *aff'd,* 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982).

The strike at Bonanno continued until February and March 1977 when all twelve striking drivers submitted unconditional requests for reinstatement to Bonanno. Between May 3, 1976, and the strikers' requests for reinstatement the following February and March, four of the permanent strike replacements hired by Bonanno had departed and been replaced. Despite the unconditional requests, Bonanno refused to offer reinstatement to any of the twelve former strikers. On April 5, 1977, the Union filed another unfair labor charge against the Company for refusing to offer reinstatement to the strikers who, it claimed, had become unfair labor practice strikers when the Company refused to sign the collective bargaining agreement on May 3, 1976. A complaint issued from the Board's General Counsel. A stipulation of facts was entered into on August 30, 1977, but the Board subsequently deferred its decision and order on the complaint while the first unfair labor practice charge was litigated in this court and the Supreme Court. After the Supreme Court upheld ours and the Board's finding that Bonanno had violated § 8(a)(5) & (1) when on May 3, 1976, it refused to honor the collective bargaining agreement, proceedings on this complaint were taken up again and the decision and order at issue in this case followed. The facts remain those of the August 1977 stipulation.

The Board found that Bonanno's unfair labor practice of May 3 had converted the drivers' economic strike into an unfair labor practice strike. Consequently, ruled the Board, the twelve striking employees, as unfair labor practice strikers, had an absolute right to any position at the Company that became vacant during the unfair labor practice strike. The Board ruled that Bonanno had committed violations of § 8(a)(3) & (1) when it had denied reinstatement to any of the twelve drivers, and ordered that Bonanno fire the four replacements hired after May 3 and place four of the former strikers in those positions. It also ordered that the remaining eight drivers be placed on a preferential hiring list. The Board issued various cease and desist, posting and notice orders as well. Bonanno's request for reconsideration was denied and, pursuant to § 10(e) of the Act, this petition for enforcement followed.

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II. *Substantial Evidence*

Bonanno asserts that there is not substantial evidence on the record as a whole to support the Board's finding that the original economic strike was converted into an unfair labor practice strike on May 3, 1976, when the Company refused to execute the collective bargaining agreement reached by the Union and the multiemployer bargaining group. Bonanno claims there must be "direct" evidence of a causal link between the unfair labor practice and the strike's continuation. It asserts that the Board's failure to point to evidence demonstrating that the employees knew that after May 3 their strike was continuing because of Bonanno's unfair labor practice is fatal to the Board's enforcement petition. We disagree. Although it may sometimes be a difficult question whether an economic strike is converted into an unfair labor practice strike when the strike has many causes and motives, *see, e.g., Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1079–82 (1st Cir.1981), such is not the case here. The strike in this case began as an economic strike. When an agreement was reached between the Union and the multiemployer bargaining group the employees' economic demands were satisfied. All the striking employees in the industry, except Bonanno's, ended their strikes. When Bonanno refused to execute the bargaining agreement, that refusal—which was ultimately held to be an unfair labor practice by the Supreme Court—became the sole cause of the strike's continuation beyond May 3. The record shows no other cause. The Board did not need to look beyond this for additional evidence such as statements of strikers or messages on picket signs.

The record adequately supports a finding of conversion of the economic strike into an unfair labor practice strike on May 3, 1976.

III. *Reinstatement Rights of the Unfair Labor Practice Strikers*

Bonanno asserts that the Board erred in ordering that it fire four employees hired after May 3 and replace them with four strikers because the strikers did not have reinstatement rights to those jobs. It argues that even if the twelve strikers became unfair labor practice strikers on May 3 their reinstatement rights remained "fixed" as those of permanently replaced economic strikers. It is undisputed that the twelve strikers were permanently replaced while they were still economic strikers and that with respect to the jobs still held by those permanent replacements the strikers have no rights to reinstatement. Under the *Laidlaw* doctrine, permanently replaced economic strikers who unconditionally request reinstatement have rights only to preferential hiring as positions reopen or are newly created, *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1367–70 (1968), *enforced*, 414 F.2d 99, 103–05 (7th Cir.1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100 (1970). In contrast, unfair labor practice strikers have rights to their positions greater than any replacements hired during their strike, and must be rehired upon unconditional request for reinstatement. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278, 76 S.Ct. 349, 355, 100 L.Ed. 309 (1956). Bonanno argues that when there is a conversion of an economic strike into an unfair labor practice strike "settled principles" of Board law dictate that strikers permanently replaced during the economic phase of the strike are not entitled to enhanced reinstatement rights. Thus, according to Bonanno, when the twelve applied for reinstatement they had rights only to preferential future hiring, and the Board's order that Bonanno fire four replacements hired after the conclusion of the lawful economic strike and during the unfair labor practice strike is inconsistent with prior law and should not be enforced. We find Bonanno's reading of prior Board cases to be seriously myopic.

It is well settled Board law that the conversion of a strike into an unfair labor practice strike, while not enhancing the strikers' reinstatement rights vis-a-vis permanent replacements hired during the preconversion economic strike, does give the strikers the right to force the dismissal of any replacement hired after conversion,

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upon an unconditional request for reinstatement. *NLRB v. Plastilite Corp.*, 375 F.2d 343, 348 (8th Cir.1967); *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 725, 729 (6th Cir.), *cert. denied*, 379 U.S. 888, 85 S.Ct. 159, 13 L.Ed.2d 92 (1964); *Gulf Envelope Co.*, 256 N.L.R.B. 320, 320 & n. 2, 332 (1981); *Cavalier Div. of Seeburg Corp.*, 192 N.L.R.B. 290, 291 (1971), *enforced sub nom. Allied Indus. Workers Local 289 v. NLRB*, 476 F.2d 868, 882–83 & n. 23 (D.C.Cir.1973). This rule is consistent with the principles of *Laidlaw* and *Mastro*. There is no valid basis for denying enforcement of the Board order directing the Company to fire four replacements hired after May 3 and reinstate four strikers in their place.

IV. *Scope of the Remedy*

Bonanno asserts that the Board's order, insofar as it requires Bonanno to place the remaining eight unreinstated strikers on a preferential hiring list, is either an abuse of the discretion granted the Board under § 10(c) of the Act or a violation of Bonanno's due process rights. Bonanno asserts that the only unfair labor practice charge brought in the General Counsel's complaint, litigated by the parties, and found by the Board was Bonanno's refusal to discharge the four strike replacements hired after May 3, 1976. Bonanno claims, therefore, that since the Board nowhere found that it violated the rights of the remaining eight strikers, any remedy with respect to them is impermissible. We find this position meritless.

First, the reinstatement rights of all twelve striking drivers were properly before the Board, and were fully litigated and decided. The complaint named all twelve striking employees, and recited that each had unconditionally demanded reinstatement and that the employer "has refused and continues to refuse, to offer any of the employees . . . reinstatement," in violation of § 8(a)(1) & (3). Bonanno's answer to the complaint also contested the reinstatement rights of all the strikers. It stated that none of the twelve were "legally entitled to reinstatement having been permanently replaced as economic strikers and ha[d] lost their status as employees for purposes of reinstatement." In fact, Bonanno's answer was a misstatement of the law because even permanently replaced economic strikers are still "employees" for purposes of reinstatement. *See Fleetwood Trailer Co.,* 389 U.S. 375, 381, 88 S.Ct. 543, 547, 19 L.Ed.2d 614 (1967); *Laidlaw Corp.,* 414 F.2d at 104. Each of the twelve strikers had reinstatement rights once he requested unconditional reinstatement, rights either to immediate reinstatement or to future preferential hiring. Since the rights of all twelve strikers were contested in the complaint and answer the Board properly determined the issue. It found both a "precise" violation of § 8(a)(3) in Bonanno's refusal to reinstate four of the strikers and a general violation of § 8(a)(1) & (3) in its "general disregard of the reinstatement rights of unfair labor practice strikers." [1] Given this general violation and Bonanno's misapprehension of the legal rights of all the strikers the Board was fully justified in determining the legal rights of all the strikers.

Second, the Board's order is squarely within its remedial powers. The Board did no more than order Bonanno to do what it was required to do—rehire the remaining eight employees as positions reopen. Bonanno argues that the Board is ordering it to put the employees on a preferential hiring list even though there is nothing in the stipulated facts that indicates that as of August 1977 it ever failed to give those eight preferential hiring rights. Because such an order is "punitive," says Bonanno, and is more expansive than the violation found, it is an abuse of the Board's discretionary powers under § 10(c). Bonanno's assertion is ludicrous. If the Board may not make a prospective order with regard to preferential hiring then it must wait until each time that a position reopens and an employee with preferential hiring rights is denied employment, and then bring a separate unfair labor practice complaint and litigate it. The entire process could take years. Perhaps this scenario appeals to a party seeking to delay redress for its unfair labor practices as long as possible and at all cost, but it does not effectuate the policies of the Act. Section 10(c) empowers the Board, when it has found an unfair labor practice, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The Board's order in this case effectuates the policies of the Act precisely by ordering Bonanno to recognize and effectuate in the future the present reinstatement rights of each of the twelve employees whose rights it violated. This is not the first time the Board has ordered an employer to put unfair labor practice strikers on a preferential hiring list when no violation of their preferential hiring rights had yet occurred, and some other violation had triggered the remedial order. *See Purolator Armored, Inc. v. NLRB,* 764 F.2d 1423, 1427 (11th Cir.1985); *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB,* 617 F.2d 977, 989 (3rd Cir.), *cert. denied,* 449 U.S. 871, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980); *Gulf Envelope Co.,* 256 N.L.R.B. 320, 332 (1981).

Third, the Board's order is not punitive. It does no more than order Bonanno to implement the employees' rights. We are unable to see any unfair prejudice to Bonanno by this order. Bonanno may well be open to contempt penalties if it fails in the future to reinstate any of the strikers. [2] But it had a full and fair opportunity to state and argue its position before the Board.

Fourth, there being nothing surprising, punitive, or in any way extraordinary or harsh about this order, Bonanno's claim that his due process rights were violated is without foundation.

V. *The Board's Stated Basis for the Decision*

Bonanno's final argument is that the Board made a "quantum leap from a set of facts to a legal conclusion," without adequate explanation of the basis for its conclusion, when it found that because the economic strike was converted into an unfair labor practice strike on May 3 Bonanno committed a separate unfair labor practice when it refused to reinstate any of the twelve strikers who requested reinstatement in February and March 1977. The Board's statement that its conclusion was based on "settled law" is inadequate, argues Bonanno, because the Board departed from settled law. The Board explained that it was applying settled law, and after reviewing the cases cited by the Board, *Covington Furniture Mfg. Corp.*, 212 N.L.R.B. 214 (1974), *enforced*, 514 F.2d 995 (6th Cir.1975), and *Gulf Envelope Co.*, 256 N.L.R.B. 320 (1981), and the other cases cited in this opinion, we agree. *Order Enforced.*

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[1] Bonanno quotes only one passage in the Board's opinion relating to an unfair labor practice finding, where the Board stated that "we find that [the employer's] precise violation of Section 8(a)(3) was its refusal to reinstate the four former strikers to the positions held by the postconversion replacements." Bonanno claims that this language indicates that the Board only found the precise refusal to reinstate four strikers to be an unfair labor practice. This is wrong. The Board found violations of § 8(a)(1) *and* (3). It stated in its decision and order: "We find that Respondent thereby violated Section 8(a)(3) and (1) of the Act as a result of its general disregard of the reinstatement rights of unfair labor practice strikers." While Bonanno's failure to reinstate immediately four of the twelve striking employees violated § 8(a)(3), the effect of Bonanno's course of conduct on all twelve employees' § 7 rights was a violation of § 8(a)(1). *See* R. Gorman, *Basic Text on Labor Law* 326–41 (1976).

[2] In fact, it was stated at oral argument that all the positions at Bonanno have reopened and been filled since the stipulation of facts in August 1977. As of now, then, all twelve strikers have rights to immediate reinstatement and back pay except insofar as Bonanno can raise defenses at a back-pay proceeding such as picket-line violence, unavailability because of other employment, etc.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 105, AFL-CIO v. NLRB

United Brotherhood of Carpenters and Joiners of America, Millwright Local Union 1519, AFL-CIO v. NLRB

International Association of Bridge, Structural and Ornamental Iron Workers Local 769, AFL-CIO v. NLRB

Tri-State Building and Construction Trades Council v. NLRB

781 F.2d 569 (6th Cir.), January 27, 1986—272 NLRB No. 2

On action affirming Board Order

Before MILBURN and GUY, Circuit Judges; and WOODS, District Judge *

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PER CURIAM: Upon consideration of the briefs and record herein and after oral argument, the judgment of the National Labor Relations Board is AFFIRMED for the reasons stated in the entered opinion of the Board. *Tri-State Building Trades*, 272 N.L.R.B. No. 2 (1984).

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* The Honorable George E. Woods, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

ARA Leisure Service, Inc. v. NLRB

782 F.2d 456 (4th Cir.), January 28, 1986—272 NLRB 1300

On petition to review Board Order

Before HALL, MURNAGHAN, and WILKINSON, Circuit Judges

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WILKINSON, Circuit Judge: ARA Leisure Services, Inc. petitions for review of a decision by the National Labor Relations Board finding ARA guilty of unfair labor practices. *ARA Leisure Services, Inc.*, 272 N.L.R.B. No. 199 (1984). Specifically, the Board adopted the decision of an Administrative Law Judge ("ALJ") that ARA violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged certain novelty vendors from their jobs at a sports arena in Indianapolis, Indiana. Because we find no error in the Board's action, we deny the petition for review and grant enforcement of the Board's order.

I

ARA sells food, beverage and novelty items in Market Square Arena in Indianapolis under a concession lease agreement with Market Square Associates.[1] The nov-

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elty vendors are classified either as "tableheads" or "helpers." In late 1982, twelve individuals served as tableheads. As the title implies, each was responsible for a tabletop operation selling novelty items in the concourse of the arena. Each tablehead worked closely with one or more helpers—hired by the tablehead—who assisted at the table or hawked items inside the arena itself. A total of twenty-six helpers worked at Market Square under this arrangement.

The instant dispute arose from the efforts of intervenor Printing and Graphic Communications Union No. 17 to organize ARA personnel at the arena. In December 1981, early in its organizational campaign, the union filed a representation petition for a unit of all ARA novelty and souvenir vendors at Market Square. The Board's Regional Director found the suggested unit inappropriate because these employees did not possess interests sufficiently distinct to warrant separate representation.

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[1] Because ARA transacts business within this circuit, this court has jurisdiction to review the Board's decision under 29 U.S.C. § 160(f).

The union again filed a representation petition in November 1982, but broadened the suggested unit to include "[a]ll food, beverage, novelty and souvenir sales employees, all commissary employees, [and] all money room cashiers." ARA contested the propriety of this unit on two grounds. First, it argued that the tableheads were independent contractors, and therefore neither they nor their helpers were ARA employees. Alternatively, ARA characterized the tableheads as supervisors and therefore not within the coverage of the Act. *See* 29 U.S.C. §§ 152(3), 164(a). On December 22, 1982, the Regional Director directed an election but excluded the tableheads as supervisors. The election was set for January 18, 1983.

In light of the finding that tableheads were supervisors, ARA sent a letter dated January 3, 1983 to seven tableheads who were members of the union's organizing committee. The letter informed these tableheads that they were discharged "for being disloyal to the Company concerning the union." The next day ARA wrote to the eighteen helpers of these tableheads that "your supervisor was discharged for disloyalty to the Company concerning the union" and "your services are no longer needed." On January 12, the Board postponed the election indefinitely.

In the subsequent unfair labor practice proceedings, the ALJ rejected ARA's assertion that the tableheads were independent contractors. He did, however, find their discharge as supervisors permissible under the doctrine of *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982), *enforced sub nom., Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C.Cir.1983). The ALJ rejected—both on these facts and as a matter of law—the theory that the firing of supervisors constituted an unfair labor practice because it was intended to thwart the union activity of rank-and-file employees.

With respect to the discharge of helpers, however, the ALJ concluded that ARA's action was so inherently destructive of section 7 rights as to give rise to an inference of unlawful intent without need for specific proof. *See NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963). The ALJ also found sufficient specific evidence to warrant the inference of anti-union animus and concluded that the discharge of helpers violated sections 8(a)(1) and 8(a)(3).[2] The Board adopted the relevant portions of the ALJ's decision, though it relied only on specific evidence of intent and found it unnecessary to consider the theory of *Erie Resistor* and *Great Dane*. It ordered ARA to reinstate the discharged helpers with back pay.

II

We note at the outset of this appeal, that a tablehead and a helper enjoy a very **459** different legal status. The discharge of tableheads would be legal whether they are characterized as independent contractors or supervisory employees. Independent contractors, of course, are not protected by the Act and a company may terminate its relationship with its contractors without limitation, *see* 29 U.S.C. § 152(3). Supervisors likewise enjoy no protection, *id.*, and *Parker-Robb*, 262 N.L.R.B. 402, reaffirmed the settled principle that supervisors may be discharged for union activity. *See Florida Power & Light v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 807–09, 94 S.Ct. 2737, 2746–47, 41 L.Ed.2d 477 (1974); *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 654–55, 94 S.Ct. 2023, 2024–25, 40 L.Ed.2d 443 (1974). In this case, the record leaves no doubt that the tableheads were supervisors, and we see no reason to question the conclusion that their discharge was legitimate.[3]

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[2] These sections, found at 29 U.S.C. § 158(a), provide in relevant part: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[3] In *Parker-Robb* the Board abandoned its previous prohibition on supervisor discharges found to be part of a "pattern of conduct" to discourage rank-and-file employees from exercising section 7 rights. Instead, the Board concluded that the "incidental or secondary effect on the employees [from the discharge of a supervisor for union activity] is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act."

Even under *Parker-Robb*, an employer may not discharge a supervisor where that action "directly interferes with the section 7 rights of an employee." *Automobile Salesmen's Union*, 711 F.2d at 385. Thus, an employer may not discharge a supervisor "for giving testimony adverse to an employer's interest either at an NLRB proceeding or during the process-

Continued

The discharge of their helpers is another matter. ARA defends its discharge of helpers on two grounds. First, it argues that tableheads are independent contractors and, consequently, helpers departed simply because their employers—the tableheads—were released. Second, ARA asserts that the evidence of anti-union animus in the discharge of helpers is insufficient to establish an unfair labor practice, and attempts to show a legitimate business practice whereby helpers always depart with their tableheads. For the reasons explained below, we reject these contentions and direct enforcement of the Board's order.

A.

The Board's conclusion that ARA committed unfair labor practices by discharging the helpers rests upon its finding that the helpers were employees of ARA and not of the tableheads. This finding, in turn, is grounded in the characterization of tableheads as supervisory employees rather than independent contractors. ARA challenges that characterization here. On this question, the Board's decision, though "not one in which [it] had to apply its special expertise, should be upheld if the Board chose between two fairly conflicting views." *NLRB v. Tri-State Transport Corp.,* 649 F.2d 993 (4th Cir.1981). *See also, NLRB v. United Insurance Co.,* 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968). Our examination of the record here convinces us that the Board did indeed choose between fairly conflicting views, and we accordingly affirm the finding that tableheads are employees of ARA.

In excluding independent contractors from the coverage of the Act, Congress intended that common law agency principles would govern the determination of employee/independent contractor status. *United Insurance,* 390 U.S. at 256, 88 S.Ct. at 989. Courts analyze this issue by applying the "right to control" test: "When the person for whom services are performed retains the right to control the manner and means by which those services are to be accomplished and particularly when that person provides supervision as to the details of the work, the workers are considered employees." *Air Transit, Inc. v. NLRB,* 679 F.2d 1095, 1098 (4th Cir.1982). *See also, Yellow Taxi Co. v. NLRB,* 721 F.2d 366, 374 (D.C.Cir.1983); *NLRB v. A.S. Abell Co.,* 327 F.2d 1, 4 (4th Cir.1964); *Restatement (Second) of Agency* § 220 (1958). It is the right to control, rather than the actual exercise of control, that is significant. *NLRB v. Associated Diamond Cabs, Inc.,* 702 F.2d 912, 920 (11th Cir.1983). The test, however, is not narrowly focused on direct supervision, though of course such supervision is indicative of control. Instead, we must examine the relationship in its entirety, considering all the circumstances that suggest either employee or independent contractor status. *See Associated Diamond Cabs,* 702 F.2d at 919; *Tri-State Transport,* 649 F.2d at 995; *Associated General Contractors of California, Inc. v. NLRB,* 564 F.2d 271, 279 (9th Cir.1977).

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Our examination of the relationship between ARA and the tableheads convinces us that the Board made a reasonable choice when it characterized tableheads as employees of ARA. We note that the company performs for the tableheads the kind of services one would expect from an employer. In contrast to cases where we have found independent contractor status, ARA makes all necessary payroll deductions for novelty personnel, including state and federal withholding taxes, Social Security, and worker's compensation. *Cf. Air Transit,* 679 F.2d at 1097; *Tri-State,* 649 F.2d at 996. There are other indicia of employee status as well. Tableheads must complete an employment application, sign in and out of work, abide by company rules contained in the ARA Employee Handbook, and face the customary sanctions of reprimand, suspension and discharge for infractions of those rules. Moreover, the tableheads perform in the name of ARA largely unskilled work of indefinite duration rather than a specialized and finite task.

Not only are many of the normal attributes of employment present in the relationship between ARA and the tableheads; many of the entrepreneurial attributes that one might expect in an independent contractor are absent. While the tableheads may vend novelty items at other locations, may use independent marketing techniques to enhance sales at their tables and bear the risk of loss or destruction of the novelty items entrusted to

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ing of an employee's grievance under the collective-bargaining agreement, . . . for refusing to commit unfair labor practices, or because the supervisor fails to prevent unionization." *Parker-Robb,* 262 N.L.R.B. at 402–03. None of these circumstances is present here.

them, it is ARA that secures vendor's licenses, rents the space used by the tableheads, and designates what items and at what price the tableheads may sell.

In addition to this absence of tablehead discretion over price or product, all equipment necessary to perform the job is provided by ARA without charge to the tableheads. *See Restatement (Second) of Agency* § 220(3) and comment k. *Cf. Air Transit,* 679 F.2d at 1097; *Local 777, Democratic Union Organizing Committee v. NLRB,* 603 F.2d 862, 878 (D.C.Cir.1978). As noted by the ALJ, "a tablehead could report to an event without a penny in his pocket or a shopping bag at his side." ARA provides the tables on which novelty items are displayed, and gives the workers baskets to use when items are hawked in the arena. Tableheads do not purchase the items to be sold, and ARA bankrolls each tablehead with $50 in cash before an event so the tablehead can make change. ARA uniforms, required by the company's contract with Market Square, are also provided by ARA. In short, it is not necessary for a tablehead to make any personal investment to perform the task assigned to him. ARA's provision of the necessary instrumentalities further indicates an employer/employee relationship, not that of an independent contractor.

In considering the degree of control available to a putative employer, courts have also found relevance in the financial incentive of that party to exercise control. *See, e.g., Air Transit,* 679 F.2d at 1099; *Local 777,* 603 F.2d at 879. In *Air Transit,* for example, a taxi company charged drivers fixed fees unrelated to earnings. The fact that the company made "no attempt to share in a percentage of the drivers' earnings" created a strong inference that the company did not exercise control over the manner and means of the drivers' work. *Air Transit,* 679 F.2d at 1099. Here, ARA has every incentive to retain and exert control over tableheads, for it receives 90% of each tablehead's gross receipts from each event. Thus, ARA's own

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profit depends upon both the success of tablehead operations and the strict procedures ARA imposes for maintaining and reporting tablehead receipts. ARA cannot simply give tableheads unbridled control over novelty operations, for it receives no fixed fee or rental on which it can depend. *Cf., Air Transit.* These financial incentives for control create a strong inference that ARA retains the right to oversee the manner and means of tableheads' performance.

ARA disputes the inference of control by stressing the areas in which tableheads enjoy flexibility and discretion in the performance of their work. Tableheads, for example, exercise substantial authority over helpers who work with them. Tableheads hire and fire helpers with little oversight by ARA. They determine the number of helpers hired and the number present at each event, set the helpers' pay, and decide whether helpers will work the tables or hawk novelty items in the arena. A tablehead can turn over his whole operation to helpers, for ARA does not require tableheads to be present at every event.

Though these facts suggest that tableheads actually exercise control over helpers, ARA has nonetheless retained at all times the right to control the tablehead/helper relationship. ARA's General Manager at Market Square, Gary L. Shipp, testified as to his ultimate authority over nearly every decision delegated to tableheads. Shipp indicated that he retained power to compel or prohibit hiring a certain helper, and could discipline or terminate a helper if he thought it necessary. Though tableheads enjoy flexibility in determining helper's compensation, ARA requires that helpers receive at least minimum wage, and Shipp stated that he had the power to require tableheads to pay helpers a certain percentage of their take. The fact that ARA does not routinely exercise its retained authority is not controlling, for, by definition, supervisory employees enjoy power to exercise some independent judgment over other employees on behalf of the employer. *See* 29 U.S.C. § 152(11); C. Morris, *The Developing Labor Law* 1452–54 (2d ed. 1983). Only where an individual possesses such authority with genuine independence from the putative employer is independent contractor status indicated. The scope of ARA's retained authority supports the conclusion that tableheads are supervisory employees.

ARA argues further that any control it retained over tableheads was required by its contract with Market Square, and is therefore not relevant to the independent contractor issue. Courts have recognized that controls imposed by an employer to ensure compliance with governmental regulations "do not evidence an employee-employer relationship unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control." *Associated Diamond Cabs,* 702 F.2d at 922. *See also, Air Transit,* 679 F.2d at 1098; *Tri-State,* 649 F.2d at 995. ARA argues by analogy that the requirements of its contract should likewise be considered irrelevant on the issue of control by ARA, and several courts have suggested that this analogy is appropriate. *See Air Transit,* 679 F.2d at 1100; *SIDA of Hawaii, Inc. v. NLRB,* 512 F.2d 354, 359 (9th Cir.1975); *but see, City Cab of Orlando v. NLRB,* 628 F.2d 261, 264 n. 8 (D.C.Cir.1981). The contract here requires ARA to get arena approval of items for sale and their prices, to keep careful records of sales, to obtain all necessary permits and licenses, and to ensure that ARA personnel wear arena-approved uniforms. As indicated, however, ARA has retained power over the tableheads substantially in excess of that required to ensure compliance with its contract.

It is, of course, "a rare case where the various factors will point with unanimity in one direction or the other." *Merchants Home Delivery Service, Inc. v. NLRB,* 580 F.2d 966, 973 (9th Cir.1978). This case is no exception. We are nonetheless satisfied that the Board chose between two fairly conflicting views in characterizing tableheads as ARA employees. This characterization of tableheads applies as well to their helpers.

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B.

Having concluded that novelty helpers were employees of ARA, we now consider whether the company's discharge of these employees violated the Act. It is axiomatic that, under the Act, "an employer may dismiss an employee for good cause, no cause, or for any reason he chooses except the employee's union activity." *Torrington Co. v. NLRB,* 506 F.2d 1042, 1047 (4th Cir.1974). Whether a discharge was motivated by anti-union animus is a question of fact, and we must affirm the Board's determination if it is supported by substantial evidence on the record as a whole, even though we might have decided the case differently *de novo. NLRB v. Daniel Construction Co.,* 731 F.2d 191, 193 (4th Cir.1984); 29 U.S.C. § 160(e). Impermissible motive may be shown either by direct or circumstantial evidence. *NLRB v. Nueva Engineering,* 761 F.2d 961 (4th Cir.1985). Review of the record here convinces us that the Board's finding of anti-union animus is supported by substantial evidence and we therefore direct enforcement of the Board's order.

Our analysis is structured by the burden of proof allocations sustained by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (approving the Board's decision in *Wright Line,* 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982)). The General Counsel bears the burden throughout to demonstrate that an employer's anti-union animus contributed to its decision to discharge employees. He must demonstrate that the employees were engaged in protected activity, that the employer was aware of the activity, and that such activity was a substantial or motivating reason for the employer's action. *Daniel Construction,* 731 F.2d at 197. An employer faced with such evidence may then prove by preponderant evidence that the worker would have been fired even in the absence of union activity. *Transportation Management,* 462 U.S. at 395, 103 S.Ct. at 2471. Thus, an employer might show that a worker's deficiencies, economic necessity, or a legitimate business policy compelled the discharge. Given the scheme of proof, we consider first the General Counsel's case of anti-union animus, and then turn to ARA's contention that the discharges resulted from operation of a legitimate business policy.

Both direct and circumstantial evidence support the conclusion that significant hostility toward the union on the part of ARA influenced the company's action. On several occasions, ARA's General Manager Shipp—who ultimately executed the discharge of tableheads—made his feelings about the union clear. After an event on February 4, 1982, Shipp was drinking with several tableheads and helpers when conversation turned to the union. He warned the employees, "Get your fucking union in and I guarantee you in six months all of you fuckers are gone. Now you put that in your fucking union meeting." Two weeks later, Shipp was asked by several employees to work out a dispute. He responded by asking, "Well, is that why all you assholes signed union cards?"

In addition, there is evidence tying this general anti-union animus to these specific discharges. The circumstances surrounding the discharges are suggestive of the company's motivation. The helpers were discharged two weeks before a scheduled election. Not only did this action remove approximately 15% of the voting unit from the election, it also posed a potential deterrent to other employees inclined to favor the union. *Cf. NLRB v. Instrument Corporation of America,* 714 F.2d 324, 330 (4th Cir.1983). Moreover, Shipp in effect admitted to at least one novelty helper that he had been fired for his union support. Kent Allensworth approached Shipp after his discharge and asked if he could take over the stand of his tablehead. According to Allensworth, Shipp asked why he should " 'give me the stand when he just fired my 'F'ing partner for the same reason?' And I said, 'What's that?' He said, 'Signing a union card, an organizer's card.' " Thus, it is clear that ARA's hostility toward union

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organizational activity played a significant part in its decision to discharge helpers.

ARA contends, however, that the evidence was insufficient to show its awareness of the union sympathies of all the fired helpers. The record before us does indeed reveal only ARA's specific knowledge of union support by four of the discharged helpers. Nevertheless, the evidence as a whole supports the conclusion that the other fourteen helpers were discharged in violation of the Act as well.

Where an overall decision to discharge has been found to be prompted by organizational activity, individual discharges may be ascribed to that same cause where, as here, the employer has actual knowledge of some employees' union activity, and a reasonable suspicion that other terminated employees were among the union's supporters also. *Cf. Dillingham Marine & Mfg. Co. v. NLRB,* 610 F.2d 319, 321 (5th Cir.1980). Here, it is clear that ARA knew union activity centered among the novelty workers. Initial union efforts concentrated solely on novelty vendors, and the union first sought a unit comprised only of these employees. Union disclosures to ARA revealed that the organizing committee was comprised largely of tableheads and helpers. In a speech to food and beverage employees, ARA Vice-President Pistone acknowledged the company's view that "the problem was just with novelty people." Thus, though ARA was perhaps not aware of each and every helper's union views, it was aware of a concentration of union sympathies among novelty vendors. Given the other evidence of ARA's animus, motivation, and specific knowledge, we find its general knowledge of union support among novelty employees sufficient to uphold the Board's decision. It is reasonable to conclude that ARA simply seized the moment to wipe out a pocket of suspected union support without waiting for actual confirmation that each employee discharged actually supported the union.

ARA responds that legitimate business concerns required the simultaneous departure of tableheads and helpers. It contends that its policy is grounded in the necessities of the working relationship between tableheads and helpers. Tableheads trust helpers to handle large sums of money efficiently and honestly in the tablehead's absence or in hectic circumstances where close monitoring is impossible. Tableheads therefore must have freedom to work with helpers of their own choosing. Accordingly, the company argues, the job of the helper depends on that of his tablehead. If the tablehead is terminated, the helper is discharged as well.

The policy ARA advances no doubt reflects a plausible approach to these relationships. Unfortunately for ARA, however, the record provides inadequate evidence for us to conclude that this policy was a reality at Market Square. In fact, the evidence provides at least as much support for concluding that ARA replaced tableheads with their helpers rather than discharging them simultaneously. In the related representation case, Shipp testified on three separate occasions that when a tablehead left his position, ARA policy was to replace the tablehead with one of his helpers. He recalled at least one example of the operation of this policy, though he denied the existence of such a practice in proceedings below. The ALJ found no instances prior to this case where ARA "terminated a novelty worker solely because the tablehead with whom he or she worked departed from ARA's employ." [4]

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[4] ARA contends that the testimony of Judith Selig, novelty supervisor at Market Square from 1974 to 1981, demonstrates that helpers and tableheads departed together. During Selig's tenure, however, novelty vendors were not designated as either helpers or tableheads. Selig testified that she hired novelty workers as equal partners, frequently employing husband and wife to work as a team. Because of this relationship, both members of the team left ARA at the same time. Where only one team member left, Selig testified, the other team member continued to work the table. Selig was unable to testify that helpers replaced tableheads only because no individuals were so designated.

On this record, we are unable to conclude that the helpers would have been discharged in the absence of ARA's anti-union animus, and

accordingly affirm the Board's findings that the discharges violated sections 8(a)(1) and 8(a)(3).

III

Finally, ARA contends that hostility, bias, and prejudgment by the ALJ require that we remand this matter to a different ALJ for *de novo* consideration. While the record indeed reveals that the ALJ exercised little patience and a sharp tongue, it also shows that he neither played favorites nor directed his ire at only one party. Moreover, his written decision demonstrates careful and balanced consideration of the evidence before him. We accordingly are unwilling to direct the drastic course of action requested by ARA.

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We have examined the various issues in this case and find the conclusions of the Board supported by the evidence. Accordingly, the order of the Board is hereby

ENFORCED.

Dawson Carbide Industries, Inc. v. NLRB

782 F.2d 64 (6th Cir.), January 28, 1986

On petition to review and cross-application to enforce Board Order

Before MERRITT, JONES and NELSON, Circuit Judges

MERRITT, Circuit Judge: Petitioner Dawson Carbide asks that we refuse enforcement of the decision and order of the NLRB finding Carbide guilty of unfair labor practices. In the alternative, it asks that we find that the employees in question would have been laid off with other employees anyway within a few weeks and hence would have been eligible to receive backpay running only to the date of subsequent layoffs and would have been ineligible to vote in the representation election. Because we believe the decisions of the Administrative Law Judge and the NLRB to be supported by substantial evidence, we enforce the Board's decision. Confident that the agency will give serious attention to the amount-of-backpay and election issues when and if it is required to decide those issues—a contingency that has not yet occurred—we express no opinion thereon.

I.

This case involves the layoff of two employees of Dawson Carbide, Carol Ann Kustosz and Howard Churchwell, allegedly because of union activities. After Kustosz and Churchwell complained of the layoffs to the NLRB, the issue was tried before an Administrative Law Judge. Considerable quantities of testimonial and documentary evidence were presented, with Carbide contending that the layoffs were compelled by economic necessity instead of anti-union sentiments. The ALJ, however, found that Carbide was guilty of unfair labor practices and ordered the reinstatement, with backpay, of Kustosz and Churchwell. Appeal was then taken to a three-member panel of the Board, which affirmed in all respects relevant to this case. Both the ALJ's opinion and that of the Board fully reviewed the facts and arguments involved.

II.

The scope of review in this case is the narrow one of determining whether the Board's action was supported by substantial evidence. 29 U.S.C. § 160(e), (f); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). After review of the briefs, the records and the opinions of the ALJ and the Board, we are of the opinion that the Board's finding of unfair labor practices was supported by substantial evidence. There is substantial evidence in the record that anti-union animus prompted the layoffs in question. Even if we were to accept Carbide's rather persuasive argument that Kustosz and Churchwell would have

been laid off soon anyway, the acceleration of a layoff to punish union activity would still be an unfair labor practice. *See* 29 U.S.C. 158(a)(1). Accordingly, we order the Board's decision and order enforced. We express no opinion as to the validity of ballots cast by Kustosz and Churchwell, leaving that to be resolved in other proceedings before the Board.

NLRB v. The Cooper Union for the Advancement of Science and Act

783 F.2d 29 (2d Cir.), January 30, 1986; cert. denied Oct. 6, 1986—273 NLRB 1768

On petition to enforce Board Order

Before FEINBERG, Chief Judge and MANSFIELD and OAKES, Circuit Judges

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PER CURIAM: The National Labor Relations Board ("Board" or "NLRB") petitions this court to enforce its order directing the Cooper Union for the Advancement of Science and Art ("Cooper Union") to bargain with a bargaining representative of its full-time faculty members on the grounds that they are neither managerial nor supervisory employees. We grant the petition.

BACKGROUND

Cooper Union is a private, nonprofit, tuition-free institution of higher education located in Manhattan, consisting of three degree-granting schools: The Schools of Art, Architecture, and Engineering. [1] Cooper Union has a student body of approximately 900 to 1,000 students and employs approximately fifty-five to sixty full-time and eighty part-time faculty members. The Cooper Union Charter vests ultimate authority in a sixteen-member board of trustees, a board which has no faculty representatives on it.

In 1974, following an NLRB-supervised election, the Cooper Union Federation of College Teachers, AFT, NYSUT, AFL–CIO ("the Union") was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty, deans, assistant deans, division heads, and the library head were excluded from the bargaining unit. In 1978 the Union and Cooper Union entered into their only collective bargaining agreement, which expired in August, 1980. Shortly before this expiration date, and following the Supreme Court's decision in *NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980), Cooper Union withdrew its recognition of the Union and refused to bargain with it.

An administrative law judge dismissed a complaint against Cooper Union that charged it with unfair labor practices under section 8(a)(5) and (1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5) and (1) (1982). He concluded that the full-time faculty were managerial employees within the meaning of *Yeshiva,* and therefore outside the protections of the Act. The Board reversed the ALJ, finding that the bargaining unit members did not exercise sufficient authority over academic matters to be considered managerial employees under *Yeshiva.*

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DISCUSSION

Our role in reviewing a decision of the Board is a limited one. Congress has assigned to the Board the primary function of balancing competing interests to effectuate national labor policy, and this court will enforce the Board's application of a rule that is rational, consistent with the Act, and supported by substantial evidence on the record as a whole. *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 500–01, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978). [2]

Although the Act does not explicitly exclude managerial employees, as it does supervisors, *see* 29 U.S.C. § 152(3), the Supreme Court has held that the Act implies such an exclusion. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 288–89, 94 S.Ct. 1757, 1768–69, 40 L.Ed.2d 134 (1974). The rationale behind this exclusion is that "an employer is entitled to the undivided loyalty of its representatives." *Yeshiva,* 444 U.S. at 682, 100 S.Ct. at 862. The Court has defined managerial employees as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *Bell Aerospace,* 416

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[1] Prior to 1975, the Schools of Art and of Architecture were combined as one school—the School of Art and Architecture.

[2] We recognize that when the Board makes findings inconsistent with the ALJ, as here, the findings are more open to question than if the Board and the ALJ had reached the same result, but only if the evidence turns on the credibility of the witnesses. *Local 259, UAW v. NLRB,* 776 F.2d 23, 27 (2d Cir.1985); *Ewing v. NLRB,* 732 F.2d 1117, 1120–21 (2d Cir.1984). Although the ALJ apparently made some findings based on credibility, they do not overcome the extensive findings made by both the ALJ and the Board that the administration exercised extraordinary authority in both academic and nonacademic areas.

U.S. at 288, 94 S.Ct. at 1768 (quoting *Palace Laundry Dry Cleaning,* 75 N.L.R.B. 320, 323 n. 4 (1947)).

In *Yeshiva* the Court held that this definition applies to those college faculties that "exercise discretion within, or even independently of, established employer policy," adding that the faculty "must be aligned with management." *Yeshiva,* 444 U.S. at 683, 100 S.Ct. at 862. Under *Yeshiva,* a faculty need only exercise "effective recommendation or control, rather than final authority," to be managerial. *Id.* at 683 n. 17, 100 S.Ct. at 863 n. 17. The Court found that the Yeshiva faculty's authority was "absolute" in "academic matters" such as course offerings, scheduling, grading, matriculation, and admissions, *id.* at 686, 100 S.Ct. at 864, and that the faculty "play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion." *Id.* at 686 n. 23, 100 S.Ct. at 864 n. 23.

Although the Court concluded that Yeshiva's faculty was managerial, it noted that there may be faculty at other institutions of higher learning that are nonmanagerial. *Id.* at 690 n. 31, 100 S.Ct. at 866 n. 31. In the wake of *Yeshiva,* the Board and courts of appeals have engaged in intensive fact-based analyses to determine whether a particular college faculty is managerial. *See, e.g., NLRB v. Lewis University,* 765 F.2d 616 (7th Cir.1985); *Loretto Heights College v. NLRB,* 742 F.2d 1245 (10th Cir.1984); *College of Osteopathic Medicine & Surgery,* 265 N.L.R.B. 295 (1982); *Ithaca College,* 261 N.L.R.B. 577 (1982).

Cooper Union's faculty has significant authority in certain core academic matters, but certainly not the "absolute" authority of Yeshiva's faculty, nor even "effective recommendation or control." *See Yeshiva,* 444 U.S. at 683 n. 17, 100 S.Ct. at 863 n. 17. The evidence before the Board shows that, in response to financial concerns, the trustees instituted major changes in 1972–73 with minimal faculty input and against strong faculty opposition. [3] The trustees again restructured

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Cooper Union in 1975 without faculty participation and over their strong opposition. [4] The authority of bargaining unit faculty over academic matters was also weak because of the presence of administrators, nonbargaining unit (part-time) faculty, and students on various committees, and the power of deans to control the agenda and meeting times of many of the committees. The Board's findings that the committee structure and the changes that Cooper Union's administration unilaterally instituted [5] often rendered faculty authority ineffective in core academic areas are amply supported by the record.

The evidence also strongly supports the findings of both the Board and the ALJ that in the nonacademic areas noted by the Court in *Yeshiva* the faculty was extremely weak. The Cooper Union faculty has virtually no role in the areas of budget and facilities. Even faculty access to ordinary office supplies is restricted. The faculty has no input into the appointment, retention, or employment conditions of nonteaching staff. Faculty input into appointment of teaching staff and administrative positions has frequently been bypassed, and faculty tenure and promotion recommendations have frequently been rejected. *Compare Lewis University,* 765 F.2d at 623 (president vetoed only five of 118 faculty recommendations for tenure and promotion; faculty found managerial); *Loretto Heights College,* 742 F.2d at 1250 (although president had in recent years accepted all faculty committee recommendations on promotion and tenure. Board and court found faculty nonmanagerial); *Ithaca College,* 261 N.L.R.B. at 578 (faculty recommendation in tenure and promotion followed in 119 of 120 cases; faculty found managerial). The administration, not the faculty, makes leave-of-absence and even sabbatical determinations.[6]

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[3] The 1972 changes included consolidation of departments into larger divisions, replacement of faculty-elected department chairpersons with division heads appointed by the president, the creation of new degree programs in mathematics, physics, and the distributive sciences, and the creation and filling of the position of provost.

In 1973 the administration implemented changes that included increasing class size, the student-faculty ratio, and teaching loads, severely limiting tenure grants, reducing the number of full-time faculty through attrition, and increasing the proportion of adjunct faculty. These changes were implemented while still under consideration by the student-faculty senate.

[4] These changes included eliminating the divisions and division heads, leaving the schools as the primary structural academic units, dividing the School of Art and Architecture into two separate schools, creating the "Faculty of Liberal Arts and Science" entirely outside the degree-granting schools, thereby effectively disenfranchising almost half the faculty, and eliminating the curricula leading to degrees in mathematics, physics, and distributive science. As a result of these changes, eight tenured faculty members were laid off permanently.

[5] In 1975 the dean of the School of Engineering, without faculty consideration, promulgated an amended governance for that school that, inter alia, delegated all administrative functions to the dean. Over strong faculty opposition, in 1977 Cooper Union entered into a library consortium that delegated administrative control and purchasing to New York University.

The Board had before it an extensive record of faculty-administration conflict arising out of the unilateral changes instituted by the administration in the early to mid-1970's. This conflict culminated in the Senate dissolving itself and in the faculty's decision to engage in collective bargaining. *Yeshiva* makes clear, of course, that the fact that a college faculty chooses to unionize does not mean it is nonmanagerial. However, we would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is "aligned with management." For example, after Cooper Union on June 26, 1980, asserted that the faculty were managerial employees and refused to bargain with the union, it unilaterally revised the governances and terms and conditions of employment. We agree that the Board had before it substantial evidence that the Cooper Union faculty did not

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exercise effective recommendation or control in academic or nonacademic areas, and that they are not managerial or supervisory employees.[7] Accordingly, we grant the petition to enforce the Board's order to Cooper Union to recognize and bargain with the Union.

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[6] A 1978 evaluation team from the Middle States Association of Colleges found that Cooper Union's structure was distinguished by the fact that the deans were unusually strong and the faculty unusually weak. The team noted inter alia the absence of a mechanism by which the faculty could review institution-wide academic policies and priorities.

[7] We do not intend by this opinion either to criticize or condone the actions taken by Cooper Union's administration in response to serious financial pressures. We simply make clear that the consequence of such actions may be to make a college faculty nonmanagerial within the meaning of *Yeshiva* and the Act.

General Teamsters Local No. 162, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB

782 F.2d 839 (9th Cir.), February 11, 1986—272 NLRB 1393

On petition to review Board Order

Before Skopil, Nelson and Boochever, Circuit Judges

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Boochever, Circuit Judge: The General Teamsters Local No. 162, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") appeals from a final decision of the National Labor Relations Board ("NLRB" or "the Board") which (1) dismissed an unfair labor practice charge under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1982),[1] against a company that discharged a striking employee for engaging in serious strike misconduct, and (2) found that although the company's discharge of a second employee was unlawful, the employee engaged in such serious strike misconduct that it would not advance the remedial purpose of the Act to award him reinstatement or backpay. We have jurisdiction under 29 U.S.C. § 160(f), and affirm.

OVERVIEW

Western-Pacific Construction Materials Co. ("the Company") is an Oregon building materials supply company that operates six cement mixing yards in and around Portland. The Teamsters Local 162 is the exclusive bargaining representative for a unit of the Company's employees and had a collective bargaining agreement with the Company. On May 16, 1983, the Union

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commenced an economic strike against the Company. The Union maintained picket lines at all Company sites and utilized ambulatory picketers who followed Company trucks and picketed the trucks at construction sites. The strike ended on June 21. During the course of the strike, the Company discharged several Union members, including Joel Johnson and Harry Jump, for alleged strike misconduct. The Union filed unfair labor practice charges contesting the discharges. It now contends that there was no substantial evidence to support Johnson's discharge and that the Board abused its discretion in refusing to order Jump's reinstatement or to award him backpay.

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[1] Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under section 157 of title 29 U.S.C. Section 8(a)(3) makes it an unfair labor practice to discourage or encourage membership in any labor organization by discriminating with respect to hire or tenure of employment. 29 U.S.C. §§ 8(a)(1) and 8(a)(3).

I. Does Substantial Evidence Support Johnson's Discharge?

A. *Facts*

Joel Johnson, a Company truck driver, went on strike with other employees on May 16. On May 27, Johnson approached Company Security Guard Kennedy at the front gate to the Company's downtown site, and after asking Kennedy whether he had a flak jacket, stated that the "IRA are not the only people who can buy hand grenades, and that [Kennedy] had better get a flak jacket." At other times on the picket line, Johnson carried a baseball bat and a toy pistol resembling a real gun, spit at vehicles, and cursed and threatened employees as they crossed the picket line. Security Guard Kennedy observed and reported these incidents.

On June 8, Kennedy observed that Johnson was present at the Company's city center site. Johnson moved away from a small group of picketers, picked up some rocks, and then ran behind a nearby building as a car approached the front gate where Kennedy was stationed. As the car slowed, Kennedy observed a hand from behind the building throw a rock the size of a baseball; the rock dented the car's door. Johnson then peeked out from behind the building, and subsequently left the picket site. The other picketers remained. Kennedy observed this incident, called the police, and later filed an incident report identifying Johnson as the striker who threw the rock. On the basis of this report, the Company discharged Johnson on June 13.

The Union filed an unfair labor practice charge with the NLRB on June 24, 1983. The NLRB on October 31, 1983 issued a complaint charging the Company with violations of sections 8(a)(1) and 8(a)(3) of the Act for discharging Johnson. On May 24, 1984, the ALJ issued a decision which found that the Company's discharge of Johnson for strike misconduct was lawful and dismissed the complaint. On appeal, the NLRB agreed with the ALJ that the Company lawfully discharged Johnson for engaging in serious strike misconduct by throwing a rock that struck and damaged the car of a nonstriking employee. The Board dismissed the complaint with respect to Johnson.

B. *Analysis*

1. General Principles

Striking employees who engage in serious picket line misconduct forfeit the protection of the Act and may be discharged for such conduct. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252–55, 59 S.Ct. 490, 494–96, 83 L.Ed. 627 (1939); *Schreiber Manufacturing, Inc. v. NLRB*, 725 F.2d 413, 415 (6th Cir.1984). Where it is alleged that an employer violated the Act by discharging a striking employee, the General Counsel must establish a prima facie violation of the Act by showing that the employer discharged the employee because of conduct that occurred in the course of the economic strike. *General Telephone Co. of Michigan*, 251 NLRB 737, 738 (1980), *aff'd without opinion sub nom. Local 1106, IBEW v. NLRB*, 672 F.2d 895 (D.C.Cir.1981). The employer may defend the discharge on the ground that it had "an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature" and that the discharge decision was based on that misconduct. *Id.* Once an employer establishes an "honest belief" defense, the General Counsel must then affirmatively show that the employee did not in fact engage in such conduct. *Schreiber Manufacturing, Inc.*, 725 F.2d at 415–16; *General Telephone*, 251 NLRB at 738–39; *see also NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 n. 3, 85 S.Ct. 171, 172 n. 3, 13 L.Ed.2d 1 (1964). The General Counsel must prove the necessary elements of the alleged unfair labor practice by a preponderance of the testimony. See section 10(c) of the NLRA, 28 U.S.C. § 160(c);[2] *see also NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 103 S.Ct. 2469, 2471, 76 L.Ed.2d 667 (1983).

2. Standard of Review

The Board's determination that the National Labor Relations Act has or has not been violated should be affirmed if its findings of fact are supported by substantial evidence on the record as a whole, 29 U.S.C. § 160(f), and if the Board correctly applied the law. *Carpenters Union Local No. 25 v. NLRB,* 769 F.2d 574, 579 (9th Cir.1985). *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 485–90, 71 S.Ct. 456, 463–66, 95 L.Ed. 456 (1951). The Board's interpretation and application of the Act is entitled to considerable deference. *Carpenters,* 769 F.2d at 579. Upon review of a decision of the NLRB, this court gives "special weight" to the credibility determinations made by the administrative law judge, and the Board's findings are not to be disturbed unless a clear preponderance of all the evidence convinces the court that the findings are incorrect. *Id.*

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[2] As amended in 1978, but not yet noted in U.S.C. See section 3 of Pub.L. 95-251, March 27, 1978, 92 Stat. 184; 29 U.S.C.A. § 160(c) (West Supp.1985).

3. Discussion

Because the Company showed that it had a good faith belief that Johnson threw the rock, the General Counsel had the burden of proving by a preponderance of the evidence that Johnson did not in fact engage in the misconduct for which he was discharged. The Union argues that the General Counsel met that burden of proof by affirmatively showing that Johnson did not throw the rock. The Union asserts that it would have been physically impossible for Johnson to have thrown the rock, given the placement of the building and the car, and the angle from which the rock was thrown. The Union contends that only a left-handed thrower could have hit the car, and Johnson is right-handed. The ALJ found that the angles of vision were not shown with sufficient detail to support that contention.

The Union also contends that the ALJ failed to consider all relevant factors in assessing Security Guard Kennedy's credibility. Kennedy's report concluded that Johnson threw the rock, while Kennedy testified only that he saw the rock thrown by a hand that he believed was Johnson's. The Union asserts that this discrepancy shows that Kennedy's report misstated and exaggerated what he had seen, and concludes that Kennedy's identification of Johnson was unreliable.

The ALJ found that the Company had an "honest belief" that Johnson threw the rock based on Kennedy's report, and that the General Counsel failed to show affirmatively that Johnson did not throw the rock. The ALJ specifically stated that "[t]he testimony of Kennedy is credited." Kennedy "unwaiveringly" identified Johnson at the site picking up rocks and ducking behind the building. Kennedy saw the hand he believed was Johnson's throw the rock, and then saw Johnson peek from behind the building. Johnson then left the site. "Contrasted to this detailed description of events by Kennedy, Johnson, based on demeanor, lack of candor, and inherent inconsistency in his testimony, was not a credible witness." Johnson claimed to have carried the baseball bat for a cane, but would have had to stoop to use it as such, and in any event, admitted carrying it over his shoulder. He admitted spitting at drivers, but said that the reason was that it was "dry and dirty."

This court has recognized that the administrative law judge "is in the best position to evaluate which witness is recalling the **843** facts most accurately, and the [reviewing c]ourt cannot conduct a *de novo* review of the testimony to make different credibility determinations." *NLRB v. Anchorage Times Publishing Co.,* 637 F.2d 1359, 1364 (9th Cir.), *cert. denied,* 454 U.S. 835, 102 S.Ct. 137, 70 L.Ed.2d 115 (1981). We find that substantial evidence on the record as a whole supports the ALJ's conclusion that Johnson threw the rock.

The Union alternatively argues that if Johnson threw the rock, the incident does not constitute misconduct sufficient to justify discharge. The Union is mistaken. The Board and the courts have consistently held that throwing objects at moving vehicles constitutes serious strike misconduct for which employees may be discharged. *See, e.g., NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 844 (5th Cir.1978) (egg); *NLRB v. Otsego Ski Club-Hidden Valley, Inc.,* 542 F.2d 18, 19 (6th Cir.1976) (egg); *PBA, Inc.,* 270 NLRB 998, 998–99 (1984) (rock). The Union's contention is without merit. We affirm the NLRB's holding that Johnson was lawfully discharged.

II. Did the NLRB Abuse Its Discretion in Refusing to Order Reinstatement or Backpay for Jump?

A. *Facts.*

On May 18, 1983, Harry Jump, a shop steward, was an ambulatory picketer who followed a Company readymix cement truck to a construction site. He was accompanied by two other picketers.

While the cement truck was stopped at an intersection, two picketers jumped from Jump's vehicle. One ran to the door of the cement truck and threatened the driver, and the other discharged four yards of cement onto the street. The driver of the cement truck identified Jump as one of the participants and identified Jump's vehicle. Jump was arrested, and the Company discharged him the same day.

On July 18, Jump was identified as having been involved in running a car driven by Randy Gravelle off the road on May 16. Gravelle was a strike replacement employee. After Jump pulled his car in front of Gravelle's, preventing his escape, Jump and another striker pulled Gravelle from his car, physically assaulting and threatening him. Gravelle was intimidated into joining another striker who drove with him to a parking lot, where Jump again attempted to pull Gravelle from the car. The next day Gravelle reported this incident to the Company. Subsequently, Gravelle identified two of the strikers from Company photos on June 20th, and he identified Jump on July 18th.

During the unfair labor practice charge hearing, the ALJ found that the Company had an "honest belief" that Jump was guilty of the strike misconduct for which he was fired, but that the General Counsel established that Jump did not participate in the misconduct. It was undisputed that Jump remained in the vehicle and did not participate or encourage the other strikers in dumping the cement. He did not try to stop them. The police charges were dropped on July 22 for lack of evidence. The ALJ further found, however, that Jump's misconduct in assaulting Gravelle was sufficiently serious to preclude his reinstatement or backpay. The ALJ held that the Company did not violate sections 8(a)(1) and 8(a)(3) by discharging Jump, and dismissed the complaint.

On appeal, the NLRB disagreed with the ALJ's conclusion of law as to Jump and held that the Company did violate sections 8(a)(1) and 8(a)(3) by discharging Jump for misconduct in which he was not involved.[3] The Board, however, found that Jump "committed egregious acts of strike misconduct" in forcing a nonstriking employee's car off the road and physically accosting and threatening the nonstriker. The Board held that it "would not advance the remedial purposes of the Act" to require the Company to reinstate Jump or pay him backpay. The Board ordered the Company to cease and desist from discharging employees engaged in protected strike activi-

ties, and required the Company to post an appropriate notice.

B. *Analysis*

1. General Principles

The Board's remedial authority is set forth in section 10(c) of the Act, 29 U.S.C. § 160(c), which provides that the Board shall order a violator "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." Although reinstatement and backpay are the conventional remedies ordered to redress an unlawful discharge, the Board may withhold such remedies where they would not effectuate the purpose of the Act. *Golden Day Schools, Inc. v. NLRB,* 644 F.2d 834, 840 (9th Cir.1981); *NLRB v. Western Clinical Laboratory, Inc.,* 571 F.2d 457, 460 (9th Cir.1978); 29 U.S.C. § 160(c).

2. Standard of Review

The Board's discretion in the selection of appropriate remedies is exceedingly broad and is to be given special respect by reviewing courts. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 215–16, 85 S.Ct. 398, 405–06, 13 L.Ed.2d 233 (1964); *NLRB v. Fort Vancouver Plywood Co.,* 604 F.2d 596, 602 (9th Cir.1979), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). Conversely, a reviewing court's scope of review of the Board's remedial orders is narrow. The Board's choice of remedies will not be disturbed on review in the absence of a clear abuse of discretion. *See Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943); *cf. United Steelworkers of America v. NLRB,* 646 F.2d 616, 629 (D.C.Cir.1981) ("the administrative expertise of the Board in fashioning remedies, derived from its unique understanding of the complex relationship between labor and management in our industrial society and the policies incorporated in the labor laws, is not to be interfered with lightly by reviewing courts lacking that expertise"); *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d at 461 ("discretionary power of reinstatement subject to limited judicial review").

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[3] The Board's conclusion that Jump's discharge violated the Act has not been appealed.

3. Discussion

The Union contends that the Board's inquiry should have been whether reinstatement would have created "an unacceptable employment relationship" thereby frustrating the policies of the NLRA. The Union then argues that Jump should be reinstated because two other striking employees who were involved in the Gravelle incident were reinstated by the Company after the strike, thus showing that reinstatement would not create an unacceptable relationship. The Union also disputes the ALJ's findings as arbitrary and inconsistent.

The Union's contentions do not recognize the Board's broad discretion and the deference owed the ALJ's findings of fact. The correct standard is whether the Board abused its discretion in selecting a remedy.

The ALJ accepted the testimony of the Company's general manager that Scott (one of the employees involved in the Gravelle incident) was not fired because Scott was not involved in the actual physical violence, and that the general manager was not satisfied with Gravelle's identification of Scott. The ALJ also credited Gravelle's testimony based upon demeanor, candor, inherent probability, consistency, and his ability to testify in detail without embellishment or apparent rancor. Further, the ALJ found that the record showed that two of the three known participants were not reinstated. In any event, neither the involvement of the other strikers participating in the Gravelle incident nor the Company's decision to reinstate them were issues that were before the Board.

The Board found that "Jump committed egregious acts of strike misconduct" by running a nonstriking employee's

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car off the road and twice physically assaulting and threatening him. Acts such as these have been consistently recognized as constituting serious misconduct for which the courts will refuse to order reinstatement. See *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 121–22 (5th Cir.1981) (striking employee bent car radio antenna); *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843–44 (5th Cir.1978) (striking employee swerved in front of and blocked another employee's car; second employee threw egg); *Ohio Power Co. v. NLRB*, 539 F.2d 575, 578 (6th Cir.1976) (striking employee intentionally bumped employee, knocking him to ground); *NLRB v. Fibers International Corp.*, 439 F.2d 1311, 1312–14 (1st Cir.1971) (striking employee intimidated nonstriking employee).

Alternatively, the Union argues that even if Jump should not be reinstated, he should receive backpay from the time of his unlawful discharge (May 20) until the time when the Company first discovered his involvement in the Gravelle incident (July 18). The Union contends that the Board failed to consider whether backpay as a remedy distinct from reinstatement would effectuate the policies of the Act.

In refusing to order reinstatement or backpay, the Board places on Jump the burden for his own serious strike misconduct, and informs other employees that they cannot with impunity engage in the type of misconduct in which Jump participated. The Board, in the exercise of its discretion and expertise, issued a cease and desist order and affirmatively required the Company to post a notice that it would not engage in unlawful misconduct. We hold that the Board did not abuse its discretion in refusing to order reinstatement or award backpay. The decision of the NLRB is AFFIRMED.

R. Eddie Wayland v. NLRB

627 F.Supp. 1473 (M.D. Tenn.), February 11, 1986

On petition for disclosure of documents under FOIA

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WISEMAN, Chief Judge: Plaintiff, Eddie Wayland, brings this action against defendants, the National Labor Relations Board ("NLRB"); Louis D'Amico, NLRB Region 5 Director; and Mary Shanklin, Director of the NLRB General Counsel's Office of Appeals, seeking disclosure of certain documents pursuant to the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. The documents plaintiff seeks relate to two closed unfair labor practice cases. Defendants contend that the materials sought are exempt from disclosure under FOIA exemptions 5, 7(A), (C), and (D). 5 U.S.C. § 552(b)(5), 7(A), (C), (D). The parties have filed cross motions for summary judgment. Jurisdiction has been conferred on this Court by 5 U.S.C. § 552(a)(4)(B).

The facts are undisputed. On January 8, 1985, plaintiff filed a request for documents contained in two unfair labor practice case files with the NLRB pursuant to the provisions of FOIA. Both cases involved charges filed by the Baltimore Newspaper Graphic Communications Union, Local 31. The union subsequently withdrew both the charges, and the cases were closed at the time plaintiff filed his request. By letter dated January 25, 1985, the NLRB Regional Director released copies of several documents, and withheld others. By letter dated March 12, 1985, the NLRB's Regional Counsel denied plaintiff's appeal seeking the withheld documents. On May 3, 1985, plaintiff filed the present action seeking to compel disclosure of the withheld documents. The NLRB's Assistant General Counsel for Special Litigation subsequently released copies of a few documents found to be erroneously withheld.

Defendants have filed a "*Vaughn* Index of Documents Withheld" describing each document and the applicable FOIA exemptions invoked. *See Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). The *Vaughn* Index reveals that the following 25 documents have been withheld: three witness statements or affidavits given to a Board examiner in connection with the investigation of the unfair labor practice charges; one casehandling chronology recorded by the investigating Board examiner; two logs of Board investigator's contacts; seven sets of handwritten notes by Board examiners or their supervisors concerning evidence gathered by investigation; seven documents containing summary reports andor agenda outlines which discuss and analyze the relevant evidence acquired by investigation and recommend a particular course of action be taken by the Region; the draft and confirmation copy of a mailgram from the Board examiner to a witness; a handwritten list of questions to be addressed to a particular witness; and two letters.

The FOIA requires disclosure of requested material in the possession of a federal agency unless that material falls within one of the nine statutory exemptions structured to protect specified confidentiality and privacy interests. *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 220–21, 98 S.Ct. 2311, 2316, 57 L.Ed.2d 159, 165–66 (1978). These statutory exemptions are to be narrowly construed with all doubts resolved in favor of disclosure. *Department of the Air Force v. Rose,* 425 U.S. 352, 361–62, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 21 (1976). The agency resisting disclosure bears the burden of establishing the exempt status of the requested material, 5 U.S.C. § 552(a)(4)(B); *EPA v. Mink,* 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119, 128 (1973), and is required to present a detailed justification for nondisclosure in order to carry its burden. *See Parke, Davis & Co. v. Califano,* 623 F.2d 1, 7 (6th Cir.1980). The FOIA provides for *de novo* judicial review of an agency's determination to withhold requested material. 5 U.S.C. § 552(a)(4)(B). *Mink,* 410 U.S. at 79, 93 S.Ct. at 832, 35 L.Ed.2d at 128.

Exemption 5

The NLRB claims that several of the requested documents are protected from disclosure by exemption 5. Exemption 5 permits an agency to withhold:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency

5 U.S.C. § 552(B)(5). Exemption 5 has been held to encompass recognized civil discovery privileges, *FTC v. Grolier, Inc.,* 462 U.S. 19, 26, 103 S.Ct. 2209, 2214, 76 L.Ed.2d 387, 393 (1983), and the deliberative process, or "executive," privilege. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150–51, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29, 47–48 (1975).

A. *Witness Statements*

Defendants argue that the witness statements (*Vaughn* Index Nos. 3, 11, 12) fall within the attorney work product privilege andor the deliberative process privilege. In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29, 49 (1975), the Supreme Court ruled that "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy" constitute attorney work product which is protected from disclosure by exemption 5. The Court also explained that exemption 5 includes the deliberative process privilege which encompasses predecisional documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." 421 U.S. at 150, 95 S.Ct. at 1516, 44 L.Ed.2d at 47.

Most courts have held that witness statements obtained by NLRB employees are not protected from disclosure by exemption 5, either because they do not constitute "memorandums or letters," *see Poss v. NLRB*, 565 F.2d 654, 659 (10th Cir.1977); *Baptist Memorial Hospital v. NLRB*, 92 LRRM 2645 (W.D.Tenn.1976), or because they contain purely factual, investigative material that is not inextricably interwined with deliberative material. *See Associated Dry Goods Corp. v. NLRB*, 455 F.Supp. 802, 809 (S.D.N.Y.1978); *Joseph Horne Co. v. NLRB*, 455 F.Supp. 1383, 1387 (W.D.Pa.1978); *Mareathon LeTourneau Co. v. NLRB*, 414 F.Supp. 1074, 1080 (S.D.Miss.1976); *Amerace Corp. v. NLRB*, 431 F.Supp. 453, 455 (W.D.Tenn.1976).

With respect to the work product privilege, the Court concludes that the NLRB has not shown that these witness statements are other than an objective reporting of facts, and thus do not reflect the attorney's theory of the case and his litigation strategy. Similarly, the Court concludes that the NLRB has not shown that disclosure of the witness statements would reveal the internal deliberative processes of the agency. Moreover, the Court does not consider the witness statements to be inextricably intertwined with deliberative material merely because the choice of facts reported or of questions asked necessarily reveal the reporter's viewpoint. *See Powell v. United States*, 584 F.Supp. 1508, 1519 (N.D.Calif.1984). Thus, the Court concludes that even if the witness statements are considered to be "memorandums or letters," they do not come within exemption 5.

B. *Summary Reports*

Defendants also argue that the summary reports qualify for the deliberative process privilege. Defendants state that these reports are prepared by an NLRB examiner for the Regional Director and contain a summary of the relevant evidence gathered during the investigation along with a recommended course of action. The Court concludes that these predecisional documents fall within the scope of the deliberative process privilege as described in *Sears*. They contain recommendations and, according to defendants, serve as a basis for discussion in the course of the Regional Director's decision whether or not to issue a complaint. Accordingly, the summary reports (*Vaughn* Index Nos. 7–9, 22–25) are exempt from disclosure under exemption 5.

C. *Other Documents*

Defendants contend that the remaining documents are so closely related to the witness statements that they should be exempt from disclosure for the same reasons they argued that the statements were exempt. With respect to the Board Examiner's list of questions to be addressed to a specific witness and a mailgram enlisting cooperation from a witness (*Vaughn* Index Nos. 16, 17, 20), the Court concludes that these documents are not exempt from disclosure under exemption 5 for the same reasons that the witness statements were held to be nonexempt. The NLRB has not shown that either of these documents reflect an attorney's theory or litigation strategy under the work product privilege, or that they reflect the deliberative processes of the agency.

The description of the remaining documents—handwritten notes, a letter, a casehandling chronology, and logs of investigator's contacts—by the NLRB is insufficient to allow the Court to consider the applicability of exemption 5 to these documents. In this regard, the Court notes that courts considering the exempt status of notes promulgated by NLRB personnel find, depending on the content and context in which the notes were promulgated, that some notes fall within the deliberative process privilege, and others consist of purely factual accounts of witness interviews that are disclosable. *See e.g., Poss v. NLRB*, 565 F.2d 654, 659 (10th Cir.1977); *Associated Dry Goods Corp. v. NLRB*, 455 F.Supp. 802, 811 (S.D.N.Y.1978); *Joseph Horne Co.*

v. NLRB, 455 F.Supp. 1383, 1387–88 (W.D.Pa.1978). Defendants' description of these documents is conclusory, and fails to disclose how these documents fit into the deliberative process, "whether it is an essential element of that process or possibly a peripheral item which just 'beefs up' a position with cumulative materials." *Parke, Davis & Co. v. Califano,* 623 F.2d 1, 6 (6th Cir.1980). The FOIA puts the burden on the agency to show that these documents qualify for exempt status. 5 U.S.C. § 552(a)(4)(B). Thus, the Court will require defendants to submit affidavits, or other materials, which contain a more detailed description of the content of these documents and how they fit into the deliberative process. Defendants are to file their submissions within ten days after entry of this Order, and plaintiff will be given ten days to respond to defendants' submission after it has been filed. Accordingly, the Court will reserve decision on the exempt status of these documents until the parties have filed their submissions.

Exemption 7(A)

A. *Witness Statements*

The NLRB contends that several of the documents are protected from disclosure by exemption 7(A), which permits the withholding of "investigatory records compiled for law enforcement purposes" the production of which would "interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 236, 98 S.Ct. 2311, 2324, 57 L.Ed.2d 159, 175 (1978), the Supreme Court held that witness statements obtained for use in pending unfair labor practice proceedings are exempt from disclosure under 7(A), at least until completion of those proceedings. The Court reasoned that disclosure of the statements presented a risk that employers or unions may coerce or intimidate potential witnesses before they are able to testify at the hearing. 437 U.S. at 239–41, 98 S.Ct. at 2325–26, 57 L.Ed.2d at 176–78. In addition, the Court noted that potential witnesses may be reluctant to give statements to NLRB investigators absent assurances that their statements will not be disclosed until completion of the proceedings. *Id.*

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Although the Supreme Court has not addressed this issue, most courts hold that these concerns are not applicable to witness statements contained in closed NLRB files, unless those statements are related to another specific, concrete proceeding. *See Van Bourg, Allen, Weinberg & Roger v. NLRB,* 751 F.2d 982, 985 (9th Cir.1985); *Poss v. NLRB,* 565 F.2d 654, 657–58 (10th Cir.1977); *Stroock & Stroock & Lavan v. NLRB,* 106 LRRM 2553, 2554–56 (S.D.N.Y.1981); *Trustees of Boston University v. NLRB,* 105 LRRM 2159, 2161–62 (D.Mass.1980); *Nemacolin Mines Corp. v. NLRB,* 467 F.Supp. 521, 522–24 (W.D.Pa.1979); *Associated Dry Goods Corp. v. NLRB,* 455 F.Supp. 802, 811–13 (S.D.N.Y.1978); *Joseph Horne Co. v. NLRB,* 455 F.Supp. 1383, 1386 (W.D.Pa.1978). The Court is persuaded by the reasoning of these courts and notes that the NLRB has not shown that disclosure of these statements would interfere with a specific proceeding that is currently pending. Thus, the Court concludes that the witness statements are not exempt under 7(A).

B. *Other Documents*

Defendants appear to argue that the Court's decision concerning the exempt status of the witness statements is determinative of the disclosure of the remaining documents. Thus, the Court concludes that none of the requested documents are exempt from disclosure under exemption 7(A).

Exemption 7(B)

In their *Vaughn* Index, defendants have listed exemption 7(B) as one of the exemptions claimed for the draft of a mailgram enlisting further cooperation from a witness (Index No. 16). Exemption 7(B) exempts from disclosure investigatory records the production of which would "deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). It appears to the Court that the listing of this exemption may have been a typographical error on the defendants' part because they do not address the applicability of this exemption in their brief. In any event, the Court concludes that defendants have not shown that disclosure of the mailgram would deprive an individual of a fair trial or impartial adjudication. Thus, the mailgram is not exempt from disclosure under 7(B).

Exemption 7(C)

Exemption 7(C) permits withholding of investigatory records the production of which would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In determining whether a particular disclosure represents an unwarranted invasion of privacy, the Court must balance the individual's privacy interest against the public interest in disclosure. *See Kiraly v. FBI,* 728 F.2d 273, 277 (6th Cir.1984). Exemption 7(C) permits nondisclosure of the type of highly personal data normally found in a personnel file. *Department of the Air Force v. Rose,* 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11, 27 (1976). Defendants contend that disclosure of several of the withheld documents would constitute an unwarranted invasion of personal privacy because they reveal the identity of those providing information to the agency during its investigation, those individuals' home address and telephone numbers, various employees' wage rates, and references to an employee's job performance and personnel action affecting that employee. The identity of those making witness statements, their home addresses and telephone numbers are

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more appropriately considered under exemption 7(D).

With respect to the information concerning employee wage rates, job performance and personnel action, the Court notes that information of this type would typically be found in a personnel file, and concludes that employees have a legitimate privacy interest in this type of information. *See Department of the Air Force v. Rose, supra,* 425 U.S. at 377, 96 S.Ct. at 1606, 48 L.Ed.2d at 30 (results of examinations and evaluations of work performance); *Associated Dry Goods Corp. v. NLRB, supra,* 455 F.Supp. at 815 (employee wage rates). Although the Sixth Circuit in *Akron Standard v. Donovan,* 780 F.2d 568 (6th Cir.1986), required disclosure of information pertaining to an employee's job performance, the court noted that much of that information had already been disclosed during a prior public proceeding. *Akron Standard, supra,* at 572. Thus, the Court does not consider the *Akron Standard* decision as controlling in the instant case. Plaintiff has asserted no countervailing public interest in disclosure of this information. Accordingly, the Court directs defendants to redact the portions of the withheld documents concerning this information. (*Vaughn* Index Nos. 11, 12, 14, 19, 20, 21).

Exemption 7(D)

Defendants argue that several of the withheld documents are exempt from disclosure under exemption 7(D), which allows information in investigatory files to be withheld if production would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). In order to establish that an individual who provides information to an agency is a confidential source, the agency must show that the information was given either "under an express promise of confidentiality or in circumstances under which such an assurance could be reasonably inferred." *L & C Marine Transport, Ltd. v. United States,* 740 F.2d 919, 923–24 (11th Cir.1984) (quoting Conf. Rep. No. 93-1380, 93rd Cong., 2nd Sess. 13 (1974)). The NLRB claims that the following statement appeared at the beginning of each witness statement withheld:

> I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

Defendant's Memorandum at 20–21. Based on this language, the Court concludes that the witnesses were given an express assurance of confidentiality.

With respect to witness statements contained in closed files, courts appear to be in disagreement as to whether these statements should be disclosed even if an express or implied assurance of confidentiality has been given to the witness. Those courts holding that the witness statements should be disclosed base their decision on either their view that the grant of confidentiality given by the agency carries little weight because it is routine and conditional, or that the witness had no reasonable expectation of confidentiality because he was a potential witness for the investigating agency at a later hearing. *Poss v. NLRB,* 565 F.2d 654, 658 (10th Cir.1977); *Stroock & Stroock & Lavan v. NLRB,* 106 LRRM 2553, 2557 (S.D.N.Y.1981); *Trustees of Boston University v. NLRB,* 105 LRRM 2159, 2164–

65 (D.Mass.1980); *Nemacolin Mines Corp. v. NLRB,* 467 F.Supp. 521, 524–25 (W.D.Pa.1979); *Joseph Horne Co. v. NLRB,* 455 F.Supp. 1383, 1386–87 (W.D.Pa.1978). Other courts have rejected the so-called "potential witness" rule, noting its adverse effect on the agency's ability to gather information. *See e.g., United Technologies Corp. v. NLRB,* 777 F.2d 90, 94–95 (2d Cir.1985); *Borton, Inc. v. OSHA,* 566 F.Supp. 1420, 1422 (E.D.La.1983); *Lloyd v. Marshall,* 526 F.Supp. 485, 487 (M.D.Fla.1981); *T.V. Tower, Inc. v. Marshall,* 444 F.Supp. 1233 (D.D.C.1978); *Kaminer v. NLRB,* 90 LRRM 2269 (S.D.Miss.1975).

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In *United Technologies Corp., supra,* the Second Circuit Court of Appeals recognized the split of authority surrounding the potential witness rule and determined that it should be rejected "regardless of whether the underlying enforcement proceeding has been dismissed before the hearing, is pending or has been completed." 777 F.2d at 95. The court based its decision on the practical realities of an agency's law enforcement capabilities, noting that agencies, such as the NLRB, that have no independent investigatory power must depend on the information provided by witnesses. 777 F.2d at 94. The court reasoned that the effect of a potential witness rule would be to "require an agency to choose, at the outset of its investigation, which informants it *may* later call to testify and which informants it will *definitely not* call," and concluded that Congress did not intend to create such a dilemma for agencies. 777 F.2d at 95 n. 6. Thus, the court held that the term "confidential source" includes a witness who is promised or reasonably expects confidentiality "unless and until the agency needs to call him as a witness at trial." 777 F.2d at 94.

The Court finds the reasoning of the *UTC* court in rejecting the potential witness rule to be persuasive. The terms of the express promise of confidentiality given by the NLRB to the witnesses in the instant case provide that the source can expect confidentiality *unless* the affidavit is produced in a later proceeding. The Court believes it is entirely reasonable for a witness to expect, based on this assurance, that his identity will remain confidential if either a later hearing is never held, or the hearing is held and the affidavit of this particular witness is not produced.

Moreover, the ability to grant an assurance of confidentiality is especially important to agencies such as the NLRB. As noted by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co., supra,* 437 U.S. at 240, 98 S.Ct. at 2326, 57 L.Ed.2d at 177, witnesses, who are the principal source of information in NLRB investigations, may be reluctant to give statements to NLRB investigators absent assurances of confidentiality, for fear of employer reprisal or harassment. The Court believes that the effect of a potential witness rule would effectively eliminate the ability of the NLRB to grant meaningful assurances of confidentiality. Realistically, it is very unlikely that the NLRB will have decided before it takes an individual's statement whether it expects to call that person to testify at a later proceeding. As a result, practically every individual who makes a statement for the NLRB will be a "potential witness." Thus, if a potential witness rule were adopted, exemption 7(D) would lose much of its usefulness for agencies whose investigations primarily depend on the acquisition of witness statements. The Court believes that if Congress had intended such a result when it adopted exemption 7(D), it would have made those intentions clear. Absent a showing of clearly expressed Congressional intent to the contrary, the Court will not construe the statute to exempt certain agencies from receiving the full benefit of exemption 7(D).

Furthermore, although the Sixth Circuit Court of Appeals has not specifically addressed exemption 7(D) in this context, it did appear to question the viability of a potential witness rule in *Akron Standard v. Donovan,* 780 F.2d 568 (6th Cir.1986). In *Akron Standard,* the court reviewed a lower court's decision refusing to recognize the 7(D) exemption based on the fact that the investigation had been completed, and based on what the lower court characterized as the routine and conditional nature of the confidentiality grant. *Akron Standard,* at 572–73. The court of appeals noted that information given by a witness under a grant of confidentiality may remain protected even after the investigative file has been closed if confidentiality has not been waived. *Akron Standard,* at 573. The court remanded to the district court the determination of whether statements of witnesses, whose identity had not already been revealed, could be effectively redacted to protect the identity of those witnesses.

Akron Standard, at 573. To the extent that the court refused to rely on the reasoning of the lower court in disregarding the grant of confidentiality to witnesses

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whose identity had not already been revealed, the Court believes its disposition of the instant case is in accordance with the tenor of the *Akron Standard* decision. Accordingly, the Court concludes that the *identity* of those individuals who provided witness statements (*Vaughn* Index Nos. 3, 11, 12) to the NLRB fall within exemption 7(D).

In *Radowich v. United States Attorney,* 658 F.2d 957, 960 n. 10 (4th Cir.1981), the court stated that the protection afforded by exemption 7(D) extends to an individual's identity and all information furnished by that individual which might disclose or point to his identity. *See also Akron Standard,* at 573. Defendants contend that no edited version of the witness statements can be released because the nature of the information given by the witnesses provide numerous clues to their identity. In addition, defendants claim that practically all the other documents withheld contain references which would lead to the disclosure of the witnesses' identity. Because neither the plaintiff nor the Court have seen these documents, it is difficult to dispute the defendants' assertion. In order to determine whether the witness statements and other documents can be redacted effectively, the Court will require defendants to submit affidavits which present a detailed explanation of the potential risk disclosure of information, contained in each document, would have on the confidentiality of these sources. These affidavits are to be filed within ten days after the entry of this Order. Plaintiff will then have ten days to respond to defendants' submissions. Accordingly, the court will reserve decision on whether these documents (*Vaughn* Index No. 1–4, 11–14, 16–21) may be redacted effectively until the parties have filed their submissions.

Finally, the Court would advise the parties that if an *in camera* review is requested, the Court will require the requesting party to file a brief accompanying that request which addresses the factors set forth in *Ingle v. Dept. of Justice,* 698 F.2d 259, 267 (6th Cir.1983), for evaluating the appropriateness of an *in camera* review.

In sum, the Court grants summary judgment in favor of defendants under exemption 5 for documents containing summary reports (*Vaughn* Index Nos. 7–9, 22–25), and under exemption 7(C) for redaction of documents containing information on employee wage rates, job performance and personnel action (*Vaughn* Index Nos. 11, 12, 14, 19–21). The Court will reserve judgment with respect to the exempt status of the remaining documents withheld under exemption 5 (*Vaughn* Index Nos. 1, 4–6, 10, 13–15, 18, 19, 21), and exemption 7(D) (*Vaughn* Index Nos. 1–4, 11–14, 16–21).

Attorney's Fees

Plaintiff has requested an award of attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). The Court will reserve decision on this issue until the case has finally been resolved. At that time, the Court will require plaintiff to submit an affidavit containing information as to the amount requested and will require both parties to submit briefs addressing the standards set forth in *American Commercial Barge Lines Co. v. NLRB,* 758 F.2d 1109 (6th Cir.1985).

NLRB v. Americana Healthcare Center

782 F.2d 941 (11th Cir.), February 19, 1986; rehearing and rehearing en banc denied April 7, 1986—273 NLRB 1728

On petition to enforce Board Order

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS *, Senior Circuit Judge

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NICHOLS, Senior Circuit Judge: We have before us a petition by the National Labor Relations Board (NLRB) under 29 U.S.C. § 160(e), for enforcement of an order by it directed at Americana Healthcare Center (aka Americare Healthcare Corporation, a Delaware Corporation), respondent (employer), requiring employer to cease and desist from denying its employees existing sick leave benefits to which it had agreed, and to take various other remedial actions as will appear. Laborer's International Union of North America, Local 438 (union) was the "Charging Party." We determine that the NLRB is entitled to have its order enforced, with some minor modification, but the facts are intricate and, among the volumes of NLRB litigation, almost if not quite unique, and require analysis at some length.

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* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Background

Employer was, up to about January 1, 1982, a subsidiary of Cenco, Inc., a corporation having its headquarters at Oakbrook, Illinois. Its business included a nursing home at Decatur, Georgia. On or about the above date, it became a subsidiary of Manor Healthcare Corporation, apparently headquartered in Maryland, and ceased to be a subsidiary of Cenco. Those of Employer's personnel having responsibility respecting this case left, and the case passed into the hands of persons having no personal knowledge of previous transactions and

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scant enthusiasm for dealing with employee unions. However, Americana remained the employer throughout—the change in its parent companies not affecting its legal duties. Problems that may arise with a substitution of employers are not met here.

Employer, then known as DECA, a Limited Partnership dba American Health Care Center of Decatur, had been the target of a previous NLRB order requiring it to bargain collectively with union; enforcement was granted by our predecessor Fifth Circuit, Unit B, 645 F.2d 69 (April 13, 1981, unpublished). The "bargaining unit" was "service and maintenance employees * * * including all nurses' aides, unit clerks, physical therapy aides, housekeeping employees" etc., at the Decatur facility, but excluding office and professional and technical employees, practical nurses, guards, and supervisors. Thereafter, May 8, Donnie M. Dennison designated himself representative of union for the bargaining, and on May 18, James E. Dick, Cenco's director of Human Resources, designated himself employer representative.

The findings of the administrative law judge (ALJ) in this new and present proceeding delve in detail into what happened next. Mr. Dick made repeated trips to Decatur, Georgia, for negotiating sessions, at which sometimes he was alone, other times accompanied by managerial employees from the local facility. This was the first negotiation between these parties, but Mr. Dick started with the form of contract used by Cenco at other of its facilities. Mr. Dennison always had with him at the sessions, various union members employed at the local facility.

Sick leave, which is the subject of the present litigation, early came under discussion. Mr. Dick stated that company policy then in effect was as follows:

> Sick leave commences after 600 hours of employment. Each additional 200 worked accrues for paid hours up to 120 hours total. The benefit commences on the second day of excused absence. In December upon application, we will pay out up to one half of the remaining sick leave due.

We understand members of the bargaining unit were all hourly wage employees who were not paid for any hours not worked except as company policy, or (for the future) the collective bargaining agreement provided otherwise. Sick leave, if not used, would accrue as stated by Mr. Dick and presumably could be carried over from year to year, or "bought back" in December only to the limit of half the accrual. If used, the pay was a "benefit," not part of the regular wage.

It is undisputed that the union requested more favorable terms, but Mr. Dick, on behalf of Cenco, refused any improvement. It also seems pretty clear that the union gave up on this issue in November so that, at the final negotiating session in December 1981, the union was asking no more than Cenco had always been willing to grant. There really was nothing more to discuss concerning sick leave at this session. Mr. Dick, having assumed the role of "rapporteur" for the conferees, produced a final draft at a final meeting on January 5, 1982, which contained no clause respecting sick leave. The five union representatives present all signed it without reading it. They said they did this because they trusted Mr. Dick: he had earned their respect by his fairness and moderation during the many sessions.

The ALJ found as a fact that the parties had agreed December 9 on continuing the prior Cenco policy as to sick leave, and that a suitable clause was omitted from the contract by mutual mistake. The NLRB, adopting this finding, ordered the employer to amend the contract to make it incorporate such a commitment.

The employer, however, relied before the NLRB and before us on another provision that actually was in the contract. It is what is often called a "zipper" clause, but is nonstandard and is considered an even more difficult hurdle than such a clause usually is, for those who would insert in a contract a provision not textually found therein:

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ARTICLE XXVIII. WAIVER OF FURTHER BARGAINING

> *Section 1.* The parties agree that this Agreement contains their full and complete understanding and that any prior practices, benefits or oral agreements are superseded by the terms of this Agreement. The parties further agree that no oral understandings, practices or benefits will be recognized or regarded as binding unless committed to writing and signed by the parties as a supplement to this Agreement and that the Company may, in its discretion, discontinue or modify the provision of any benefit or privileges not required under this Agreement.
>
> *Section 2.* Since this Agreement expresses the understanding of the parties in respect to all matters deemed by them to be applicable to the Bargaining Unit, for the term of this Agreement, the Company and the Union each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters not specifically referred to or covered by this Agreement, and even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.
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> *Section 3.* The Company does not by this Agreement waive any rights, legal or equitable, which it would otherwise have except as specifically defined and provided in this Agreement, which sets forth all understandings and agreements arrived at by the parties.

The parties negotiated over this provision as offered by Mr. Dick, and Mr. Dennison understood that one of its purposes was to enable the employer to change without negotiation any practice not made permanent in the contract The ALJ thought, as we read him, that to employ the "zipper" clause to bar an amendment of the contract, *i.e.*, to insert an actual agreement, would be to make it operate contrary to the National Labor Relations Act, 29 U.S.C. § 158(d) (Act) provision which requires agreements between unions and employers to be put in writing. It is argued by the General counsel that another mistake was adhesion to the "zipper" clause in ignorance of the existence of a necessary claim the "zipper" clause would invalidate because not in writing. The NLRB itself does not seem to adopt either view.

While the ALJ, the NLRB, and this court are aided by sworn testimony of Mr. Dennison, his clients of the bargaining unit, and documents produced by them, as to the course of negotiations, Mr. Dick has disappeared from the scene, both he and whatever notes and files he might have kept. It seems his position became surplus on Manor Care becoming the parent company, and he left his employment in May 1982, before the instant controversy arose. No one knew how or where to reach him at the time of trial. No inference from his unavailability was drawn for or against any party to the case.

The parties went through most of 1982 unaware of the hazard to their harmonious relations the sick leave issue would pose. Patricia Shepherd, Manor Care's new administrator for the Decatur facility, had been employed there previously but had had no connection with the contract negotiations. Apparently having been asked to set up the buy-back procedures, she examined the contract and could find nothing in it about sick leave. So she telephoned James F. McCormick, Regional Director for Manor Care, who had sixteen health care facilities under his supervision, including the one at Decatur. He could find nothing in his copy either. They agreed they were not obliged to make any provision for sick leave and in the future would not do so, but to discontinue it after employer had been granting it all year, just before Christmas, would be unwise. Thus, a notice was posted that the buy-back would be conducted as usual, but not on account of any company obligation. While the writing thus was on the wall, the employees were positively told

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there would be no sick leave or buy-back for 1983 only on March 9. Mr. Dennison had before then heard rumors, read the contract, and confirmed the painful truth. He attempted to have the issue referred to arbitration, but the employer refused, presumably on the ground the claim did not arise out of the contract, which includes an arbitration clause. Mr. Dennison was told if he didn't like it, his recourse was an unfair labor practice complaint, and one promptly followed.

With respect to nonbargaining unit employees at the Decatur facility, the policy of allowing sick leave and paying the "buy-back" continued unaltered to the time of trial.

Discussion

I

The NLRB found that the parties to the contract agreed to continue the sick leave benefits according to previous practice, and that by "mutual mistake" they omitted a clause so providing from their contract. We think both parts of this have ample support of "substantial evidence on the record considered as a whole * * *." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951). In the standards there set out, the evidence is more than a mere scintilla, and is such as a reasonable mind might accept as adequate to support a conclusion. The ALJ's own assessment is entitled to weight, especially so far as to reach it, he had to make credibility determinations.

It hardly would be possible to find the parties did not agree as to sick leave benefits. Documentary evidence adduced by the NLRB, and originally created during the negotiations, shows that the union had made a claim for improved sick leave benefits, but acquiesced when the employer refused, and stated it would settle for what the bargaining unit employees already had. The employer reiterated continuously from beginning to end that it would continue them in effect. Thus all difference between the negotiating positions had vanished, and they were agreed. Only a little closer is the question whether they intended to make an oral side agreement outside the contract, or to put it in the contract. That the truth was the latter has support only beginning with Mr. Dennison's testimony. The contract, as signed, under Article XVIII, On-the-Job Injury, Section 3, has a clause "[n]o charge will be made against *accrued sick leave* for on-the-job injuries unless said injuries result in an absence from work of no more than three (3) days. * * *" [Emphasis supplied.] This is meaningless if the union has not contracted for a right to accrued sick leave and obviously was written in the expectation such leave would be provided for. The "zipper" clause, Article XXVIII, makes it folly to rely on an outside oral agreement, as both negotiators cannot but have understood. The contention or suggestion by respondent that they ever so intended pays scant tribute to their intelligence. Mr. Dick did at one time talk as if he meant to leave out an agreement calling for annual free uniforms, but in the end he added it to an appendix to the contract, after all, showing he understood the situation perfectly. As Mr. Dick prepared the final draft, of course he might have meant to overreach the union negotiators, but respondent does not suggest this for obvious reasons, and indeed, there is nothing in the record to suggest he did not negotiate in entire good faith. Thus, mutual inadvertence and mistake are, on the whole record, a far more plausible explanation of the absence of a contract clause dealing with sick leave than is a conscious choice to leave it out and make the agreement actually reached a legal nullity.

II

There cannot be any doubt that in the absence of specific findings that an agreement respecting sick leave was made, and was omitted from the written contract by inadvertence and mistake, the "zipper" clause would be perfectly effective to legalize the action of the employer in stopping payment of sick leave benefits without no-

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tice to the union or negotiation with it. *Aeronca, Inc. v. NLRB,* 650 F.2d 501 (4th Cir.1981); *NLRB v. Auto Crane Co.,* 536 F.2d 310 (10th Cir.1976). The General Counsel does not argue otherwise. Therefore, the specific question for our decision is, what difference do the inadvertence and mistake make?

We are not aided as much as we might have wished by the several pronouncements of the NLRB, the General Counsel, and the ALJ, as to what law they rely on. However, the Act, 29 U.S.C. § 158(d), does require an employer "to execute a written contract incorporating any agreement reached." Court orders requiring such agreements to be put in writing are common, *e.g., Retail Clerks International Association v. NLRB,* 373 F.2d 655, 659 (D.C.Cir.1967). Assuming, as we now do, that an agreement was reached, reliance on the "zipper" clause to excuse the employer from putting in writing, as the NLRB has ordered, an agreement actually reached, does frustrate the policy of the Act. It would have been in writing but for inadvertence and mistake. If the oral agreement also incorporated a term that it was a "gentleman's agreement" that should not be put in writing, that would be a different case with which we are not confronted. Here we have a contract negotiated under the actual order of this court, and it incorporates a clause asserted to nullify a basic policy of the Act we were trying to enforce. We think, in the circumstances, the "zipper" clause must be read with an implied exception that it has no application to an actual agreement negotiated pursuant to court order, but omitted from the written contract by inadvertence and mistake. It is often asserted that good technical contract law is not necessarily good collective bargaining law. *San Antonio Machine & Supply Corp. v. NLRB,* 363 F.2d 633, 636 (5th Cir.1966); *Lozana Enterprises v. NLRB,* 327 F.2d 814, 818 (9th Cir.1964). Our reading of the "zipper" clause leaves it ample scope for application, where it will not nullify statutory policy.

III

Finally, the employer invokes the law of equity, saying that the NLRB's reformation of the contract was improper in view of the facts establishing waiver and estoppel on the union's part.

It is true that reformation of the plain language (or here, eloquent silence) of a contract and enforcement of it as reformed, was before the merger of law and equity, an equitable remedy, available only in a tribunal having equity jurisdiction. *South Boston Iron Works v. United States,* 34 Ct.Cl. 174, 200 (1899). Even in more recent times entities have been created which could enforce contracts as written but not reform them, for example, until very recently, contract appeal boards. *Applied Devices Corp. v. United States,* 591 F.2d 635, 219 Ct.Cl. 109 (1979). No one questions the right of the NLRB to exercise this jurisdiction, though it must petition this court for enforcement and cannot do so itself. It is seeking relief under the law of equity and thus opens itself to questioning as to whether it is doing equity as well. When a federal court is asked for injunctive or other prospective relief, "* * * the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Hecht Co. v. Bowles,* 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944). We think respondent, in its complaint about the negligence of Mr. Dennison and the union generally in not reading the contract they signed, and in reacting too slowly to the employer's stand on the sick pay issue when revealed, is relying too much on the inadequacies of what is after all only the "charging party" and is not considering enough the public interest in labor peace. But even if the union were a plaintiff in a civil suit, its negligence would not bar reformation and enforcement of the contract as reformed. *Applied Devices Corp. v. United States, supra.* If parties to contracts were never negligent, courts would never need to reform them.

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This concludes our review except for one relatively minor matter. The posted notices which the NLRB customarily requires amount to an avowal that the employer has, figuratively speaking, stopped beating his wife. That is, he is required to use phrases that in one breath confess past derelictions and promise future reform. This may be perfectly all right in the typical case, but we think it is inappropriate in one such as this where equitable reformation of contract language is required. The fresh-caught officers of the employer, with no knowledge of the negotiations, and only the bald text of the contract to guide them, justifiably believed from everything known to them that they had a perfect right to terminate the sick leave benefits, a right guaranteed to them by Article XXVIII, the "Zipper" clause. The officials of the union had said or done nothing to alert them that the benefits were claimed under the contract. When employer's officers first learned of the claims, the right and wrong were so uncertain as to require an evidentiary hearing before being established.

Justice Douglas' landmark opinion in *Hecht Co. v. Bowles* also points out that statutory injunctive enforcement language never should or can be construed, unless compelling, to require courts to order remedies not acceptable to the mild and measured conscience of the equity tribunal.

The NLRB here would require the employer to declare in a posted notice to employees:

> [T]he National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We will not terminate the sick leave program to which we have agreed, and we will not deny our employees the sick leave benefits to which they are entitled. We will not in any other like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

And we have stopped beating our wives! The implications of this notice are untrue because the employer has not yet violated the Act and will not do so unless and until the mandate of this court has issued and the employer then refuses to do what we will grant enforcement to require it to do. Americana has not agreed to the sick leave benefits in a manner to obligate it, and will do so only when it amends the contract as ordered. At present, the contract is unamended and has no provision for sick leave.

The remainder of the proposed notice is proper and is ordered.

ENFORCEMENT GRANTED AS SPECIFIED.

NLRB v. Ensign Electric Division of Harvey Hubble, Inc. and United Steelworkers of America, Local 5925, AFL-CIO-CLC

783 F.2d 1121 (4th Cir.), February 19, 1986; rehearing and rehearing en banc denied April 1, 1986; cert. denied December 1, 1986—268 NLRB 620

On petition to enforce Board Order

Before MURNAGHAN and CHAPMAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge

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CHAPMAN, Circuit Judge: On July 22, 1985, an opinion was filed deciding that *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), *enforced sub nom. Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184 (D.C.Cir.1984), was not such an abrupt break from prior precedent that it would come as a great surprise, and thus it could be given retroactive application. *See NLRB v. Ensign Electric Division of Harvey Hubble, Inc.*, 767 F.2d 1100 (4th Cir.1985). We granted the petition for rehearing in order to reconsider the question: whether this action is barred by the six month limitation contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982). This limitation provides in pertinent part:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

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This point was presented and argued in the original appeal, but not mentioned in our opinion.

Ensign Electric manufactures electrical distribution equipment and component parts in West Virginia for the mining industry. It has maintained a collective bargaining relationship with Local 5925 of United Steel Workers of America for many years. Since 1970 these collective bargaining agreements have contained a clause granting preferential seniority to local union officials, including the president, vice president, recording secretary, treasurer, and grievance committeemen.

In March 1979, the union elected new officers including Douglas Jarrell as treasurer and George McCoy as recording secretary. About the same time, Ensign Electric was required to lay off a number of employees, and from March 1979 to April 1981, the work force was reduced from 262 employees to 68 employees. In order to protect his job, George McCoy, the recording secretary, exercised preferential seniority on August 31, 1979. The layoffs continued, and Douglas Jarrell exercised his preferential seniority rights as treasurer of the union on April 10, 1981. When each of these officers exercised his "super seniority" rights, an employee with greater natural seniority was laid off.

The original complaint was filed by the National Labor Relations Board on November 4, 1980, as a result of charges made by a laid-off employee and union member filed September 15, 1980. This complaint was amended on June 10, 1981, and covered claims of employees laid off on April 10, 1981, as a result of the exercise of super seniority rights by the union treasurer.

The employer and the union contend that the present action is untimely because the following events took place outside the six-month § 10(b) period: (1) the initial negotiation of the super seniority clause, which first appeared in the contract between Ensign Electric and Local 5925 in 1970; (2) the latest renewal of the contract containing this clause (February 10, 1979); (3) the secret ballot election of Jarrell as treasurer and McCoy as recording secretary in March 1979; (4) the assumption of office by Jarrell and McCoy in June 1979; (5) the wide discussion of the super seniority clause among the members as early as 1979; and (6) the actual exercise of preferential seniority August 31, 1979 by recording secretary McCoy.

The employer and the union agree that the exercise of preferential seniority on April 10, 1981, by the union treasurer Jarrell was within six months of the April 22, 1981 filing of the charge with the Board, but they contend that such exercise was merely a later manifestation of the officer's already changed status, and since neither the union nor the employer made any further determinations regarding the status, duties, or identities of the individual union officers within six months of the filing of the charge, such charge was barred by § 10(b). They cite as support *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), and *NLRB v. Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir.1978).

We find that *Local Lodge No. 1424* and *Auto Warehousers* are not controlling. In *Local Lodge No. 1424*, the employer and the local union had entered into a collective-bargaining contract which contained a clause recognizing the union as the exclusive bargaining representative for all of the employees. It also contained a union security clause by which all employees were given 45 days to join the union. It later developed that at the time of the execution of this contract, the union did not represent a majority of the employees. This lack of majority status at the time of execution was the subject of charges filed with the Board ten months and twelve months after the execution of the original contract. The Board conceded that charges as to the contract's execution were barred by § 10(b), but it argued that it was an unfair labor practice to enforce the illegal agreement and that this was not time barred. The Board admitted that the union security clause was valid on its face, but contended that since it was entered into when the union did not have majority status, it gave rise to two separate unfair labor practices, one being the execution of the contract, and the other being its continued enforcement. In discussing the use of § 10(b) the court distinguished two factual situations.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

362 U.S. at 416–17, 80 S.Ct. at 826–27 (footnote omitted). The Court found *Local Lodge No. 1424* to fall within the latter category because enforcement of the union security clause was not an unfair labor practice except for the fact that the agreement was executed at a time that the union did not have majority representation, and this event was time-barred.

Local Lodge No. 1424 does not apply to a contract that is invalid on its face. 362 U.S. at 423, 80 S.Ct. at 830. An agreement that is unlawful on its face does not require the proof of facts or unfair labor practices outside the six-month period. This is the factual situation we confront, for the contract between Ensign Electric and Local 5925 grants super seniority to union officials solely because of their status as union officials and discriminates against employees for "union related" reasons.

In *NLRB v. Auto Warehousers, Inc.*, there was a collective bargaining provision allowing shop stewards super seniority for purposes beyond layoff and recall. The court analyzed the *Auto Warehousers* situation under *NLRB v. Milk Drivers & Dairy Employees, Local No. 338,* 531 F.2d 1162 (2d Cir.1976) and found such super seniority for purposes beyond lay off and recall to be presumptively unlawful, but not unlawful on its face. However, *Gulton Electro-Voice, Inc.,* 266 N.L.R.B. 406 (1983), *enforced sub. nom. Local 900, International Union of Electrical Workers v. NLRB,* 727 F.2d 1184 (D.C.Cir.1984), determined that super seniority to union officers without regard to whether they performed on-the-job contract administration functions was unlawful and not presumptively unlawful. In light of *Gulton, Auto Warehousers* is no longer persuasive. *See NLRB v. Local 1131,* 777 F.2d 1131, 1140 (6th Cir.1985).

In *Great Lakes Carbon Corporation v. NLRB,* 360 F.2d 19 (4th Cir.1966), we decided that a super seniority plan favoring employees who worked during a strike was unlawful on its face and that the action was not barred by the six month limitation of § 10(b). With the super seniority plan being unlawful on its face, there was no need to consider the circumstances surrounding the creation of the plan, which circumstances admittedly took place more than six months before the action was brought. *See id.* at 21–22.

Since the Ensign Electric Local 5925 contract grants super seniority to union officials solely because of their status as union officials, this provision is unlawful on its face. Thus, no evidence outside the terms of the contract is required to prove the unfair labor practice, and § 10(b) does not apply.

As to all other issues, our views remain as expressed in our opinion decided July 22, 1985 and found in 767 F.2d 1100.

ENFORCEMENT GRANTED.

HAYNSWORTH, Senior Circuit Judge, dissenting: I adhere to my view expressed in dissent when this case was before us earlier, *see* 767 F.2d at 1103 *et seq.,* that *Gulton* should not be applied retroactively to make exercise of these super-seniority rights unlawful. Should I agree with my brothers on that score, however, I could not agree that the contract was unlawful on its face.

At the time the successive contracts were negotiated and executed and at the time of the layoffs, there was no relevant precedent holding such super-seniority provisions unlawful. Though the members of the National Labor Relations Board were divided on the subject, such precedents as there were supported the legality of the super-seniority clause.

Moreover, even after *Gulton,* the super-seniority provision is not unlawful on its face unless one knows or assumes that it extends super-seniority to one or more union officials who have no on-the-job responsibilities for contract administration. Thus I think that, if *Gulton* is to be applied retroactively, the six month limitations period is triggered by an actual layoff based upon a claim of super-seniority by a union official having no on-the-job responsibility for contract administration.

NLRB v. Preterm, Inc.

District 1199, Massachusetts, National Union of Hospital and Health Care Employees v. NLRB

784 F.2d 426 (1st Cir.), February 20, 1986—273 NLRB 683

On petition to enforce Board Order

Before BOWNES and TORRUELLA, Circuit Judges, and HILL,* Senior District Judge

IRVING HILL, Senior District Judge: In this case the National Labor Relations Board ("NLRB") seeks a judgment enforcing a Board order. Both parties affected by that order, namely, the employer, Preterm, Inc., ("Preterm"), and District 1199, Massachusetts, National Union of Hospital and Health Care Employees, ("Union"), object to a portion of that order. Each petitions this court for review of the order and a judgment setting aside the portion to which it objects.

We have determined to reject both sides' objections and to enforce the order.

BACKGROUND AND FACTS

Preterm, the employer, is a health care clinic in Brookline, Mass. In October, 1976, Preterm was negotiating with the union for an initial labor agreement. During those negotiations, the union went on strike. It

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* Of the Central District of California, sitting by designation.

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also filed unfair labor charges against Preterm alleging failure to bargain in good faith. Shortly thereafter, Preterm filed unfair labor practice charges against the union accusing certain of the striking employees of violence and improper conduct on the picket line. In February, 1979, the Board issued a decision and order which held that Preterm had engaged in various unfair labor practices. These included refusing to bargain in good faith and threatening and coercively interrogating certain employees. The Board concluded that the strike was the result of the employer's unfair labor practices. The Board ordered Preterm, upon application, to reinstate with back pay any striking employee who had unconditionally offered to return to work, but reinstatement and back pay were not required for any employee who was guilty of picket line misconduct. The order is published at 240 NLRB Dec. 676. After the Board issued its order, Preterm stipulated that the order was valid in all respects.

Following the Board's order, the employer and the union unsuccessfully attempted to negotiate the details of the order's reinstatement and back pay provisions. Later negotiations between the Board's Regional Director and the employer were also unfruitful. So, in 1981, the Regional Director instituted the present proceeding by issuing a back pay specification setting forth his computation of back pay and interim earnings and his proposals as to which employees had forfeited reinstatement rights. The matter was tried before an administrative law judge.

As to back pay, the Board took the position that the back pay period should commence on March 3, 1977, the day immediately following an offer by the union that all employees would return to work. The employer contended that the union's offer of March 2, 1977, was not an unconditional offer to return to work within the meaning of the Board's basic reinstatement order of 1980. After an evidentiary hearing, the administrative law judge found that the March 2nd offer to return was unconditional and that reinstatement and back pay should proceed as of March 3rd.

The administrative law judge also found that five employees had engaged in such serious picket line misconduct that they were not entitled to reinstatement or back pay. These were employees Pinero, Walker, Erde, Matson and Reeves.

Both the employer and the union filed exceptions to the administrative law judge's decision. On December 14, 1984, the Board issued a supplemental decision in the matter. The Board affirmed the administrative law judge as to the March 3, 1977, reinstatement and back pay date. The Board agreed with the administrative law judge that all five of the above-named employees had forfeited their right to reinstatement, but held that one additional employee, Baskin, had also forfeited the right to be reinstated because of her picket line misconduct.

The Board seeks to have its supplemental order enforced in all respects. The employer seeks a judgment setting aside the portion of the supplemental order dealing with the March 3, 1977, reinstatement and back pay date. The union seeks to have set aside all provisions of the order holding that any employees were disqualified from reinstatement.

I. WAS THE UNION'S OFFER TO RETURN TO WORK OF MARCH 2, 1977, AN UNCONDITIONAL OFFER

The union's offer of March 2, 1977, that all employees would return to work, is unconditional on its face. Nevertheless, the employer argued throughout the entire NLRB proceedings that the offer was in fact conditioned on the employer reinstating each and every striking employee, even though a number of them were ineligible for reinstatement because of picket line misconduct. The administrative law judge and the Board both rejected the employer's claim. We also reject it.

Where an offer to return to work was conditional or unconditional is a question of fact. *Kellogg Co. v. NLRB,* 457 F.2d 519, 526 (6th Cir.), *cert. denied,* 409 U.S. 850, 93 S.Ct. 58, 34 L.Ed.2d 92 (1972).

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Under section 10(e) of the NLRA, 29 U.S.C. § 160(e), a finding of fact by the Board is deemed "conclusive" if "supported by substantial evidence on the record as a whole." We find that the Board's decision that the offer of reinstatement was unconditional is supported by substantial evidence on the record as a whole. The offer was not an offer by the union that the company take back all of the employees or none. To the contrary, it contained a separate and separable offer to return made "on behalf of each and every employee."

When an offer to return to work is unconditional on its face, as this one was, the burden of proof to show that the offer was other than unconditional is on the employer. *Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1107 (1st Cir.1981); *NLRB v. Okla-Inn,* 488 F.2d 498, 505 (10th Cir.1973). The support for the Board's finding is more than adequate on the record as a whole, even if that burden of proof did not exist. When the employer's burden of proof is added to the equation, the record should be regarded as overwhelmingly supporting the Board's conclusion.

Neither the employer nor the union attacks the computation of each employee's back pay award as made by the administrative law judge and adopted by the Board. Therefore, we will enforce the Board's supplemental order as to each employee found not disqualified from returning to work.

II. THE DISQUALIFICATION OF THE SIX EMPLOYEES

Under Section 7 of the NLRA, 29 U.S.C. § 157, employees are granted the right to peacefully strike, picket and engage in other concerted activities for the purpose of collective bargaining. Section 7 also gives other employees the right to refrain from such activities if they so decide.

Courts recognize that some confrontations between strikers and non-strikers are inevitable and may not be cause for discharge. *NLRB v. W.C. McQuaide, Inc.,* 552 F.2d 519, 527 (3rd Cir.1977). However, it is also the law that serious misconduct during a strike will justify a refusal to reinstate. *Associated Grocers of New England v. NLRB,* 562 F.2d 1333, 1335 (1st Cir.1977). *Accord Newport News Shipbuilding & Dry Dock Co. v. NLRB,* 738 F.2d 1404, 1408 (4th Cir.1984); *Chevron U.S.A., Inc. v. NLRB,* 672 F.2d 359, 361 (3rd Cir.1982).

The cases establish a standard to be applied in examining conduct of a striking employee to determine whether that employee has lost the right of reinstatement. As to conduct directed against non-striking employees, the employee forfeits the right to reinstatement if, under the circumstances, "[the conduct] may reasonably tend to coerce or intimidate [non-striking] employees in the exercise of their right to refrain from strike activities." *Clear Pine Mouldings, Inc.,* 268 NLRB at 1046, (quoting *Operating Engineers Local 542 v. NLRB,* 328 F.2d 850, 852–853 (3rd Cir.), *cert. denied.* 379 U.S. 826, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964)). *Accord Associated Grocers,* 562 F.2d 1333; *McQuaide,* 552 F.2d 519. *See also Newport News Shipbuilding & Dry Dock Co. v. NLRB,* 738 F.2d 1404, 1408 n. 6 (4th Cir.1984).

It is also clear that misconduct of a striking employee directed against patrons or customers of the employer, or others seeking to enter the premises for business purposes, is the equivalent of misconduct against fellow employees. *Associated Grocers,* 562 F.2d 1333; *Clear Pines Mouldings,* 268 NLRB at 1046 n. 14.

In this area, as in many others, great deference must be given to the views and determination of the Board. As the Supreme Court has said, questions about whether reinstatement and back pay for strikers or the denial thereof would best effectuate the policy of the [NLRA] are "committed to the Board . . . in the exercise of its discretion subject only to the limitation that its actions may not be arbitrary, unreasonable and capricious." *NLRB v. Fansteel Corp.,* 306 U.S. 240, 258, 59 S.Ct. 490, 497, 83 L.Ed. 627 (1939).

After reviewing the instant record and the decisions of the administrative law judge and the Board, we are satisfied that the Board's denial of reinstatement and back pay to the six employees in question involved correct application of the law and can in no way be characterized as arbitrary, unreasonable or capricious. The acts which each of the six employees committed during the strike which were held to disqualify them from reinstatement and back pay are set forth at length in the record and in the decisions of the administrative law judge and the Board. It will not serve any useful purpose to quote those findings at length. The following capsulized descriptions demonstrate that each disqualification rests on an adequate factual basis.

1. **Pinero.** She interfered with the efforts of a non-striking nurse to enter the premises by blocking the way and jockeying her body to attempt to keep the nurse out. Finally she grabbed the nurse and shook her. At a later time, while wearing heavy boots, she kicked the side of a car in which the Clinic Director was trying to get to work,

damaging the car. She also kicked and damaged another car bearing non-striking employees attempting to enter the premises.

2. **Walker.** When a non-striking employee was leaving the work place, Walker called her a scab in a loud and angry voice and then spat in the non-striker's face. On another occasion, she spat at the same worker at close quarters but did not hit her. On a third occasion, she spat at a non-striking worker who was getting off a bus that had been escorted through picket lines.

3. **Erde.** While the Director and other staff members were going through the picket line in a car, she applied some sharp instrument to the side of the car, severely scratching two of the door panels.

4. **Matson.** When the Clinic Director attempted to reach some patients who were having difficulty entering the premises due to the pickets, Matson placed herself between the patients and the Director. She told the patients not to believe anything that the Director said, that the establishment had no staff, had untrained personnel and that it was not safe to enter. She told another patient on a different occasion that it was dangerous to go in, that the patient could be severely hurt and that the staff did not know what it was doing.

5. **Reeves.** On one occasion, she entered the employer's premises where a number of patients were sitting waiting for service and yelled that they should leave because it was a dangerous place for them to be and no one there could properly handle any medical problem. She was escorted from the building by police and charged with trespassing.

6. **Baskin.** She grabbed a non-striking employee attempting to go to work, requiring the police to escort the non-striking employee into the clinic. On another occasion she grabbed and held a patient by the arm as the patient was trying to enter the clinic and pushed the patient away from the premises.

For the reasons stated above,

1. The Board's petition to enforce its entire order is granted; and,

2. The petitions of the employer and the union, each seeking to set aside a portion of the Board's order, are denied.

Business Service By Manpower, Inc. v. NLRB

784 F.2d 442 (2d Cir.), February 24, 1986—272 NLRB 827

On petition for review and cross-application for enforcement of Board Order

Before FRIENDLY, CARDAMONE and WINTER, Circuit Judges

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FRIENDLY, Circuit Judge: This petition for review and cross-application for enforcement of an order of a divided panel of the National Labor Relations Board (the Board), 272 N.L.R.B. 827 (1984), raises close questions with respect to the application of the National Labor Relations Act to a case where employees honor stranger picket lines without adequate advance notice to their employer.

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The Facts and the Proceedings before the Board

The facts, as developed at a hearing before an Administrative Law Judge (ALJ), on the General Counsel's complaint charging a violation of § 8(a)(1) of the National Labor Relations Act, are as follows: Petitioner, Business Services by Manpower, Inc. (Manpower), is in the business of furnishing employees to businesses requiring industrial and clerical help on a temporary basis. It does this by maintaining a pool of individuals who have notified it that they would be available to accept temporary assignments on short notice. Kathy Taylor, who was in charge of Manpower's office in Binghamton, New York, at the time of the incidents here in question, testified:

> Punctuality and dependability are an absolute must because obviously we're supplying a service to a business, a company that needs the help. And if we can't depend on our company, therefore, the company cannot depend on us, therefore, we lose the account.

In order that its employees should realize the importance of these considerations, Manpower distributed a two-page policy statement to its employees at the time of their enlistment. First on the list of the employee's responsibilities was the following:

> *CALL IF YOU CAN'T REPORT OR IF YOU WILL BE LATE*
>
> If you can't report for work, you *MUST* phone us early. This is very important!!! As your

> employer, it is necessary that you keep us informed.

Included at the close of the statement, under the heading "IMPORTANT," was the following warning:

> IF YOU DO NOT REPORT AS SCHEDULED AND HAVE NOT CALLED OUR MANPOWER OFFICE, YOU HAVE RESIGNED.

These policies were also stressed in the initial interviews with new employees.

The practice was for employees desiring an assignment to call Manpower's office in Binghamton to check for job assignments and confirm their availability and for Manpower to call them during the day if an assignment developed. Between 5 P.M. and 8 A.M. communication could be had only through an answering service.

Richard Cordes had worked for Manpower in 1979 and, after a period when he was in school, had his file reactivated and began receiving assignments early in 1981. Craig Monroe started working for Manpower on April 15, 1981, and worked approximately two days a week during the five weeks of his employment until the events here in issue. The men lived in the same rooming house and, whenever possible, requested the same work assignment so that they could ride together to the customer's premises. Neither was a union member.

One of Manpower's largest accounts was Spaulding Bakery (Spaulding), which had a plant in Conklin, New York, near Binghamton. On May 20, 1981, Monroe received a call from Esther Nui of Manpower stating that she had a two-day assignment for him and Cordes at the Spaulding plant, starting at 9 P.M. on May 21; Monroe accepted on behalf of both.

Cordes and Monroe arrived at the plant around 8:30 P.M. on May 21. They observed five or six individuals carrying or wearing picket signs advertising a labor dispute between Spaulding and the Bakery and Confectionery Workers Union.[1] The picketers made no attempt to block cars from entering the plant, and neither the signs nor the men carrying them requested anyone to refrain from doing so. Cordes and Monroe stopped to talk with the picketers and learned that there was a labor dispute at Spaulding's plant at Hazelton, Pennsylvania, over 100 miles away, resulting in a strike, and that the picketers claimed that Spaulding had moved to Conklin some of the work previously performed at Hazelton. Although they were not asked to do so, and although Cordes "could well believe" he had been told that if he did not report as scheduled and had not called Manpower's office, he would be considered as having resigned, Cordes and Monroe immediately made up their minds not to "cross" the picket line and to drive back to Binghamton.

The men drove into town and stopped at a grocery store, from which Cordes called Manpower's answering service. He claimed he told the service that they had come upon the picket line, of which they had not been previously informed, and that they could not cross it in good conscience, but that they were available for future assignments that night or the next day. He further claimed that the answering service operator identified herself as such, said she couldn't give out assignments, and agreed to pass on the message. The person who received the call did not testify, and her note of the call was not produced. However, the ALJ allowed Kathy Taylor to testify that the note said merely:

> 5/20/81, 8:55 P.M. Rick Cordes with a phone number, available the next few days.

Taylor asserted that whatever Cordes may or may not have said to the answering service, she then knew only that Cordes and Monroe had not appeared, as she learned on the following morning on a visit to the Spaulding plant and also from the information contained in the note of the answering service.

Over the next two and a half weeks Cordes and Monroe made frequent calls to Manpower, mostly in the evening, reporting their availability but without result in the form of job assignments. They could not recall to whom they had spoken or exactly what was said, but neither made any mention of the incident involving the picket lines or otherwise informed Manpower of their attitude toward picket lines or that this was the reason for their failure to show up for work on May 21. When Monroe called on June 10, Esther Nui answered. After Monroe reported his availability, Nui replied, "Well, Craig, I have to inform you that we have you listed as having resigned." When Monroe said he had never resigned, Nui answered, "On the last assignment that we sent you and Rick on, you didn't report for work and you didn't inform us." Monroe replied, "Esther, we did inform you as soon as we got there and saw there was a picket line. We called the answering service as soon as we got there and saw there was a picket line. We called the answering service as soon as we could get to a phone." After a pause, Nui said, "Well, Craig, I'm sure you have your principles. But I'm afraid you're going to have to remain listed as having resigned." [2]

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[1] At the hearing before the ALJ, Manpower disputed that picketing was still going on at 8:30 P.M. and claimed that Cordes' and Monroe's story was fabricated. No claim is made before this court that the contrary determination of the ALJ was not supported by substantial evidence

The next day, June 11, Cordes called Manpower and also got Esther Nui. He said, "I understand that Craig and I have been fired," to which Nui responded, "No, we hadn't been fired, that we had resigned." Nui admitted that she knew of the men's repeated phone calls seeking assignments. She said at first that Cordes and Monroe were treated as having resigned because of the picket line but, when Cordes said they had not been informed there would be a picket line, said that the dismissal didn't have anything to do with the picket line but resulted from the men's failure to call sufficiently in advance of the starting time for the assignment. [3]

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Accepting as credible all the testimony except Manpower's assertion that there was no picket line as late as 8:30 P.M. on May 21, the ALJ found that in refusing to cross the picket line Cordes and Monroe were exercising a right protected by § 7 and that Manpower violated § 8(a)(1) of the National Labor Relations Act [4] by dismissing them because of their exercise of their § 7 rights. He also held that the violation occurred on May 22, 1981, when Cordes and Monroe were first placed in the status of having resigned, even though there was no evidence that anyone in the company other than the answering service knew that refusal to cross a picket line had been a part of the stream of events. Accordingly, he recommended, in standard language, that Cordes and Monroe be reinstated to their former jobs or, if these no longer existed, to substantially equivalent positions of employment, and that Manpower should make them whole for any loss of wages or other benefits as a result of their termination.

Manpower filed exceptions which were heard by a three-member panel of the Board. Members Zimmerman and Dennis joined in an opinion sustaining the ALJ. 272 N.L.R.B. 827 (1984). They held that the refusal to cross the picket line was within the "mutual aid or protection" clause of § 7, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–65, 98 S.Ct. 2505, 2511–12, 57 L.Ed.2d 428 (1978); *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1363–64 (9 Cir.1981); and *NLRB v. Browning-Ferris Industries, Chemical Services, Inc.*, 700 F.2d 385, 387 (7 Cir.1983). They rejected Manpower's business necessity defense, holding that removal of Cordes and Monroe from Manpower's referral list was equivalent to a discharge and that, on the analogy of economic strikers, an employer may not discharge employees who refuse to cross lawful picket lines. Recognizing that Manpower "to protect its business interests, could lawfully have refrained from referring Cordes and Monroe to Spaulding or to any other company known to be involved in a labor dispute," 272 N.L.R.B. at 828, they held that Manpower violated the Act by discharging them. The majority rejected any balancing of employer and employee interests that would result in a finding that the discharges here were lawful, as the dissent urged, stating that "it is difficult to envision circumstances in which the dissent's balancing test would result in a decision favorable to employees. The balancing test thus effectively renders nonexistent an essential Section 7 employee protection." *Id.*

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[2] This is Monroe's version. Nui did not contradict it but emphasized that this was the first occasion on which she knew about the role of the picket line.

[3] This is Cordes' version. Nui's is not essentially different, although she summarized the conversation as follows:

> Well, you have your principles. Well, you didn't want to cross the picket line. But you are not being rehired by Manpower because of that reason. You are not being rehired by Manpower because you had failed to follow our procedure.

[4] These provide:

> § [7]. **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [§ 8(a)(3).]
>
> 29 U.S.C. § 157.
>
> § [8]. **Unfair labor practices**
>
> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7.]
>
> 29 U.S.C. § 158(a)(1).

Chairman Dotson delivered a strong dissent. *Id.* at 829–31. He agreed with the majority that the conduct was protected concerted activity within the meaning of § 7, but argued that under a balancing of the employees' interest in engaging in the conduct at issue here and the employer's interest in assuring the reliable performance of work assignments, the discharges were justified. He stressed that the refusal was not to cross a picket line at the premises of the employees' own employer but at those of a customer of the employer, and that this interest was "highly attenuated," especially in light of the fact that the pickets were informational only and did not even seek to bar entry into the plant. In this type of case the Board

> must weigh the employee's less compelling interest in expressing support for picketers at another company against the employer's interest in the employee's job performance.

Id. at 831. He emphasized Manpower's particular necessities in its employees' reliable reporting to work. Manpower, he believed,

> could not risk maintaining Cordes and Monroe on its referral list because they had demonstrated that in the event of a picketing situation they could not be relied on to report to work.

Id. Concluding, he thought that, under the peculiar facts of this case, involving a temporary employment agency which cannot, in a literal sense, "permanently replace" individuals it refers for employment because its assignments are not permanent, Manpower's conduct was still more nearly akin to permanent replacement, which the Board allows in the case of employees failing to report because of refusal to cross a picket line, than to discharge. *Id.*

DISCUSSION

The Board's treatment of honoring "stranger" picketing, i.e., refusal of employees of one employer to cross a picket line of employees of another in the course of their employment, usually with nothing in common with the picketing employees other than a general interest in "worker solidarity," which both parties concede this case to be, has wavered over the years. So has that of the courts; as Professor Gorman has noted, "the cases stand . . . in disarray." Gorman, *Labor Law* 324 (1976).

The decision usually cited as the first to address directly the question of stranger picketing was *Cyril de Cordova & Bro.*, 91 N.L.R.B. 1121 (1950). The Board there approved the trial examiner's finding that § 8(a)(1) protected an employee of a stock brokerage firm, who was a union member, from being discharged for his refusal to cross a picket line established at a stock exchange by the same union out of sympathy with the striking employees. Adopting an approach quite close to the one now followed by the Board, the trial examiner rejected the contention that the employer's conduct was insulated from being an unfair labor practice under § 8(a)(1) because of the employer's lack of antiunion animus, *id.* at 1134–35, rejected the analogy to partial or intermittent strikers, whom employers are permitted to discharge outright, *id.* at 1135–36, analogized the employee instead to an economic striker with the same rights as the strikers whose picket line he respected, and held that the employer's remedy was limited to treating the employee as an economic striker and permanently replacing him subject to the right of reinstatement in the event of an opening when he chose to return, *id.* at 1137–38.

The next case to address the question was *Rockaway News Supply Co.*, 95 N.L.R.B. 336 (1951), *enf. denied*, 197 F.2d 111 (2 Cir.1952), *aff'd on other grounds*, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953). The Board held that the discharge of Waugh, a truck driver, for refusing to cross a picket line to make his regular pickup at a struck newspaper violated § 8(a)(1). It cited *Cyril de Cordova* and rejected as not "determinative" a distinction between the two cases based on the refusing employee's lack of common union membership with the striking employees. 95 N.L.R.B. at 337–38. The Board recognized that although Waugh's refusal to cross the picket line was a protected activity, Rockaway News could have required him "to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement," *id.* at 337; however, Rockaway News could not discharge him. This court accepted the Board's conclusion that the activity was protected concerted activity within the meaning of § 7, 197 F.2d at 113 (citing *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2 Cir.1942)), but nevertheless denied enforcement on the ground that the employee's protection from reprisal by his employer for engaging in that activity was defined by analogy to *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945) (solicitation of union membership within plant is protected activity but employer's interest in efficient performance of work permits prohibition, on pain of discharge, of such activity during working hours). Accordingly, the employee was bound to follow the employer's rules and cross the picket line if necessary when his work assignment required it, and the employer was entitled to discharge the employee for violating the rule. 197 F.2d at 113–14.[5] We also disapproved the distinction sought to be made by the Board "between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker after he had been compelled to vacate his job for refusing to do so, which it thinks would have been perfectly all right." *Id.* at 115.

The Supreme Court upheld the denial of enforcement but on a different ground. This was that an arbitration award in favor of the employer, based upon a no-strike clause in the collective bargaining agreement, was valid and covered the situation there involved. 345 U.S. at 75–81, 73 S.Ct. at 522–25. Before deciding that issue, however, the Court delivered extensive dicta, denigrating the Board's replacement-discharge distinction,[6] as this court had done, and stating that "[t]his application of the distinction is not sanctioned by *Labor Board v. Mackay [Radio & Tel.] Co.,* 304 U.S. 333, 347, 58 S.Ct. 904, 911, 82 L.Ed. 1381 [(1938)]."[7]

Shortly after *Rockaway News,* a differently constituted Board switched positions and held that a deliveryman was properly discharged for refusing to cross a picket line at certain customers' premises, even though he was a member of the same union as the striking employees, stating that the employee's "conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions," *Auto Parts Co.,* 107 N.L.R.B. 242, 243 (1953), although the Board declined to comment on whether the conduct was protected activity under § 7 or not. The Board adhered to this position during the remainder of the Eisenhower Administration. With another change in administration, the Board began an evolutionary process of returning to the approach of *Cyril de Cordova, supra,* with its decision in *Redwing Carriers, Inc.* (*Redwing II*), 137 N.L.R.B. 1545 (1962), *petition to review denied,* 325 F.2d 1011 (D.C.Cir.1963), *cert. denied,* 377 U.S. 905, 84 S.Ct. 1165, 12 L.Ed.2d 176 (1964).

In *Redwing Carriers,* the employer had discharged certain employees for refusing to cross a picket line at a customer's premises in order to make deliveries, and within a day or two the employees were replaced with others who were willing to make the deliveries. After the Board had initially held the activity to be unprotected under § 7, following the rationale of *Auto Parts Co., see Redwing Carriers, Inc.* (*Redwing I*), 130 N.L.R.B. 1208 (1961), and after a change in the membership of the Board under President Kennedy, it reconsidered its initial decision. While upholding the result that had been reached, it altered the rationale dramatically. The Board solidly affirmed the protected nature of the refusal to cross a stranger picket line under § 7. 137 N.L.R.B. at 1546–47. On the other hand, it took up the remarks of the Supreme Court and of this court in *Rockaway News* as to the unreality of the distinction between permanent replacement and discharge, stating that

> where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or

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[5] This court's limitation of the right to honor stranger picket lines to nonworking hours seems never to have been followed. We regard it as having died from desuetude, although it has never been expressly overruled.

[6] The Court of Appeals said, "We cannot follow the Board's reasoning." Nor can we. The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board v. Mackay Co.,* 304 U.S. 333, 347, 58 S.Ct. 904, 911, 82 L.Ed. 1381. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law. 345 U.S. at 75, 73 S.Ct. at 522.

[7] In *Mackay Radio,* the Court had held that striking employees remained statutory "employees" under § 2(3) of the Act, and that an employer was free to replace striking employees and assure their replacements of continued employment, although it could not discriminate among employees on the basis of union activity in reinstating them after the strike.

> within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question.

Id. at 1547. Thus, the Board returned to the rule of *Cyril de Cordova* that respecting stranger picket lines fell within § 7, but, by upholding its determination in *Redwing I* that the employer had engaged in no unfair labor practice by discharging the employees, implied that "business justifications" would be given broad effect in this context, at least absent any evidence of anti-union animus, and appeared to heed the Supreme Court's warning in *Rockaway News* against a formalistic application of the replacement-discharge distinction. The D.C. Circuit denied the employees' petition to set aside the Board's order, 325 F.2d 1011, with a citation to this court's decision in *Rockaway News*, but with no comment on the merits of the Board's new approach.

The next major case was *L.G. Everist, Inc.*, 142 N.L.R.B. 193 (1963), *enf. denied*, 334 F.2d 312 (8 Cir.1964), in which several truck drivers were discharged for their refusal to cross a picket line to make deliveries to a construction site. The Board held that since the employees had made unconditional offers to return to work before any replacements had been obtained for them, the discharges were contrary to the rule of *Redwing II*, which adopted the rules ordinarily applicable to economic strikers, and accordingly it was a violation of § 8(a)(1) to deny reinstatement to the employees. The Eighth Circuit resoundingly denied enforcement. First, the court emphasized the importance of uninterrupted deliveries to the employer's business. 334 F.2d at 315. Thus, the discharges " 'were prompted by [the employer's] need to continue operations and were not in reprisal for the [refusal] to cross the picket line.' " *Id.* at 315–16 (quoting the trial examiner's opinion). The court then rejected the Board's reliance on the analogy to situations involving economic strikers, citing the Supreme Court's opinion in *Rockaway News* for the proposition that the replacement-discharge distinction was immaterial in this context. *Id.* at 316–17. The court then held that refusal to cross the picket line under these circumstances constituted a "violation of the ordinary and implied obligations of employment," and hence amounted to justifiable "cause" for the dismissal, as was the case with the express contractual ban on striking at issue in the Supreme Court's opinion in *Rockaway News*, and distinguished away situations in which the discharge is motivated by anti-union animus, or where the employees share common union membership with the strikers, or where the refusing employees are also employees of the struck employer. *Id.* at 317. In effect, the court's decision in *L.G. Everist* was not just a rejection of the Board's application of the *Mackay Radio* principle in this particular situation, but amounted to a complete rejection of the underlying premise of the *Redwing II* decision and the analogy to economic strikers. Business justification in this context went beyond simply allowing the employer to take whatever actions were necessary to get the work done at the picketed location, but included allowing the employer to discharge employees who had shown their unwillingness to do the work when it was required and thus could not be relied upon in similar situations in the future.

Undaunted by the denial of enforcement in *L.G. Everist*, the Board, in *Overnite Transportation Co.* (*Overnite Transportation I*), 154 N.L.R.B. 1271 (1965), *enf'd in part*, 364 F.2d 682 (D.C.Cir.1966), continued its strict application of the analogy to economic strikers, with limited room for the employer to react to refusals to cross stranger picket lines. There the Board found the employer, a freight pick-up-and-delivery service, to be in violation of §§ 8(a)(1) and 8(a)(3) for discharging a truck driver who refused to make a delivery to a picketed plant. After the employee had informed the employer of the reason for his refusal, another employee was immediately sent over to make the delivery and quickly did so without incident. Thereafter, the employer dismissed the first employee, citing his refusal to follow orders and stating that as a matter of policy " 'we didn't honor pickets anywhere.' " 154 N.L.R.B. at 1273. The employee was not permanently replaced by any other employee. In finding a violation of the Act, the Board emphasized that an overriding business justification requires more than "a mere showing that someone else may have to do the work." *Id.* at 1274. Here no disruption was caused by having the dispatcher immediately send out someone else to make the delivery, and the Board emphasized that there was no showing that the employee's "conduct rendered him incapable of performing his job or that it disrupted the [employer's] business in any significant respect." *Id.* at 1275. In granting enforcement to the Board's order, the D.C. Circuit again refused to go into the merits of the § 8(a)(1) question, finding that there was sufficient basis to support the Board's order under § 8(a)(3) "in light of [the employer's] other anti-union actions and the frailty of the asserted business justification for the discharge." 364 F.2d at 684.

The shifting nature of the Board's approach to refusals to cross stranger picket lines is demonstrated by *Thurston Motor Lines, Inc.*, 166 N.L.R.B. 862 (1967). There the Board found no § 8(a)(1) violation in the employer's outright discharge of an employee truck driver who refused to make a delivery across a picket line during the course of his regular delivery schedule. The employer had sought to accommodate the employee's desire not to cross the picket line by attempting a number of courses short of sending a temporary substitute for that delivery alone, including delaying the delivery for over a week. However, the decision is out of line with the Board's approach in *Overnite Transportation I, supra,* and subsequent cases, because although the delivery might have been considered urgent in light of the fact that the ICC had called the employer and ordered it, as a common carrier, to make the delivery immediately, it appears that a supervisor or other employee could easily have been sent to make the delivery in the employee's stead. Nevertheless, the Board adopted the trial examiner's finding that the employer's "interest in maintaining its normal business operations clearly overrode Jackson's refusal to do a part of his regularly assigned work," even though the consignee "was not a customer with whom [the employer] did a substantial amount of business." *Id.* at 866. It was "enough to find . . . that [the employer's] right to operate, either in fact or in its reasonable estimation, was in jeopardy." *Id.* Notably the trial examiner emphasized that the employee had not unconditionally applied for reinstatement by the time he was discharged, *id.* at 865 n. 11, and he did hold it to be a violation of § 8(a)(1) for the employer to discharge a second employee who was asked, and refused, to make the delivery in place of the first, noting that the assignment was not in the regular course of that employee's own duties and that the discharge took place after the delivery had been made. *Id.* at 866. *See also Overnite Transportation Co.* (*Overnite Transportation II*), 209 N.L.R.B. 691 (1974) (reversing trial examiner's finding of § 8(a)(1) violation, following *Thurston* analysis).

With the important exception of the *Thurston* and *Overnite Transportation II* cases, which seemed to recognize that the

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concept of "business justification" must be broader than the simple need to perform the immediate task that is barred by the picket line, the Board after *Overnite Transportation I* refused to alter its approach to recognize the apparent discomfort in the courts of appeals with its strict approach to stranger picket line situations. The only major development since then was its decision in *Torrington Construction Co.*, 235 N.L.R.B. 1540 (1978), in which it appears to have narrowed the business justification exception even further. There the employer had discharged two employees for repeatedly refusing to cross a secondary, informational picket line at a construction site to deliver concrete, and each was immediately replaced. Although *Redwing II* appeared to allow room for the employer to discharge employees who refused to cross picket lines so long as they were immediately replaced, and so long as they were rehired in the event they made unconditional offers to return and a job was available, the Board in *Torrington* signalled a return to the strict replacement-discharge distinction that had preceded *Rockaway News:* "While the employee may be replaced if the evidence clearly discloses that the sole purpose was the continued efficient operation of the business, such employee may not be discharged." 235 N.L.R.B. at 1541. The Board did not explain the inconsistency between this approach and the Supreme Court's dictum in *Rockaway News* rejecting the replacement-discharge distinction. The Board's approach, which was applied in Manpower's case, appears not to allow any room for discharge even where the asserted business justification is that the employee has shown himself not to be dependable in a situation where his refusal to cross a picket line cannot be accommodated by the employer without injury to the employer's business.

At least until 1978, the courts of appeals continued to be unwilling to approve this sweeping approach. In *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1 (1 Cir.1978), the court denied enforcement of a Board order based on a finding of a § 8(a)(1) violation where the employer, an operator of a character bus service, dismissed an employee who, on his first day of work, refused to cross a picket line with a bus full of passengers after reluctantly accepting the assignment. The court emphasized that "[w]hether or not the Act has been violated depends on a case by case balancing of the right of the employee to express his union sympathies and the right of the employer to conduct his business," *id.* at 3, and emphasized that the employee's conduct here showed him to be sufficiently undependable to justify outright dismissal, *id.* at 5. The court also strongly rejected the Board's placement of the ultimate burden of justifying the discharge on the employer in a situation in which no anti-union animus had been shown and after "the employer has demonstrated a legitimate business reason for the dismissal." *Id.* at 3–4.

Even where the courts upheld the Board prior to 1978, they were cautious. In *Swain and Morris Construction Co.*, 168 N.L.R.B. 1064 (1967), *enf'd*, 431 F.2d 861 (9 Cir.1970), the Board found a § 8(a)(1) violation where several employees were discharged for refusing to cross a picket line to do a job at a construction site in a situation in which there was no one else available to do the work and the job could not be completed for two weeks in the face of a demand by the customer that the job be done immediately. While the Ninth Circuit granted enforcement, it did so on the basis that "[t]he Board could fairly conclude that the only real reason for the discharge was to make an example of the employees involved," and "[t]he Board also had reason to find that the work at [the construction site] was not of such importance that its immediate completion was necessary for the continuing and orderly operation of [the employer's] business." 431 F.2d at 863. In *Teamsters Local 657 v. NLRB*, 429 F.2d 204 (D.C.Cir.1970) (per curiam), the court granted enforcement to the Board's order finding a violation of § 8(a)(1) for discharging an employee who refused to cross a picket line, but emphasized that "[s]ubstantial evidence supports the Board's conclusion that the company's purpose in discharging the employee was not to continue the efficient operation of its business, but to punish him for his union activities," *id.* at 205. In *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032 (5 Cir.1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 683 (1971), the court granted enforcement to the Board's order finding a violation of § 8(a)(1) for discharging two truck drivers who refused to cross a picket line to make deliveries, but emphasized that the employer did not follow up this action by seeking to replace the employees with others, and did not show that this could not be done or that there was any difficulty in doing so:

> There was no evidence that the two men were eventually replaced by an employee willing to cross the picket line. Nor was the pickup or delivery to this particular site within a permanent route or special skill of either [of the two employees] such that no one would have been capable of replacing them. . . . It was a routine pickup which . . . could have been performed by any of [the employer's] other employees. . . .

Id. at 1036.

Common to all of the decisions in the courts of appeals until this point, and even to the Board's approach prior to *Torrington Construction*, was a recognition that the remedy of discharging an employee who had refused to cross a stranger picket line might be justified where strong, legitimate business interests were present, where the employee's § 7 interest in not crossing the picket line could not be accommodated without impairing those employer interests, and where it was clear that the decision was not motivated by anti-union animus. In nearly every case in which a § 8(a)(1) violation was found on the basis of such a discharge, the Board or the court of appeals emphasized that the refusal to cross the picket line did not risk injury to the employer's business because it was possible, for example, to have a temporary substitute perform the task without unacceptable delay, *see, e.g., Overnite Transportation I, supra; Swain and Morris Construction Co., supra.* On the other hand, no § 8(a)(1) violation would be found where it was shown that the employee's refusal to cross, without adequate advance warning to the employer, risked injury to the employer's business or reputation, *see, e.g., William S. Carroll, Inc., supra; Redwing Carriers, Inc.*, *supra.* As this court emphasized in *Rockaway News,* the determination of a violation of § 8(a)(1) depends on a balancing of the employer's interests against those of the employee, a balancing that must be performed on a case-by-case basis, *see William S. Carroll, Inc., supra,* 578 F.2d at 3, and not on a rigid, formalistic application of rules applicable in another context, to wit, economic strikes taking place on the employer's own premises, in which different concerns are implicated. These cases lend little support for the approach adopted by the Board in *Torrington Construction* and applied in this case, under which an employer is considered to have committed a per se violation of § 8(a)(1) whenever it discharges an employee who refuses to cross stranger picket lines, regardless of the circumstances of the individual case.

In justifying this substantial departure from prior law, the Board lays great—in our view, undue—stress on the Supreme Court's decision in 1978 in *Eastex, Inc. v. NLRB,* 437 U.S. 556, 98 S.Ct. 2505, 57 L.Ed.2d 428. The troublesome issue in *Eastex* was whether § 7 protected the right of employees to distribute in nonworking areas during nonworking time a union newsletter, one section of which called upon employees to support the union in opposing a proposal to incorporate a state's right-to-work law into its constitution and another section of which called for support in opposing a presidential veto of an increase in the federal minimum wage. The Court's affirmative answer to that question is of little relevance here; Manpower does not seriously dispute that, as we held in *Rockaway News* many years ago, § 7 encompasses the honoring of stranger picket lines. Once the Court had decided that the employees' § 7 rights had been implicated, the question whether discharging the employees because of the exercise of protected activity violated § 8(a)(1) was rather easy, since, as Justice Powell pointed out, Eastex "made no attempt to show that its management interests would be prejudiced in any way by the exercise of § 7 rights proposed by its employees here" and the intrusion on property rights, if any, would not vary because of the nature of the material in the newsletter. *Id.* at 573, 98 S.Ct. at 2516. Here, on the contrary, the issue of the scope of the business justification principle is the crucial one. Although the distribution of the newsletter in *Eastex* had no effect on the conduct of the employer's business, the Board attaches great importance to a footnote, 437 U.S. at 564–65 n. 13, 98 S.Ct. at 2511–12, n. 13, where after saying in text that "the Board and the courts long have held that the 'mutual aid or protection' clause encompasses" "otherwise proper concerted activities [of employees] in support of employees of employers other than their own," Justice Powell cited, *inter alia,* the second *Redwing Carriers* decision, *supra,* 137 N.L.R.B. 1545, 1546–47, and *NLRB v. Alamo Express, Inc., supra,* 430 F.2d 1032, 1036.

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The Board reads into the footnote more than it will bear. Insofar as *Redwing II* and *Alamo Express* held that respecting stranger picketing was an activity protected by § 7, we are in agreement with them. In fact, the statement in *Alamo Express* that such conduct was protected activity within the meaning of § 7 was followed by a single citation to our own opinion in *Rockaway News.* The issue here, however, concerns the balance between this § 7 right and the employer's right to operate its business efficiently—an issue not present in *Eastex.* The footnote cited *Redwing II* and *Alamo Express* for the former proposition only. Significantly, it concluded by stating:

> We express no opinion, however, as to the correctness of the particular balance struck between employees' exercise of § 7 rights and employers' legitimate interests in any of the above-cited cases. Moreover, in *Redwing II,* the Board refused to find an unfair labor practice because the employees were discharged not out of anti-union animus or in reprisal but because the employer wanted to continue doing business with the stranger who had been struck.

We likewise do not find that decisions of the courts of appeals subsequent to *Eastex* with respect to the honoring of stranger picket lines constitute any significant departure from the earlier ones we have reviewed.

In *NLRB v. Southern California Edison Co.,* 646 F.2d 1352 (9 Cir.1981), the court upheld the Board's finding of a violation of § 8(a)(1) for suspending for five days an employee who refused to cross a picket line at a customer's premises, citing *Eastex, Inc. v. NLRB, supra,* 437 U.S. at 564, 98 S.Ct. at 2511, for its statement that "[i]t is the Board's responsibility in the first instance to decide whether [activity in support of employees of employers other than their own] is protected," and with little more to its analysis of the conduct at issue than the statement that "[t]he Board's interpretation of the Act to protect an employee who honors a lawful picket line at a customer's place of business is reasonably defensible," *id.* at 1364. In the facts of that case, there was no urgency in performing the work that was to be done on the customer's premises, the work was for the benefit of the employer rather than of the struck customer, and the employee had notified his supervisor at the beginning of the shift that he could not perform the work and pointed out another employee who would. *Id.* at 1361. Although *NLRB v. Browning-Ferris Industries, Chemical Services, Inc.*, 700 F.2d 385 (7 Cir.1983), endorsed the Board's position that recognition of stranger picketing is protected by § 7, as do we, one of Judge Posner's reasons was that "[s]uch treatment allows a more flexible comparison of the benefits to the workers and the burden to the employer. . . . Holding that [the conduct] is protected does not make it sacrosanct but does require the employer to demonstrate good

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cause for suppression . . .," *id.* at 388. In fact, the court denied enforcement on the ground that the employees had not made an unconditional offer to return to work, i.e., without insisting on the condition that led to their replacement, and thus the employer was under no obligation to reinstate them, *id.* at 389. The conclusion that we glean from all the court cases, after *Eastex* as well as before, is simply that an employer can take reasonable steps to deal with the honoring of stranger picketing where this adversely affects his business and that what is reasonable depends on the totality of the circumstances in each case.

This case presents a particularly extreme combination of "attenuation" of the protected right, of lack of causal relationship between the exercise of the right and the employer's disciplinary measures, and of need by the employer to enforce a neutral rule requiring advance reporting of inability or unwillingness to fulfill an agreed assignment.

The employees' § 7 interest in refusing to cross the picket line at the Spaulding plant was particularly weak. In the ordinary situation involving a stranger picket line, where the refusing employee shares neither the union affiliation nor the employer of the picketing employees, the employee's conduct is still considered to come squarely within the scope of the "mutual aid or protection" clause of § 7 on the theory that honoring the picket lines of other employees generally promotes worker solidarity and increases the possibility that the refusing employee will receive the benefit of similar support in the future. *See NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–06 (2 Cir.1942). This rationale becomes strained, however, when, as here, the picket line is not only established by individuals who are not even employed at the picketed plant, but also is purely informational in nature. The picketing employees were not seeking to bar access into the plant, either physically or by requesting anyone not to enter, and Cordes' and Monroe's refusal to cross the picket line did not even help to fulfill any immediate purpose behind the picket line.

On the opposite side of the balance is Manpower's compelling interest in the performance of work assignments, or in sufficient advance notice to permit timely replacement, and the complete lack of antiunion animus underlying the discharges that served to safeguard that interest. Manpower's business was the furnishing of temporary help, and Manpower had made abundantly clear to Cordes and Monroe their overriding responsibility to phone early if they could not report for work—for whatever reason—and the consequences that would ensue if they did not. Cordes and Monroe were terminated for failing to make a timely report of their unavailability for work, not for having honored a stranger picket line—something of which, as the ALJ determined in a finding not disturbed by the Board, the employees of Manpower responsible for their termination did not even know until three weeks later. The ALJ properly regarded the General Counsel's attempt to show a discriminatory application of the resignation rule as not even worthy of discussion.[8] The refusal to cross the picket line thus was simply a but-for cause of the termination, not a motivating one. The uncontradicted testimony of Kathy Taylor, whom the ALJ found to be a credible witness, was that another employee who did give advance notice of objection to working at the Spaulding plant because of the picketing was offered and accepted other assignments. Cordes and Monroe refused to pass pickets who were simply giving information about a strike at a different plant and had not even asked them to do this, without any regard for the interests of their employer and without notice

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[8] This consisted of testimony by Cordes and Monroe that no adverse consequences had been suffered on one occasion when Cordes arrived late after his car had broken down and on another in which Monroe did not arrive at all due to car trouble. However, on both occasions the men had given reasonable advance notice to Manpower. Both Taylor and Nut gave uncontradicted testimony to the strict and neutral application of the rule.

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sufficient to permit their replacement. As a result of this refusal Manpower lost the profits it would have earned on their services and, more important, risked impairment of its reputation for reliability with one of its most important customers. Unlike the many cases discussed above in which replacement of the refusing employee could be achieved with little or no disruption in the employer's operations, or with only a harmless delay, such replacement was simply impossible here—the failure of Cordes and Monroe to show up on the night of May 21 meant that that business was lost forever. If under this combination of circumstances the position of the Board majority is not making the protected conduct "sacrosanct," to use Judge Posner's phrase, we do not know what would be.

The Board majority does not and could not well dispute that Manpower would have been entitled to fill the jobs that Cordes and Monroe left empty if it had been given an opportunity to do so. It says that Manpower could "permanently replace" Cordes and Monroe but not discharge them. In most cases, there is a distinction between the practical effect of these concepts, as Judge Posner elaborated in *Browning-Ferris, supra,* 700 F.2d at 389. But, apart from the effect of the Court's dictum in *Rockaway News, supra,* 345 U.S. at 75, 73 S.Ct. at 522, which the Court has never retracted, the concept of "permanent replacement" does not rest comfortably in the context of a temporary employee and a two-night assignment. As we read the Board's opinion, all that Manpower could lawfully do was to "replace" Cordes and Monroe for the remaining night of their assignment, assuming that this still remained open; despite their disregard of the warning given them on their employment, Cordes and Monroe were entitled, on the Board's theory, to be treated on a parity with other applicants for any new job that turned up. But once Cordes and Monroe had demonstrated their unreliability, it would be cold comfort to Manpower to know that in similar situations in the future it would be entitled to "replace" the employees, and only after the harm had already been done. In any event, an element of the "permanent replacement" doctrine is an unconditional offer to resume employment. *See NLRB v. Koenig Iron Works, Inc.,* 681 F.2d 130, 145 (2 Cir.1982); *Browning-Ferris, supra,* 700 F.2d at 389. Here Cordes and Monroe never offered that if a picket line theretofore unknown to them were to turn up at some other assignment, they would not again walk off the job without giving advance notice.

The Board, 272 N.L.R.B. at 828, seeks to analogize the case to that of economic strikers, *see NLRB v. Mackay Radio & Tel. Co., supra;* Manpower proffers the conflicting analogy of intermittent work stoppages, *see UAW Local 232 v. Wisconsin Employment Relations Board,* 336 U.S. 245, 255–58, 69 S.Ct. 516, 522–23, 93 L.Ed. 651 (1949). Neither analogy is exact. We prefer to deal with the case on its own terms and its unusual facts. In rejecting the Board's application of the analogy of economic strikers to this situation, we do not mean to indicate that such an approach would be unacceptable in all cases. Here, however, the Board has abdicated its responsibility to balance the interests at stake and to take into account the employer's compelling business reasons for its conduct under the special facts of this case. We reject the Board's contention for what amounts to a per se rule where the employees' § 7 rights are so thin and the employer's case so compelling as here.

The petition for review is granted; the cross-application for enforcement is denied.

NLRB v. Jefferson Electric Company, a Division of Litton Systems, Inc.

783 F.2d 679 (6th Cir.), February 24, 1986—274 NLRB 750

On petition to enforce Board Order

Before JONES and NELSON, Circuit Judges; and PECK, Senior Circuit Judge

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PER CURIAM: This case is before us on the application of the National Labor Relations Board to enforce its order. The administrative law judge found that the Jefferson Electric Company committed a violation of section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), when it discharged an employee who had campaigned actively for a union. The Board upheld the decision of the ALJ on the ground that the

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General Counsel established a prima facie showing that the employee's union activity was a motivating factor in the discharge and the company had not carried its burden of demonstrating that the employee would have been discharged absent her union activity. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–401, 103 S.Ct. 2469, 2472, 2474, 76 L.Ed.2d 667 (1983).

On consideration of the record, briefs and arguments, we find that the Board's findings of fact are supported by substantial evidence. *See* 29 U.S.C. § 160(e); *NLRB v. United Insurance Co.*, 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968). We therefore GRANT enforcement of the Board's order.

DAVID A. NELSON, Circuit Judge, concurring: I concur in the opinion and judgment of the court, but write separately to express the view that the evidence on which the agency found a violation of the statute passes the "substantiality" test by only the narrowest of margins.

NLRB v. Financial Institution Employees of America, Local 1182, Chartered by United Food & Commercial Workers International Union, AFL–CIO

475 U.S. 192, February 26, 1986—752 F.2d 356

On certiorari to 9th Cir.

JUSTICE BRENNAN delivered the opinion of the Court

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The question for decision in these cases is whether a rule of the National Labor Relations Board that requires that nonunion employees be permitted to vote in a certified union's decision whether to affiliate with another union is consistent with the National Labor Relations Act.

I

In 1970, the Board certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of petitioner Seattle-First National Bank (SeaFirst). Firstbank and SeaFirst subsequently negotiated successive collective-bargaining agreements, the most recent of which expired in 1977. In 1978, Firstbank voted to affiliate with the Retail Clerks International Union, AFL–CIO. Under Firstbank's constitution, only union members in good standing could vote in the election. The union members voted in

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favor of affiliation by a margin of 1,206–774. Upon affiliation, Firstbank changed its name to the Financial Institution Employees of America, Local 1182 (FIEA), chartered by the Retail Clerks International Union, AFL–CIO. FIEA then petitioned the Board to amend its certification to reflect this change. SeaFirst challenged the petition, arguing that affiliation with the Retail Clerks had substantially changed the union, that nonunion employees should have been allowed to vote on whether to affiliate, and that the union had not followed its own constitution in establishing voter eligibility standards. The Board rejected these arguments and amended Firstbank's certification to name FIEA as the employees' bargaining representative. *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979).[1]

SeaFirst refused to recognize the amended certification or to bargain with FIEA. The Board sustained FIEA's charges and held that SeaFirst had committed an unfair labor practice in violation of §§ 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5), and ordered it to bargain.[2] *Seattle-First National Bank*, 245 N. L. R. B.

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[1] After the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL–CIO. The Board granted FIEA's motion to amend the name of the charging party in this case to reflect this change. *Seattle First National Bank*, 245 N. L. R. B. 700, 700, n. 1 (1979).

[2] Under § 8(a) of the Act, as set forth in 29 U.S.C. § 158(a), "[i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title."

700 (1979). SeaFirst petitioned the Court of Appeals for the Ninth Circuit for review of the Board's order, and the Board cross-applied for enforcement. Before the Court of Appeals

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rendered its decision, the Board moved for remand of the case to it, and the court granted the motion. *Seattle-First National Bank v. NLRB,* Nos. 79-7515, 80-7004 (June 27, 1980); see n. 4, *infra.*

On remand, the Board notified the parties of its decision on its own motion to reconsider its earlier decision. On reconsideration, the Board held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards, and therefore that the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. *Seattle-First National Bank,* 265 N. L. R. B. 426 (1982).

FIEA petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision. The Court of Appeals, in a 2-1 decision, granted the petition and remanded the case. 752 F. 2d 356 (1984). The court held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the Act for three reasons. First, the Board's rule intruded upon the union's internal affairs—here a totally unjustified intrusion because the Board had not determined that affiliation had substantially changed the union or eroded its majority support—and violated the "longstanding federal labor policy of avoiding unnecessary interference in internal union affairs." *Id.,* at 362. Second, the Board's rule was "inconsistent with the strong national policy of maintaining stability in the bargaining representative." *Id.,* at 364. Pursuant to that policy, Congress and the Board had restricted the opportunities for employers and employees to challenge a certified union's status as bargaining representative, [3] and the Board's new rule did not further but breached

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the policy, since it effectively decertified the union without a Board determination that affiliation had undermined the union's majority support. Finally, the Board's rule was irrational, because the interests of nonunion employees were adequately protected under existing procedures, and because the Board's reasoning did not support the rule.

The holding of the Court of Appeals conflicts with contrary holdings of the Courts of Appeals for the Fifth and Seventh Circuits upholding the Board's rule. *Local Union No. 4-14 v. NLRB,* 721 F.2d 150, 152-153 (CA5 1983); *United Retail Workers Union, Local 881 v. NLRB,* 774 F. 2d 752 (CA7 1985). [4] We granted both petitions in this case to to [sic] resolve the conflict. 471 U.S. 1098 (1985). We affirm.

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II

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 U.S.C. § 157, and the Board is empowered to determine representation on petition of employees or the employer. 29 U.S.C. §§ 159(c)(1)(A)(i), 159(c)(1)(B). In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to believe that a "question of representation" exists, 29 U.S.C. § 159(c), and directs a representation election by secret ballot to settle the question. *Ibid.* The Board certifies the winning union as the bargaining representative of all of the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 U.S.C. § 158(a)(5).

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[3] The court cited three examples of Board rules designed to maintain stable bargaining relationships. 752 F. 2d, at 365. First, in cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first year after certification, this presumption is irrebuttable. See *Brooks v. NLRB,* 348 U. S. 96, 103 (1954). Second, the Board will consider "decertifying" a union only if at least 30% of the employees present a petition, or in "extreme cases." See 29 CFR § 101.18 (1985); R. Gorman, Basic Text on Labor Law 49-50 (1976). Third, under its contract-bar rule, the Board ordinarily refuses to conduct decertification elections for a certain period of time while the collective-bargaining agreement remains in effect. See 1 C. Morris, The Developing Labor Law 361-376 (2d ed. 1983).

[4] The procedural history of the Fifth Circuit's decision is closely intertwined with this case. In that case, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation. The Board ordered the employer to bargain. *Amoco Production Co.,* 220 N. L. R. B. 861 (1975), aff'd, 239 N. L. R. B. 1195 (1979). The Board relied on its *Amoco* decision when it originally amended FIEA's certification in this case. *Amoco* was then appealed to the Court of Appeals for the Fifth Circuit, which remanded the case for the Board to determine whether affiliation had substantially changed the union. *Amoco Production Co. v. NLRB,* 613 F.2d 107, 112 (1980). In light of the strong similarity between the two cases, the Board asked the Ninth Circuit to remand this case as well. On remand from the Fifth Circuit, the Board did not address whether affiliation had substantially changed the union. Rather, the Board reversed itself and concluded that the affiliation was invalid because only union members had been allowed to vote. *Amoco Production Co.,* 262 N. L. R. B. 1240 (1982). The Board in turn relied on this decision in dismissing FIEA's unfair labor practice charge and revoking its amended certification.

The Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances. In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U.S.C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U. S. C. § 159(c)(1)(B); 29 CFR §§ 101.17, 102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N. L. R. B. 652, 656 (1966); 29 CFR § 101.17 (1985); see 1 Morris, *supra.* Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U. S. C. § 159(c).

One such change in circumstances is, as here, where an independent union decides to affiliate with a national or international organization.[5] In many such cases, the union may also change its name to reflect its new affiliation, and will petition the Board to amend its certification to reflect this name change. 29 CFR §§ 101.17, 102.60(b) (1985). The Board's practice has been to grant such petitions if the Board found that the affiliation satisfied two conditions. First, that union members have had an adequate opportunity to vote on affiliation. *North Electric Co.,* 165 N. L. R. B. 942, 943 (1967). The Board ordinarily required that the affiliation election be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. *E. g., Newspapers Inc.,* 210 N. L. R. B. 8, 9 (1974), enf'd, 515 F. 2d 334 (CA5 1975).[6] Second, that there was substantial "continuity" between the pre- and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union; the Board considered such factors as whether the union retained local autonomy and local officers, and continued to follow established procedures.

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See Note, *supra* n. 5, at 445, and nn. 74–82.[7] If the organizational changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a "question concerning representation" which could only be resolved through the Board's election procedure. 1 Morris, *supra,* at 690; 29 CFR §§ 101.17, 102.60(b) (1985). However, as long as continuity of representation and due process were satisfied, affiliation was considered an internal matter that did not affect the union's status as the employees' bargaining representative, and the employer was obligated to continue bargaining with the reorganized union. 1 Morris, *supra,* at 690–691; *Universal Tool & Stamping Co.,* 182 N. L. R. B. 254, 259 (1970).[8]

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[5] A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. *Amoco Production Co.,* 239 N. L. R. B., at 1195; Hale, Union Affiliations: Examination of Governing NLRA Standards, 1983 Det. C. L. Rev. 709. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions." Note, Union Affiliations and Collective Bargaining, 128 U. Pa. L. Rev. 430, 431 (1979). The Board has recognized that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process.' *The Williamson Co.,* 244 N. L. R. B. 953, 955 (1979).

[6] The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. Brief for FIEA 28–29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures.

[7] The parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n. 2; Brief for FIEA 4. However, the Board did not make a continuity determination but simply dismissed FIEA's unfair labor practice charge and vacated its amended certification. The Court of Appeals therefore declined to address the continuity issue. 752 F. 2d, 356, 359, n. 4 (1984). We also decline to address it.

[8] In some cases, the affiliated union will not petition the Board to amend its certification, but will instead wait to see whether the employer will continue to bargain. If the employer refuses to bargain, the union may then file an unfair labor practice charge with the Board. In the past, the Board required the employer to bargain if the affiliation satisfied its two-prong due process and continuity test. In other words, the Board used the same standards to examine affiliations whether the issue arose as a defense to an unfair labor practice charge or in a petition to amend a certification. *Independent Drug Store Owners of Santa Clara County,* 211 N. L. R. B. 701, 701, n. 2 (1974), enf'd, 528 F. 2d 1225 (CA9 1975); Hale, *supra* n. 5, at 710, and n. 8; Note, *supra* n. 5, at 432.

The Board's new rule dramatically changes this scheme.[9] The Board now takes the position that all employees in the

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bargaining unit—not merely union members—must have the opportunity to participate in the affiliation decision. See *Amoco Production Co.*, 262 N. L. R. B. 1240, 1241 (1982). Unless they are allowed to do so, the Board will not amend the union's certification or require the employer to bargain with the reorganized union. The Board applies this rule even though the organizational changes resulting from the affiliation are not substantial enough to raise a question of representation. See Brief for NLRB 16–17. The Board does not contend that the Act requires that all employees of the bargaining unit, union and nonunion, must be allowed to participate in the affiliation election or that the Act expressly authorizes the Board to impose such requirements. Rather, the Board and the employer defend the Board's new rule on two grounds. First, they assert that the Board's rule is a reasonable means of protecting the bargaining unit employees' right to select a bargaining representative under § 7 of the Act. Second, they argue that the rule minimizes industrial strife. We address each argument in turn.

III

A

Petitioners argue that the Board should be afforded "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB v. A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also 29 U. S. C. § 156; *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969); *NLRB v. Waterman S.S. Corp.* 309 U. S. 206, 226 (1940), and contend that a requirement that all employees be allowed to vote on affiliation is a reasonable means of insuring that a majority of employees consent to representation by the postaffiliation union, and ultimately of protecting the right of

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all employees to select a bargaining representative. Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. *Ford Motor Co. v. NLRB*, 441 U. S. 488, 495, 497 (1979); *Beth Israel Hospital v. NLRB*, 437 U. S. 483, 501 (1978); *NLRB v. Iron Workers*, 434 U. S. 335, 350 (1978). However, the question here is whether the Board's new rule exceeds the Board's statutory authority. Cf. *NLRB v. Longshoreman*, 473 U. S. 61 (1985); *NLRB v. Bildisco & Bildisco*, 465 U. S. 513 (1984). Deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U. S. 300, 318 (1965); see also *NLRB v. Insurance Agents*, 361 U. S. 477, 499 (1960). We hold that the Board's new rule exceeds its authority under the Act.

Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. 29 U. S. C. § 159(c). Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 29 U. S. C. § 159(c)(1). However, the Board's decision must take into account that "[t]he industrial stability sought by the

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[9] The Board's assertion that it actually adopted its "new" rule in its decision in *Jasper Seating Co.*, 231 N. L. R. B. 1025 (1977), may be questioned. *Jasper* was a 3–2 decision in which only two members took the position that nonunion employees should be allowed to vote in affiliation elections. While suggesting that he could adopt this position under other circumstances, Member Penello concurred in the decision "based upon the application of [different] principles." *Id.*, at 1026. He found that the affiliation had raised a question of representation which could only be resolved through a Board-conducted representation election. *Id.*, at 1027.

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Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." *Canton Sign Co.*, 174 N. L. R. B. 906, 909 (1969), enf. denied on other grounds, 457 F. 2d 832 (CA6 1972). In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation.[10] In such situations, affiliation does not necessarily implicate the "selection" of a new bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 U. S. C. § 159(c). Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation.

Turning to the record in these cases, the Board revoked FIEA's certification and relieved SeaFirst of its obligation to bargain despite the fact, as the Board acknowledges, that it was not sufficient to raise a question of representation that nonunion employees were not allowed to vote in the affiliation election. Brief for NLRB 16–17. Absent a question of

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representation, FIEA continued to function, as it was entitled to do, as the bargaining representative of the unit, and SeaFirst was obligated to continue bargaining with it. By refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by statute. Moreover, the Board exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. See *Steelworkers v. Sadlowski*, 457 U. S. 102, 117 (1982); *NLRB v. Boeing Co.*, 412 U. S. 67, 71 (1973); *Scofield v. NLRB*, 394 U. S. 423, 428 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 195 (1967). Petitioners maintain that this policy must give way to the right of the employees to select a bargaining representative. Cf. *Pattern Makers v. NLRB*, 473 U. S. 95 (1985) (union rule barring resignations during a strike contrary to statutory policy of voluntary unionism); *NLRB v. Marine Workers*, 391 U. S. 418 (1968) (union rule requiring exhaustion of internal grievance procedures does not preclude Board review). But the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.[11]

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B

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[10] The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." *Amoco Production Co.*, 239 N. L. R. B., at 1195. Affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." *American Range Lines, Inc.*, 13 N. L. R. B. 139, 154 (1939); see also Brief for NLRB 16, n. 10 ("The Board has in general found that affiliations do not destroy continuity of representation").

[11] Congress has expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation. When the NLRA was amended by the Labor Management Relations Act of 1947, the House passed a proposal that would have regulated union procedures for electing officers, assessing dues, disciplining members, and deciding to strike. H. R. 3020, § 8(c), 80th Cong., 1st Sess. (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 179–183 (Legis. Hist.). These provisions were deleted from the final legislation. See 93 Cong. Rec. 6443 (1947), 2 Legis. Hist. 1540 ("The Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions"). In 1959, Congress adopted the Labor-Management Reporting and Disclosure Act, which regulated union procedures for assessing dues, disciplining employees, and electing officers. 29 U. S. C. §§ 411–415, 481. Senators Knowland and McClellan both advanced proposals to regulate other sorts of union decisions. See 104 Cong. Rec. 11184 (1958) (constitutional amendments and recall of officers); *id.*, at 11461 (waiver of right to strike); S. 1137, § 102(5), 86th Cong., 1st Sess. (1959), 1 Legislative History of the Labor-Management Reporting and Disclosure Act 272–273 (1959) (creation of affiliated organizations or funds), § 103(4), *id.*, at 277 (mergers and transfers between local unions). None of these proposals was incorporated into the statute. See *Steelworkers v. Sadlowski*, 457 U. S. 102, 117 (1982) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' It believed that only essential standards should be imposed by legislation" (citation omitted)).

Petitioners contend that this statutory scheme does not adequately protect the interests of nonunion employees, and that this justifies the Board's new rule. They argue that an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." *Allis-Chalmers*, 388 U. S., at 191. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation

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election only if it is unclear whether the reorganized union retains majority support.

Petitioners concede that a union's organizational and structural changes would not ordinarily justify the Board's meddling in a union's internal affairs, but argue that affiliation is different from other changes because affiliation necessarily changes the union's identity, and because initiation of the change is by the certified union seeking the Board's approval for the affiliation by amendment of its certification or an order on the employer to bargain after affiliation. Neither distinction is persuasive.

First, petitioners argue that affiliation differs from other organizational changes because it results in employees being represented by a different organization. See *Hamilton Tool Co.*, 190 N. L. R. B. 571, 576 (1971) (Miller, concurring). But many organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments. As the Board has recognized, "an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization." *Amoco Production Co.*, 239 N. L. R. B. 1195 (1979). Rather, the union will determine "whether any administrative or organizational changes are necessary in the affiliating organization." *Ibid.* If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs.

Petitioners next contend that affiliation involves the union's asking the Board to amend its certification or to order

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the employer to bargain.[12] Petitioners assert that the Board therefore has a strong interest in insuring that its own election procedures have not been circumvented before placing its imprimatur on the union's affiliation election. This argument mischaracterizes the nature of the relevant procedures. In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union continues as an ongoing entity that the employer should continue to recognize. By analogy, the fact that the Board may order the employer to bargain with a union that has amended its constitution does not mean that the Board has "sanctioned" the constitutional amendment. In any event, the Board's interest in insuring the integrity of its procedures does not empower it to adopt measures exceeding its statutory authority. If the Board finds that affiliation raises a question of representation "undermining . . . the Board's own election and certification procedures," *Amoco Production Co.*, 262 N. L. R. B., at 1241, it can refuse to consider the union's unfair labor practice charge, and is authorized to conduct a representation election. However, it may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections.

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[12] In its *amicus* brief, the Chamber of Commerce notes that the statute does not explicitly provide for petitions to amend a union's certification, and argues that the Board therefore has broad authority to refuse to grant such requests. However, because the union's request to amend its certification is a mere formality, it cannot give the Board additional authority to police the affiliation. A union could simply decide not to change its name upon affiliation, and would not have to ask the Board to amend its certification. The employer might then challenge the affiliation as a defense to an unfair labor practice charge. Unless the Board finds that the affiliation raised a question of representation, the affiliated union would continue as the employees' bargaining representative, and the employer would be required to bargain with the reorganized union. Thus, the amended certification procedure cannot broaden the Board's authority to interfere in the union's affairs.

IV

The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 U. S. C. § 151. The Act includes several provisions designed to encourage stable bargaining relationships, *e. g.*, § 8(b)(7)(A), 29 U. S. C. § 158(b)(7)(A) (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 U. S. C. § 158(b)(7)(B) (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 U. S. C. § 159(c)(3) (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See n. 3, *supra.* Petitioners argue that the Board's new rule furthers this policy by introducing a measure of certainty into the bargaining relationship that protects both the employer and the union. By having all employees vote for affiliation, so the argument goes, the employer avoids the possibility of having to bargain with a union that may not represent a majority of the employees. Petitioners submit that the union also benefits from having all employees vote, since it avoids the disruption that would occur if the Board eventually determines that it must hold a new election because the affiliation raises a question of representation. If the employees vote for affiliation, the union can continue to bargain with confidence, since the employer is less likely to challenge the affiliation, and the Board is less likely to find a question of representation. If the employees vote against affiliation, the incumbent union can forgo affiliation and continue to represent the bargaining unit.

Absent any statutory framework, the Board's rule might well be a rational means of preserving industrial stability. However, as the Ninth Circuit noted, Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status." 752 F. 2d, at 366. The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace)." *Brooks v. NLRB*, 348 U. S. 96, 103 (1954). The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference.

We hold that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union. [13] The judgment of the Court of Appeals is affirmed. The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

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[13] We do not suggest, however, that other Board representation procedures, such as its continuity determination, exceed its statutory authority.

Respondents argue that the Board's rule is irrational because it assumes that affiliation involves the selection of a new bargaining representative absent any indication that the affiliation has significantly changed the union. Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.

I write separately to note that the Court's action today striking down a Board action is one of those rare departures from this Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees. See, *e.g., NLRB v. A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also *NLRB v. Action Automotive, Inc.*, 469 U. S. 490 (1985).

NLRB v. Health Care Logistics, Inc.

784 F.2d 232 (6th Cir.), February 27, 1986—273 NLRB 822

On petition to enforce Board Order

Before MERRITT and WELLFORD, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

WELLFORD, Circuit Judge: The National Labor Relations Board ("NLRB") seeks enforcement of its order, adopting the ALJ's finding that National Health Care Logistics, Inc. ("the Company") committed unfair labor practices by discharging employees Jon Jacob, Mark Cox, and Robert Fox to discourage union activities among its employees. The Company cross appeals the decision.

At all times relevant to this case, the Company was engaged in the manufacture of medical cabinets in Circleville, Ohio. The physical plant was small, consisting of a 2000 square feet, one story building about the size of a three-car garage, and was divided into an open manufacturing area, a paint room, and a restroom. Gary Sharp, the Company president, lived a short distance from the plant.

In June 1983, several months before the alleged unfair labor practices, Sharpe allegedly told one of the discharged employees, John Jacobs, that if a union ever came into the plant, he would close it down. The comment was allegedly made in connection with an argument Sharpe had with another employee about a workers' compensation claim.

The Company's workforce originally consisted of three to four fulltime employees. In the fall of 1983, however, a business growth required expansion of the workforce, resulting in the employment of six to eight additional workers. This expansion pushed the Company into financial difficulties, with sizeable losses suffered through February 1984. In mid-October 1983, the employees began discussing the possibility of union representation. Jacobs initiated these discussions at the plant with employee Mark Cox and shop supervisor Erwin. Between mid-October and November 7, several additional discussions took place at the plant among Jacobs, Cox, Erwin, and other employees. Jacobs led these discussions and spoke in favor of union representation with several employees, including Cox and Robert Fox, who expressed an interest in union representation.

On Monday, November 7, 1983, Jacobs telephoned a representative of the United Steel Workers of America ("the Union") during a work break. He arranged for the union representative to meet with the employees a few days later. After completing his call, Jacobs returned to the work area and reported to the employees that the Union agent would be in town and that anyone interested should meet with him. On the evening of November 7, Sharpe decided to terminate employees Jacobs, Cox, and Fox. The next day, Tuesday, November 8, operations manager Salyers informed each of them that they were terminated.

Subsequently the discharged employees filed separate unfair labor practice charges, later consolidated, against the Company. The Board found, in conformity with the ALJ, that the Company violated

sections 8(a)(1) and (3) of the Act (29 U.S.C. §§ 158(a)(1) and (3)) by discharging employees Jacobs, Cox, and Fox in order to discourage union activities. [1]

In its cross petition, the Company asserts that no violation occurred as to Jon Jacobs because he was a supervisor within the meaning of the National Labor Relations Act and therefore not a covered employee. Alternatively, the Company argued—that the Board's decision is not supported by substantial evidence because all three discharged employees, including Jacobs, had been terminated for legitimate business reasons and not as a pretext for an unfair labor practice. We enforce the Board's order as to Jacobs and Cox, but deny enforcement of the NLRB order regarding the discharge of Fox.

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[1] The Board order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in exercise of rights guaranteed by section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to offer Jacobs, Cox, and Fox reinstatement, to make them whole for any losses suffered as a result of the discrimination against them, to expunge any reference to the discharges from their files, and to post an appropriate notice.

I

29 U.S.C. § 157 accords employees "the right to self-organization, to form, join, or assist labor organization. . . ." Excluded from the Act's protection are supervisors who are by the Act's definition not deemed to be employees. 29 U.S.C. § 152(3). *See ITT Lighting Fixtures, Division of ITT Corp. v. NLRB,* 719 F.2d 851, 857–58 (6th Cir.1983) (discussing consequences of statutory distinction between an "employee" and "supervisor"). Supervisors are defined at 29 U.S.C. § 152(11) to be:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Company argues that Jacobs was a supervisor because he directed the work of other shop employees and received a promotion from general laborer to the position of assistant shop supervisor, pointing to a promotion of Jacobs to supervisor on a short-lived second shift formed approximately two months before his discharge. When the second shift was discontinued, however, Jacobs returned to his position as assistant shop supervisor where his duties were expanded to include solo field maintenance trips and inventory control.

Although noting that Jacobs was a supervisor within the Act's meaning during his short-term control over the second shift, the ALJ determined that at the time of his discharge, Jacobs was not acting as a supervisor in his position as "assistant shop supervisor." The ALJ stated that neither Jacobs' job title as assistant shop supervisor nor a conclusory statement that Jacobs possessed any of the enumerated supervisory powers under 28 U.S.C. § 152(11) was sufficient to establish that Jacobs was a supervisor within the meaning of the Act, relying upon *Saladmaster Corp.,* 216 NLRB 769 (1975) and *United States Gypsum Co.,* 118 NLRB 20 (1957).

Since the question of supervisory status is a mixed question of fact and law, the Board's finding in that respect will be upheld if it is supported by substantial evidence on the record. *NLRB v. Lauren Manufacturing Co.,* 712 F.2d 245, 247 (6th Cir.1983). On this issue, we defer to the Board's expertise on a charging party's status "if it has 'warrant [support] in the record' and a reasonable basis in law." *Beverly Enterprises v. NLRB,* 661 F.2d 1095, 1099 (6th Cir.1981) (quoting *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 131, 64 S.Ct. 851, 861, 88 L.Ed. 1170 (1944)).

> The exercise of any one of the enumerated powers combined with "independent judgment" is enough to make one a supervisor. . . . It has been held that the mere fact that an employee may give some instructions to others, or that he may command their respect, does not indicate that he must identify with the interest of the employer rather than the employees; the test must be the significance of his judgments and directors. . . . [T]he specific job title of the employer is not controlling. Courts must examine the employee's actual job responsibility, authority and relationship to management.

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NLRB v. Wilson-Crissman Cadillac, Inc., 659 F.2d 728, 729–30 (6th Cir.1981) (citations omitted).

The record in this case supports the Board's finding that Jacobs did not possess sufficient indicia of supervisory status under the Act. The Company does not contend—and the record is devoid of evidence—that when acting as assistant shop supervisor, Jacobs ever hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, disciplined, or adjusted the grievances of other employees or that he had the authority to do so. Nor does the record show that Jacobs possessed or exercised authority to direct and control the work of other employees. The record shows rather that Jacobs spent approximately thirty to forty percent of his time traveling to the facilities of the Company's customers, where he performed field maintenance on products purchased from the Company. He traveled and worked alone and thus had no employees to supervise. Although Jacobs had the discretion to make decisions and purchase materials in the course of performing this duty, his discretion was unrelated to the work of fellow employees and does not demonstrate statutory supervisory status. The record further shows that when Jacobs was not traveling, he divided his work at the plant between inventory control work and production assembly work on the Company's products. Inventory control, like the field maintenance work, was performed by Jacobs alone and did not involve exercise of supervisory authority.

The Company contends that Jacobs was a supervisor because he directed the work of other employees in the course of his assembly work on the first shift, but the record does not support this contention. The occasional instructions to others given by Jacobs were routine in nature and did not involve any use of independent judgment. Rather, as the Board found, Jacobs either passed on routine instructions from operations manager Salyers or advised other employees how to do their work based on his seniority and experience. Employees generally knew what jobs to perform each day and were all expected to help one another out when necessary. We find support in the record for the finding that the limited and routine authority exercised by Jacobs did not confer supervisory status upon him.

An additional factor supports this finding. Since only seven or eight other employees were in the shop as well as two other supervisors, Salyers and Erwin, counting Jacobs as a supervisor would create a ratio of one supervisor to two or three employees, one "clearly out of balance." *Memphis Furniture Manufacturing Co.*, 232 NLRB 1018, 1021 (1977), *enforced* 616 F.2d 964 (6th Cir.1980). Jacobs earned $3.65 per hour, moreover, the same as employee Cox and less than the $3.90 per hour paid supervisor Erwin.

In sum, the Board's determination that at the time of his discharge Jacobs did not possess or exercise any of the supervisory authorities enumerated in the Act is supported by substantial evidence. Accordingly, Jacobs was entitled to the protection of the Act as an employee.

II

The Company next contends that it had no knowledge of union-related activities and that even if it had knowledge, it discharged these employees because of the economic instability of the Company and for poor work performance. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398, 103 S.Ct. 2469, 2472, 76 L.Ed.2d 667 (1983), the Supreme Court stated that an employer commits an unfair labor practice by discharging an employee for participating in protected concerted activities if the employer "has no other basis for the discharge, or if the reasons that [the employer] proffers are pretextual. . . ." Since the Company offered ostensibly legitimate reasons for discharging these employees, the Board had to "make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir.1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982); *quoted with approval in Dayton Typographic Service, Inc. v. NLRB*, 778 F.2d 1188, 1192 (6th Cir.1985); *Borel Restaurant Corp. v. NLRB*, 676 F.2d 190, 193 (6th Cir.1982). Since an employer is unlikely to acknowledge an improper motivation in its decision to terminate employees, the NLRB may rely on circumstantial evidence and all relevant facts surrounding an employer's action to establish knowledge of employees' pro-union activities as well as to infer an unlawful motive. *See, e.g., Dayton Typographic*, 778 F.2d at 1192–93; *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir.1985); *NLRB v. Lawson Printers, Inc.*, 408 F.2d 1004, 1005 (6th Cir.1969).

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Throughout the proceedings the Company's president and supervisors have denied any knowledge about employee meetings regarding possible union representation. In discrediting these denials, the ALJ applied the "small plant doctrine" which the ALJ stated as permitting a rebuttable *presumption* of employer knowledge "where the facility is small and open, the work force is small, employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity."

Although we believe the ALJ accorded the "small plant" doctrine too much weight in deeming it a rebuttable presumption, the doctrine is applicable in this case as a circumstance indicating that the employer had some knowledge or indication of union activities and would constitute some support for a finding that the union discharged the employees because of anti-union animus. The essence of the small plant doctrine "rests on the view that an employer at a small facility is likely to notice union activities at the plant because of the closer working environment between management and labor." *Alumbaugh Coal Corp. v. NLRB,* 635 F.2d 1380, 1384 (8th Cir.1980); *see also NLRB v. Buddies Supermarkets, Inc.,* 481 F.2d 714, 722 (5th Cir.1973); *Amyx Industries, Inc. v. NLRB,* 457 F.2d 904 (8th Cir.1972). The small size of the facility, however, does not give rise to a *presumption* of knowledge that an employer must rebut to prevent establishment of the Board's prima facie case. Rather, the doctrine permits an inference of employer knowledge only if the Board establishes by other evidence, direct or circumstantial, that an employer had reason to notice the union activities in the facility. *See, e.g., NLRB v. American Spring Bed Manufacturing Co.,* 670 F.2d 1236, 1245 (1st Cir.1982); *Alumbaugh Coal,* 635 F.2d at 1384–85; *Bill's Coal Co. v. NLRB* 493 F.2d 243, 247–48 (10th Cir.1974); *NLRB v. Mid State Sportswear, Inc.,* 412 F.2d 537, 539–40 (5th Cir.1969); *NLRB v. Joseph Antell, Inc.,* 358 F.2d 880, 882 (1st Cir.1966). Other evidence necessary to permit an inference of employer knowledge is often the same evidence allowing an inference that the Company was motivated by anti-union animus. Such relevant evidence includes: (1) open discussions about a union on the premises during work hours; (2) timing of the discharge; (3) adequacy of the employer's reasons for discharge; and (4) employment of a replacement soon after a discharge for asserted economic reasons. *See, e.g., American Spring Bed,* 670 F.2d at 1245; *Alumbaugh Coal,* 635 F.2d at 1384–85; *Bill's Coal,* 493 F.2d at 247; *Mid-State Sportswear,* 412 F.2d at 539–40.

We are satisfied that evidence in the record coupled with the small plant doctrine permits an inference of employer

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knowledge of union activities and anti-union animus. In this case the credited testimony revealed that the employees' discussions about union representation occurred in the main room of the small manufacturing facility during the workday with no real effort made to conceal these conversations from management and supervisory personnel who worked daily in and about the main shop. The ALJ noted that an inference of employer knowledge could be drawn from the timing of the decision to terminate these employees mid-week, the evening after Jacobs told the other employees that a union representative would be brought to the plant later in the week. Furthermore, the employer's reasons for discharging Jacobs and Cox could be deemed both inconsistent and inadequate. Finally, despite its alleged financial straits, the Company hired one new employee on November 21, 1983 only two weeks after the discharge in question, and then the Company hired other employees during January of 1984. This evidence supports a finding of employer knowledge of union activities as well as the Company's anti-union animus. [2] Thus, the Board satisfied its burden of establishing a prima facie case that the Company unlawfully discharged these employees.

III

Once the Board established a prima facie case, the burden of persuasion then shifted to the Company to establish that Jacobs, Cox, and Fox would have been discharged absent the protected union-related activities. *See Transportation Management,* 462 U.S. at 401–03, 103 S.Ct. at 2474–75; *Dayton Typographic,* 778 F.2d at 1193; *NLRB v. E.I. DuPont de Nemours,* 750 F.2d 524, 528–29 (6th Cir.1984); *NLRB v. Baja's Place,* 733 F.2d 416, 421 (6th Cir.1984). We conclude that substantial evidence does support the Board's finding that Jacobs and Cox were discharged for their participation in protected activities, but we reject the NLRB's determination that the Company committed an unfair labor practice in terminating Fox.

The Company claims that its poor financial condition compelled it to reduce its payroll costs by discharging three employees, and that it chose

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[2] In reaching its conclusion that the Company's anti-union animus was a motivating factor in its discharge of the three employees, the ALJ relied on anti-union sentiment expressed by operations manager Ted Salyers five months before the discharge. The ALJ credited the testimony of Jacobs that Salyers had stated he would run any union representative out, and that Sharpe had threatened to close the facility in the face of unionization.

We acknowledge the Company's attack on this reliance upon two isolated statements made months before the discharge. The ALJ could, however, view those statements as one element of evidence supporting the General Counsel's case. The ALJ concluded:

> General Counsel has established the existence of union activity, Respondent knowledge, Respondent hostility, and precipitous adverse action hard on the heels of significant union activity. This is sufficient to establish a prima facie showing that the separations were discriminatorily motivated.

Jacobs, Cox, and Fox because of poor work performance. As the Board found, the record does reflect the Company's financial instability in the months prior to the November 8 discharges. The Company nevertheless continued to have financial difficulty at least through February 1984. As previously mentioned, however, the Company hired one new employee only two weeks after it discharged three employees assertedly for economic reasons, and thereafter hired three more employees within two months. The fact that the Company, despite continued economic problems, replaced the three discharged employees within less than two months supports a finding that financial woes were not the reason for the discharge.

In addition to its economic justifications, the Company stated that the work performance or attitude of the three men discharged supported their termination. The Company claimed that Jacobs, the key figure in the union discussions and who had been employed by the Company for more than one year and recipient of two promotions during his employment, was fired for misappropriation of funds, unsatisfactory dress, "mouthing off," poor judgment, and declining work performance. The allegation that Jacobs misappropriated funds proved to be highly questionable, Sharpe conceding that this was not the basis for Jacobs' discharge. An interoffice memo circulated after Jacobs was fired stated that he was discharged for dress and attitude problems including low production output. As to the dress and attitude problems, the ALJ found that no creditable evidence in the record supported these "bare conclusions."

The Company also relied on Jacobs' alleged poor performance as supervisor of the short-lived second shift and on two projects prior to the discharge. The record shows (and the Company's president admitted), however, that much of Jacob's difficulty as supervisor of the second shift resulted from defective products, over which Jacobs had no control. Furthermore, the Company did not reprimand Jacobs for his performance as a supervisor and in fact expanded his duties when the second shift was terminated and Jacobs retained his prior position. Despite the Company's claims that Jacobs' work deteriorated during the month prior to the discharge, the credited testimony shows that no one warned Jacobs that the quality of his work had diminished or that his productivity level was poor. In light of the questionable reasons given by the Company for termination, and its failure to show that it would have discharged Jacobs absent his union activity, we conclude that the NLRB's conclusion that Jacobs' discharge was pretextual is supported by substantial evidence.

The Company's basis for discharging Mark Cox is no more persuasive. Cox was hired by the Company in September 1983 for assembling, but he primarily performed shearing and breaking work. The Company claims that Cox was placed on "indefinite layoff" because he "indicated a desire to perform only the shearing and breaking functions and the level of production in the shop could not justify the use of a full-time person in that position."

Cox, on the other hand, credibly and without contradiction testified that he never refused to do other work or stated that he would only do shear and break work. Other testimony showed that Cox did perform other work upon request. Cox testified that although his primary job was shearing and breaking, he did other work once or twice a week as needed and instructed by supervisor Erwin. Both Salyers and Erwin confirmed this testimony. Indeed, Salyers not only acknowledged that Cox would and did do other work, but further admitted that he did not believe that Cox only wanted to do shear and break work.

Furthermore, it is uncontroverted that Cox never received any complaints or warnings, written or oral, about any aspect of his work. On October 13, however, three weeks before termination, Sharpe gave Cox a two-step, 30-cent pay raise and a $50.00 bonus, and told Cox that he liked the way he was working. The Company's claim that it discharged Cox because of his work performance is further weakend by the fact that at the time of the discharge the Company did not express dissatisfaction with Cox's work. When Cox was "laid off," the uncontroverted evidence shows that Salyers told Cox that his work was good, but that he was being "laid off" because the Company was transferring work to another company. Substantial evidence thus supports the Board's finding that Cox was discharged unlawfully for his participation in protected activity.

Even though the Company committed an unfair labor practice in discharging Jacobs and Cox, we do not find that substantial evidence supports the NLRB's finding that the discharge of Fox was pretextual. Fox was also hired as a general laborer in September, 1983, but, unlike Cox, Fox was placed on a ninety-day probationary period. Fox testified that he was aware of his status and knew that if he performed unsatisfactorily during that time period he would be fired. The Board found that Fox had performed poorly during the probationary period. Despite recognizing the Company's legitimate basis to discharge Fox, the ALJ concluded that the discharge was unlawful, conceding that "the matter is not entirely free from doubt."

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In reaching this conclusion, the Board relied heavily upon what it considered to be a pretextual claim that the Company discharged Fox in part for a poor welding job on the morning he was terminated, since the Board found at the same time that the Company had already decided to fire Fox the previous evening. The ALJ and the Board failed to take into account that the Company merely recited all examples of Fox's poor workmanship, including an unsatisfactory job after the decision had been made. In light of Fox's status as a probationary employee and his clearly continuing unsatisfactory work performance during that period, it is our view that the Company satisfied its burden of demonstrating that Fox would have been fired even if union activities had not been present. Accordingly, we reverse the Board's determination as to Fox, finding that it is not supported by substantial evidence.

We enforce the NLRB's decision pertaining to Jon Jacobs and Mark Cox, but we deny enforcement of that portion of the Board's order relating to Robert Fox.

MERRITT, Circuit Judge, dissenting in part: I would enforce the Board's order as to Fox as well as Jacobs and Cox. The record supports the Board's view that the same anti-union animus that led to the firing of the other two also led the company to fire Fox. Fox had received a raise for his work shortly before being fired. The decision to fire him and the others was made suddenly in midweek. The faulty welding work on which the company expressly relied occurred the day after the decision to fire him was made. There was evidence of a substantial nature from which the Board could find that all three firings were prompted by anti-union views and that the reasons asserted were pretextual.

NLRB v. Honaker Mills, Division of Top Form Mills, Inc.

In re Sanmark-Stardust, Inc.

NLRB v. Honaker Mills, Division of Top Form Mills, Inc.

789 F.2d 262 (4th Cir.), February 28, 1986—273 NLRB 1246

On petitions to enforce and review Board Order

Before WIDENER and SNEEDEN, Circuit Judges, and MICHAEL, District Judge for the Western District of Virginia, sitting by designation

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WIDENER, Circuit Judge: These cases concern the National Labor Relations Board's (NLRB or Board) petition for enforcement of its bargaining order issued against Honaker Mills, Division of Top Form Mills, Inc. (Top Form) on December 14, 1984. Sanmark-Stardust, Inc. (Sanmark), which purchased the Top Form facility that was the subject of the NLRB's order, at Honaker, Virginia on December 29, 1983, filed its petition for review of that NLRB order, and the two cases were consolidated for consideration. We also consider a subsidiary issue of whether the NLRB's order, should we determine it was properly issued, is enforceable against Top Form inasmuch as Top Form has sold its Honaker Mills facility in Honaker, Virginia to Sanmark, and currently retains no interest in or control over the labor practices at said facility. Top Form requests that should we determine that the order is not enforceable against Top Form, we should release Top Form from any responsibility to appear in connection with any further proceedings in this matter. We find no merit in either Sanmark's or Top Form's contentions, and enforce the Board's order.

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On June 21, 1978, the International Ladies' Garment Workers' Union, AFL–CIO (Union), filed a petition with the NLRB seeking an election among the production and maintenance employees that Top Form employed at its Honaker, Virginia facility. A secret ballot election was conducted on August 8, 1978 which the Union won by a vote of 124 to 72.

Top Form filed timely objections to the election, alleging that the Union had engaged in various forms of pre-election misconduct. After the usual proceedings, the Board overruled Top Form's objections and certified the Union as the collective bargaining representative for certain of the employees of the Honaker, Virginia facility.

On June 20, 1979, the Union requested that Top Form commence collective bargaining. Top Form did not immediately respond to this request, except to state that it had referred the Union's request to "appropriate Company officials and Company Counsel." On July 24, 1979, the Union began a strike against Top Form that lasted until November of that year.

On August 15, 1979, the Union filed unfair labor practice charges against Top Form, alleging that Top Form had unlawfully refused to bargain with the Union. On the basis of these charges, the NLRB's Regional Director issued a complaint against Top Form on September 27, 1979. On November 26, 1979, the General Counsel for the NLRB moved for summary judgment on the complaint, a motion that the NLRB denied on March 6, 1980, finding that there were issues of fact that required development at a hearing before an Administrative Law Judge (ALJ). In particular, the NLRB concluded that the ALJ should hear evidence as to the nature of the strike and as to whether the Union committed sufficient violence during the strike so as to justify Top Form's refusal to bargain with the Union as a certified bargaining representative pursuant to the doctrine established in *Laura Modes Co.,* 144 NLRB 1592 (1963). As a result of the Board's denial of the General Counsel's motion for summary judgment, hearings were held before an ALJ concerning the unfair labor practices complaint on August 21, 1980 and October 6–9, 1980.

On May 12, 1981, the ALJ issued his findings of fact and conclusions of law in which he found that Top Form had violated Section 8(a) of the statute by refusing to bargain with the Union. In so finding, the judge expressly rejected Top Form's strike violence defense. The ALJ refused to consider Top Form's objections to the Union's alleged pre-election misconduct.

In December 1983, Top Form sold its plant facilities at Honaker, Virginia to Sanmark. Subsequently, on December 14, 1984, the Board issued its Decision and Order affirming the ALJ's rulings in the hearing on the unfair labor practice charges. The Board's order required Top Form and its successors and assigns to cease and desist from refusing to bargain with the Union. The order also requires Top Form to bargain with the Union upon request, to embody any understanding that is reached in a signed agreement, and to post an appropriate notice. It is this Decision and Order that is presently before us for review.

In its petition for review, Sanmark raises three grounds for denial of the NLRB's petition for enforcement. In addition, Top Form argues that the order should not be enforced because the order is addressed to Top Form and Top Form no longer has any interest in or control over the labor practices at the facility in question. After determining the propriety of the order in general, we address its enforceability against Top Form in particular.

Sanmark first argues that the order should not be enforced because it is the result of an unfair hearing before a biased tribunal. Specifically, Sanmark makes six allegations of partiality in the hearing:

1. that the ALJ expressed his doubts about the viability of Top Form's primary defense to the unfair labor practice charge prior to the hearing;
2. that the ALJ assumed the role of advocate in actively participating in the questioning of witnesses during the hearing;

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3. that the ALJ refused to credit uncontradicted testimony by witnesses for Top Form;
4. that the ALJ precluded Top Form from eliciting testimony helpful to its defense;
5. that the ALJ made certain disparaging remarks to counsel for Top Form during the course of the hearing; and,
6. that the ALJ disregarded incriminating conduct that the Union committed during the course

of the strike when he considered the merits of Top Form's strike misconduct defense.

Because of the serious nature of an allegation of bias on the part of a decisionmaker in such a proceeding, *see NLRB v. Phelps,* 136 F.2d 562, 563–64 (5th Cir.1943), we address in some detail each of Sanmark's allegations of bias. *See Tele-Trip v. NLRB,* 340 F.2d 575, 581 (4th Cir.1965).

In support of its first allegation of conduct evidencing bias, Sanmark points to a remark that the ALJ allegedly made during an off-the-record, pretrial conference with Top Form's attorneys. [1] To establish that the ALJ actually made this remark, Sanmark relies on an affidavit by Top Form counsel in which counsel avers that the ALJ had stated during the pretrial conference that the *Laura Modes* defense, the defense that Top Form intended to rely upon during the hearing, had never been "applied or sustained in the context of a post-certification Section 8(a)(5) strike," and that as a result the ALJ did not think that Top Form had any chance of success with that defense.

Sanmark does not dispute the accuracy of the ALJ's description of the caselaw that has developed regarding the *Laura Modes* defense. Rather, Sanmark contends that the ALJ's apparently correct statement of the law evidenced an inherent prejudice toward Top Form's defense to the unfair labor practice charges. We do not believe that the ALJ's remark reflected anything more than the familiarity with governing caselaw that was required of him for the effective performance of his duties, and reject Sanmark's contention that the remark indicated that the ALJ was personally rather than judicially prejudiced against Top Form's reliance upon the *Laura Modes* defense. A judge's remarks that constitute mere expressions on a point of law are not sufficient to show personal bias or prejudice. *Sakellar v. Lockheed Missiles and Space Co.,* 765 F.2d 1453, 1457 (9th Cir.1985); *see also United States v. Carmichael,* 726 F.2d 158, 161 (4th Cir.1981) (judge's remarks do not exhibit bias if they merely reflect attitude derived from experience on the bench).

Sanmark next alleges that the ALJ exhibited prejudice and assumed the role of advocate by his active participation in the examination of witnesses during the hearing. The NLRB's rules expressly authorize ALJs presiding in hearings concerning unfair labor practice charges to "call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence." 29 C.F.R. § 102.35(k) (1985); *see also* 29 C.F.R. § 102.64(a) (1985) (stating it is duty of hearing officer in certification proceedings to inquire fully into all matters and issues necessary to obtain full and complete record). In this case, the questioning to which Sanmark objects does not necessarily indicate more than that in response to certain witnesses' broad testimony, specifically that of Mr. Ireson, Mrs. Gilbert, Mr. Phillips, and Miss Perkins, all witnesses for Top Form, the ALJ attempted to obtain more specific statements from the witnesses to determine the weight that he should assign to their testimony. An examination of the questioning of which Sanmark complains reveals that the ALJ, again, was not necessarily doing more than clarifying the record, not slanting it. We find no excessive questioning nor abuse of discretion. We find that the questioning by the ALJ of which Sanmark complains did not exhibit bias or prejudice. *See NLRB v. Superior Sales, Inc.,* 366 F.2d 229, 233 (8th Cir.1966).

Sanmark next contends that the ALJ refused to credit uncontradicted testimony by witnesses for Top Form. A review of the ALJ's findings of fact, however, indicates that the ALJ did not exhibit bias or prejudice in his credibility determinations. In the first place, the ALJ did, on certain occasions, credit the testimony of witnesses for Top Form, in particular, that of Charlotte Foleno and Kathleen Harris regarding an incident during the strike in which one of the strikers allegedly threw nails under the tires of the Foleno automobile. Secondly, in those instances in which the ALJ did discredit the testimony of witnesses for Top Form, despite the absence of contradicting testimony, he gave specific reasons for rejecting the testimony. For example, he discounted Ireson's testimony on the basis of perceived logical and factual inconsistencies in the witness' statements, a lack of corroboration, and the overall demeanor of the witness.

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[1] We assume for purposes of argument that the ALJ did, in fact, make the statement attributed to him by counsel for Top Form. We note, however, the problem that allegations regarding off-the-record errors raise for appellate courts on review. We admonish counsel to follow proper procedures in the future for making up the record and preserving any such error as claimed here. *See Canal Elec. Co.,* 245 NLRB 1090, 1090 n. 2 (1979).

The specificity with which the ALJ made his credibility determinations, combined with his willingness to credit the testimony of some Top Form witnesses, tend to negate the charge of extrajudicial bias. As this court and other courts have reiterated, " 'the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' " *United States v. Crowell,* 586 F.2d 1020, 1027 (4th Cir.1978), *cert. denied,* 440 U.S. 959, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979) (quoting *United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966)). Because the record does not establish that the ALJ's credibility determinations were based on anything other than his participation in this case, we reject Sanmark's allegation of bias in this regard. *NLRB v. Air Prods. & Chems., Inc.,* 717 F.2d 141, 145 (4th Cir.1983) (absent exceptional circumstances, ALJ's credibility determinations when adopted by the Board are to be adopted by reviewing court).

Sanmark next contends that the ALJ demonstrated bias by refusing to allow Top Form to elicit testimony in support of its defense. The record, however, indicates that the actions by the ALJ of which Sanmark complains were merely evidentiary rulings that the ALJ made based on his understanding of the applicable law. Even assuming that these rulings were incorrect, Sanmark may not establish a sufficient case of bias merely by questioning the correctness of an ALJ's evidentiary rulings. *See Hedison Mfg. v. NLRB,* 643 F.2d 32, 35 (1st Cir.1981). Rather, Sanmark must make a showing of bias stemming from sources outside the decisional process. *See Morris v. City of Danville,* 744 F.2d 1041, 1045 (4th Cir.1983). This, Sanmark has failed to do. Consequently, we reject this contention of bias also.

Sanmark further contends that the ALJ exhibited bias through various allegedly intemperate and derisive remarks directed at counsel for Top Form. The facts that Sanmark relies upon to establish the ALJ's prejudice in this regard, however, simply do not support the broad generalizations that Sanmark makes about them. For example, Sanmark vehemently objects to the ALJ's use of the term "scab" during his questioning of a Union witness. Prior to using the term, however, the ALJ made it very clear that he was only using the term because the witness knew what the word meant. Moreover, the ALJ only used the term after the witness herself had used it several times, and only used it during the questioning of that one witness. In these circumstances, we do not believe that the ALJ's use of the term will support the broad allegations of prejudice that Sanmark makes. *See Shaw v. Martin,* 733 F.2d 304, 308 (4th Cir.1983). Similarly, other remarks of which Sanmark complains are at least innocuous, and at most injudicious. They do not rise to the level necessary to support the serious charge of judicial bias.

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Finally, with respect to Sanmark's contentions concerning the ALJ's bias, Sanmark contends that the ALJ exhibited prejudice by disregarding and discounting incriminating conduct on behalf of the Union, which, if properly credited, would have established Top Form's *Laura Modes* defense. On the contrary, although, as Sanmark correctly points out, the ALJ undertook questionable examination of a witness apparently with respect to the reasons for Union violence, the ALJ did not discount or disregard the seriousness of the violence that he concluded had been established at the hearing. Rather, the ALJ concluded that despite the seriousness of it, which he castigated, the violence did not rise to the level required to support the *Laura Modes* defense. Although Sanmark may disagree with the ALJ's conclusion in this regard, that disagreement alone does not establish bias or prejudice sufficient to warrant a conclusion that the hearing below was fatally marred by prejudice on the part of the presiding ALJ.

In conclusion, we are of opinion that the record does not show indication of bias on the part of the ALJ that would warrant a refusal to enforce the Board's order on that ground. Consequently, we reject Sanmark's contention that the order should not be enforced because it was the result of an unfair hearing before a biased tribunal.

Sanmark next raises as a ground for denying enforcement to the Board's order the contention that the Board erred in its conclusion that the Union's strike related misconduct did not preclude the issuance of a bargaining order. We review this contention under a substantial evidence standard. Thus, the question before us is whether there was substantial evidence before the ALJ to substantiate his finding, which the Board adopted, that the strike misconduct that occurred did not rise to the level sufficient to warrant *Laura Modes* sanctions. We conclude that there was. Most of the evidence that Top Form introduced in the hearing below consisted of evidence of picket line taunts and jeers. Of the more serious misconduct that allegedly occurred, certain incidents were established, and certain incidents were not because not presented through credible evidence. Other serious incidents which occurred were not connected to the Union by sufficient evidence. Given the status of the administrative record, we conclude that there was substantial evidence to support the Board's rejection of Top Form's *Laura Modes* defense to the Union's unfair labor practice charges.

As a third ground for denying enforcement to the Board's order, Sanmark contends that the Board erred in upholding the ALJ's dismissal of Top Form's allegations concerning the Union's pre-election acts in his conduct of the post-election hearing. As noted above, Top Form previously litigated the propriety of the election, culminating with the order of the NLRB. The Board overruled Top Form's objections to the election in an order dated June 6, 1979, and certified the Union as the unit's bargaining representative. Later, after the Regional Director had issued a complaint based on the Union's refusal to bargain charge that forms the basis for the order presented for enforcement to this court, the NLRB's General Counsel filed with the Board a motion for summary judgment on that complaint, contending, in part, that Top Form was seeking to relitigate in the unfair labor practice proceedings issues previously decided in the election proceedings. The Board denied the General Counsel's motion, noting that Top Form had raised, in the unfair labor practice proceedings, issues of fact, including the nature of the strike and whether violence was, in fact, committed, which would best be resolved at hearing before an ALJ. Although the General Counsel had asked for at least partial summary judgment on Top Form's pre-election allegations, the Board did not mention this request in its order. Instead, the Board simply denied the General Counsel's motion in its entirety.

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As a result of this, Sanmark claims ambiguity in the Board's order denying summary judgment on the unfair labor practice charges. Top Form, the argument goes, raised its pre-election allegations in its answer to the unfair labor practice charges. Thus, it contends that the ALJ presiding over the unfair labor practice proceedings erred in refusing to permit Top Form to relitigate those contentions in the unfair labor practice proceedings. The ALJ reasoned that absent a showing of previously unavailable or newly discovered evidence that would warrant the relitigation of issues previously decided by the Board, Top Form was precluded from raising its preelection allegations in the subsequent administrative forum.

It is of some consequence to note at this point that Sanmark does not separately allege that the Board's previous decision concerning Top Form's objections to the Union election was incorrect. The objection is essentially procedural rather than substantive. Sanmark only alleges that the ALJ erroneously interpreted the Board's order denying summary judgment to the General Counsel on the unfair labor practice charge, by which Sanmark alleges the Board implicitly recognized Top Form's right to a retrial on its pre-election allegations.

We find this argument to be without merit. The ALJ interpreted the Board's order in the light of existing law, as he should have done. The Board's regulations explicitly state that a party may not reraise in a subsequent unfair labor practice administrative proceeding issues that the Board has previously decided in a prior representation proceeding. *See* 29 C.F.R. § 102.67(f) (1985); *see also Pittsburgh Place Glass v. NLRB,* 313 U.S. 146, 162, 61 S.Ct. 908, 917, 85 L.Ed. 1251 (1941). Indeed, to initiate any further review of such allegations in the usual case, a party must wait and raise them in the appropriate judicial forum during an action contesting the enforcement of an ensuing bargaining order. *See AFL v. NLRB,* 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940); *Newport News Shipbuilding & Drydock v. NLRB,* 738 F.2d 1404, 1407 n. 3 (4th Cir.1984). The ALJ correctly interpreted the Board's order for an evidentiary hearing in the light of this well established principle, and, therefore, committed no error in dismissing Top Form's allegations of pre-election misconduct in the subsequent unfair labor practices proceeding.

Having considered each of Sanmark's allegations concerning the propriety of the Board's order and rejected each one, we conclude that the Board's order is enforceable and should be enforced absent some other bar to its enforcement. Top Form argues that its sale of the Honaker, Virginia facility to Sanmark, an entity unrelated to Top Form in any way, constitutes such a bar. We disagree.

The Board conceded in oral argument that should Top Form's allegations concerning the subsequent sale of the Honaker facility prove correct, then the Board cannot enforce its order against Top Form. The order, however, is directed to Top Form and its successors and assigns. Consequently, the order may still be enforceable against Sanmark should the Board determine in a subsequent proceeding that Sanmark is indeed a successor to Top Form. We decline to engage in fact finding to determine the accuracy of Top Form's allegations concerning Sanmark's successorship, and because Sanmark, understandably, will not admit its successorship, we do not release Top Form from further proceedings with regard to the order in question. Because the Board has conceded in oral argument, however that it will not seek to enforce the order against Top Form once it has been established in an appropriate proceeding that Top Form no longer has any relation to the facility in question, Top Form may rest assured that the Board will not require Top Form to perform a futile act.

Accordingly, the order of the Board as issued is ENFORCED.

The petition for review is DENIED.

Communication Workers of America, Local 5008 v. NLRB

784 F.2d 847 (7th Cir.), March 3, 1986—275 NLRB 148

On petition to review Board Order

Before BAUER, FLAUM and EASTERBROOK, Circuit Judges

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EASTERBROOK, Circuit Judge: Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, requires employers that seek to conduct disciplinary interviews of employees to permit the employees to invite representatives of their union to the interviews. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). In 1977 the National Labor Relations Board concluded that it should order employers to reinstate, with back pay, employees fired after interviews from which union representatives had been excluded. *Certified Grocers of California*, 227 N.L.R.B. 1211, 1215 (1977), enf. denied on other grounds, 587 F.2d 449 (9th Cir.1979); see also *Kraft Foods, Inc.*, 251 N.L.R.B. 598 (1980) (reinstatement should be ordered unless the employer establishes that the discharge was not based even in part on information obtained at the interview).

Courts proved reluctant to enforce orders of reinstatement, reasoning that § 10(c) of the Act, 29 U.S.C. § 160(c), which provides that the Board may not reinstate an employee "discharged for cause", barred reinstatement of employees who would not have been let go but for the misconduct revealed at the interviews. E.g., *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134, 137–38 (9th Cir.1983); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir.1981). Cf. *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 174 (5th Cir.1984); *NLRB v. Kahn's & Co.*, 694 F.2d 1070, 1071–72 (6th Cir.1982). In December 1984 the Board changed course, announcing in *Taracorp Industries*, 273 N.L.R.B. No. 54 (1984), that it would no longer order reinstatement and back pay for violations of the principle announced in *Weingarten*. It gave two reasons: first, that reinstatement would be inconsistent with § 10(c); second, that reinstatement would be bad policy because the prospect of reinstatement had made the investigatory and remedial process in *Weingarten* cases too adversarial and complex. The Board therefore overruled *Kraft Foods* and, among other cases, *Illinois Bell Telephone Co.*, 251 N.L.R.B. 932 (1980). See 273 N.L.R.B. No. 54 at 4 n. 6.

Overruling *Illinois Bell* was not as easy as all that. The employer had sought judicial review, and this court held that Illinois Bell had violated *Weingarten* when interviewing Cary Ann Hatfield, a telephone operator in Valdalia, Illinois. *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618 (7th Cir.1982). Illinois Bell suspected Hatfield of making long distance calls for herself and some prisoners at a nearby state prison without paying the company or billing the prisoners accurately. An investigator of Illinois Bell interviewed Hatfield at a time when no union representative could be found, and Hatfield, who confessed, was fired. We enforced the Board's order to the extent it found a violation of § 7 but remanded the case "for such further proceedings as may be required to determine whether independent evidence sufficiently supported the Company's discharge of Hatfield for cause." 674 F.2d at 623. In other words, we sent the case back to the Board with instructions to apply the *Kraft Foods* doctrine. Before the Board could do this, it overruled both *Kraft Foods* and the decision we had remanded.

The administrative law judge concluded in December 1983 that Illinois Bell could not carry its burden under *Kraft Foods*. The Board decided the case in April 1985. Citing *Taracorp*, it held that Illinois Bell needed to prove nothing at all. It revoked the portions of its 1980 decision that had ordered Illinois Bell to reinstate Hatfield. 275 N.L.R.B. No. 27 (1985). The new decision orders Illinois Bell to cease and desist from violating the *Weingarten* rule and to post appropriate notices, but it orders no relief for Hatfield personally. Chairman Dotson and Member Hunter joined this decision. Member Dennis dissented, arguing that the terms of our remand in 1982 required the Board to apply the *Kraft Foods* doctrine notwithstanding the Board's abrogation of that doctrine in 1984.

Hatfield's union now requests us to order the Board to revive its original decision, under which Hatfield would be reinstated with back pay. The Union maintains that our mandate in 1982 requires no less. If the Board was free to decide the case anew, the Union insists, it still must reinstate Hatfield because *Taracorp* misunderstood the meaning of § 10(c) of the Act. We have misgivings about the construction of § 10(c) in *Taracorp*, but we conclude that the Board was entitled to adopt the *Taracorp* doctrine as an exercise of its discretion over remedies for violations of the Act. Because the Board is entitled to rethink old rules—even after a remand from the court—we enforce its order.

I

If we had held in 1982 that *Kraft Foods* stated an approach to remedies that the Board was legally required to pursue, then the Board would have been required to apply *Kraft Foods* here; it could not have changed its mind consistent with the Act. *Butler Lime & Cement Co. v. OSHRC*, 658 F.2d 544, 549 (7th Cir.1981); *Chicago & Northwestern Transportation Co. v. United States*, 574 F.2d 926, 930 (7th Cir.1978). We came to no such conclusion, however. Our opinion expressed doubt about the propriety of reinstating Hatfield. 674 F.2d at 623. We did not direct the Board to use the *Kraft Foods* test because it was the only permissible test; it was simply the one the Board favored at the time.

The Board is free to change course, provided the new course is within its legal power. See *American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). *Weingarten* itself was a dramatic change of policy by the Board. For decades the Board had declined to require employers to admit union representatives to disciplinary interviews. See 420 U.S. at 264, 95 S.Ct. at 967. The Court concluded that the new policy was permissible. *Id.* at 265–67, 95 S.Ct. at 967–68. So there is nothing wrong with new policy. And any change of policy will be reviewed sooner or later, as the Union has asked for review in this case. The question is whether the Board must ask the court's permission before applying the new policy to a case pending on remand from the court.

If the Board had asked us in 1984 for permission to apply the *Taracorp* policy to this case, we would have had three options: to forbid use of the policy on the ground of law of the case; to review the legal basis of the *Taracorp* policy on the spot and permit its application only if it was consistent with the Act; and to permit the Board to apply its current policy subject to later review at the behest of any aggrieved party. The first option would have been unthinkable, because our decision in 1982 did not resolve any dispute between the parties about the legal basis of the *Kraft Foods* policy. The doctrine of law of the case does not prevent an agency from reexamining a policy that was not squarely presented for resolution; indeed, even if this court had sustained the *Kraft Foods* policy against legal challenge, this would not have prevented the Board from singing a different tune. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144–46, 60 S.Ct. 437, 442–43, 84 L.Ed. 656 (1940). Judicial review of the Board's orders permits correction of legal mistakes, and once any mistake has been exposed further proceedings are in the Board's charge. *South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800, 805–06, 96 S.Ct. 1842, 1844–45, 48 L.Ed.2d 382 (1976). Nothing we said in 1982 preempted the Board's reconsideration.

The second option is immediate consideration of the new policy's legal status. Yet examination of the legal basis of *Taracorp* would have been premature. A court could not tell when the Board asks for leave to apply a new policy whether the difference between old and new policies would change

the outcome. If the two policies produce the same result, a discourse on the legality of the new policy would be wasted effort in the service of an advisory opinion. That leaves the third option, to grant leave as of course and to review the new policy, once the Board has entered a final order, if it spells the difference in outcome. See *E.I. DuPont de Nemours & Co. v. NLRB*, 733 F.2d 296, 297–98 (3d Cir.1984); see also *Woodkraft Division, Georgia Kraft Co. v. NLRB*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984) (vacating 696 F.2d 931 (11th Cir.1983), and remanding to allow the Board to reconsider a "final" decision, which the Board would not have seen otherwise).

If a request by the Board for leave to apply a new policy on remand would be granted automatically, then there is no point in requiring the Board to seek leave. Gone are the days when courts required useless requests. For example, it used to be necessary to obtain an appellate court's permission before asking the district court to set aside a judgment for fraud, if the judgment had been affirmed. It was thought that the district court could not undo the appellate mandate, even on account of circumstances the appellate court had not known. Such leaves either would be granted automatically or would require the appellate court to hold a hearing, a task for which it is unsuited. Today a district court may inquire into fraud without the leave of the appellate court. *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). So it is with requests by the Board to apply a new rule on remand. Appellate courts would either grant these automatically or be impelled into premature consideration of the merits of the proposed new rule. Neither is desirable, and therefore an application for leave is unnecessary.

II

The Board's decision in *Taracorp* rests principally on its construction of a proviso to § 10(c), which provides in part that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." The Board accepted the view of *NLRB v. Potter Signal*, 600 F.2d 120 (8th Cir.1979) and *NLRB v. General Motors*, 674 F.2d 576 (6th Cir.1982) that the proviso bars reinstatement when the employee has been fired for the misconduct that was discussed or revealed in the interview.

We are not so sure as the Board that the proviso to § 10(c) precludes reinstatement. Certainly if an employee is "discharged for cause" the Board's hands are tied. "Discharge for cause" has two components, however. First there must be "cause," which in § 10(c) means misconduct and not just a "good reason." See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215–17, 85 S.Ct. 398, 405–06, 13 L.Ed.2d 233 (1964); cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937). Next there must be a causal link between the misconduct and the discharge ("discharged *for* cause"). If Illinois Bell had fired Hatfield for joining the Union, and later had made a serendipitous discovery that she had made some unauthorized long distance calls, this would not block the Board from awarding relief. So, too, if Illinois Bell had fired Hatfield for two reasons—for having the temerity to ask for the presence of a union representative as well as for the calls—the Board could order make-whole relief unless Illinois Bell could show by a preponderance of the evidence that she would have been fired for the calls alone. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

The Court held in *Transportation Management* that the Board may establish presumptions about causal chains and require employers to overcome these presumptions. This implies that the Board could presume in cases under *Weingarten* that, but for the violation of the Act, the employer would not have discharged the employee. If there is a violation, the

Board may throw the burden of persuasion on the employer under *Transportation Management*. And the proviso does not prevent the Board from insisting that the employer discharge this burden without using the "fruit" of the violation, the confession during the interview. Section 10(c) does not speak to burdens of persuasion, fruits of violations, exclusionary rules, and the other paraphernalia of trials and inferences. The Board may fill interstices with a reasoned approach, as the Court concluded in *Transportation Management* itself. 462 U.S. at 402–03, 103 S.Ct. at 2474. Unless the structure and history of the Act put a construction off limits, the Board may choose among reasonable constructions. *NLRB v. Action Automotive, Inc.,* —— U.S. ——, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985).

In *Fibreboard* the Court allowed the Board to order reinstatement of discharged employees notwithstanding their dismissal for the "cause" that there was no work for them to do. There is a strong argument that the Board has discretion to shift the burden to the employer and apply an exclusionary rule, as it did in *Kraft Foods.* Few subjects are as debated and difficult as determining what things "cause" what other things. See, e.g., H.L.A. Hart & Tony Honoré, *Causation in the Law* (2d ed. 1985). "But-for cause," "necessary conditions," "sufficient conditions," and the other words of art may obscure more than they explain. See Landes & Posner, *Causation in Tort Law: An Economic Approach,* 12 J. Legal Studies 109 (1983). The Board is not tied to one approach by which to assess whether a person was dismissed "for" misconduct. We need not decide whether the *Kraft Foods* policy is a permissible reading of the Act, or the *Taracorp* policy an inevitable one, because the *Taracorp* policy may be sustained as a reasoned selection among the remedies open to the Board.

III

If the Board finds that any person has violated the Act, it "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of this Act". Section 10(c), 29 U.S.C. § 160(c). The opinion in *Taracorp* states (273 N.L.R.B. No. 54 at 8–9):

> Even if this Board were not bound by the various remedial limitations [of § 10(c)], we would find a make-whole remedy in *Weingarten* cases inappropriate because we believe that past Board decisions have exceeded the intended scope and limitations found in the Supreme Court's *Weingarten* decision. What began as a limited protection of employees and a potential guide to management in conducting fair and expeditious investigations of employee misconduct has become a labyrinth of rules and procedures analogous to the law of criminal procedure. . . .
>
> We believe that the expansionist approach to *Weingarten,* including make whole remedies, has served to assure that the adversarial nature and complexity of the investigatory process would increase until employers are tempted to forgo interviews altogether. We believe that, in the long run, our refusal to grant make-whole remedies for *Weingarten* violations will serve the interests of the entire labor-management community.

The Union calls this an afterthought, insufficient to support the decision in *Taracorp.* It is not an afterthought. It is an independent ground of decision. If an agency states two grounds of decision, each sufficient, a court should sustain the decision if either reason is correct. *Bowman Transportation v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286–87, 95 S.Ct. 438, 442–43, 42 L.Ed.2d 447 (1974). Only when the Board states but a single incorrect ground, as in *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir.1985), or concludes that it has been compelled to adopt a policy it prefers to avoid, will the removal of that ground require a remand for further consideration. See

Massachusetts Trustees v. United States, 377 U.S. 235, 248–49, 84 S.Ct. 1236, 1251–52, 12 L.Ed.2d 268 (1964). We know how the Board wishes to exercise any discretion it may have. A remand would be pointless. See *Illinois v. ICC,* 722 F.2d 1341, 1348–49 (7th Cir.1983).

Section 10(c) requires the Board to order violators to "cease and desist" from their unlawful conduct, but it leaves in the Board's charge the selection of any "affirmative action" that will "effectuate the policies of" the statute. The statute does not compel reinstatement or the award of back pay. We wrote above of the Board's discretion to interpret the statute, to put into action a plan that can be no more than a sketch on the printed page. The Board's discretion to interpret the Act is limited by the fact that the words and history of the statute set boundaries, which courts patrol. Section 10(c) gives the Board quite a different kind of "discretion." The power to select "affirmative action" is not a power to interpret but a power to execute. The meaning of the statute is that the Board chooses; it is this choice, the fact of discretionary action, for which Congress has provided. This sort of discretion is scarcely reviewable at all, because the agency's decision *is* the implementation for which the law calls. See *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185–86, 93 S.Ct. 1455, 1457–58, 36 L.Ed.2d 142 (1973); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187–89, 61 S.Ct. 845, 849–50, 85 L.Ed. 1271 (1941); cf. *NLRB v. Bridge & Ornamental Ironworkers*, 466 U.S. 720, 104 S.Ct. 2081, 80 L.Ed.2d 715 (1984).

Taracorp sets up a graduated approach to remedies. If the employer violates *Weingarten* by excluding the union's representative from a disciplinary interview and fires the employee solely because of the employee's misconduct, the Board enters only a cease and desist order. Repeated violations of *Weingarten* will offend against that order, and few employers wish to incur the penalty, a citation for contempt of court. So repeated violations are handled more harshly than isolated violations. If the employer's initial violation is egregious—that is, if the employer fires the employee in part because he requested the assistance of his union—then *Taracorp* does not apply (so the Board's counsel stated at oral argument), and the Board will use its *Transportation Management* policy. The employee wins reinstatement with back pay unless the employer persuades the Board that it would have fired the employee even without the improper motive. This amounts to a continued application of the *Kraft Foods* policy to dual-motive discharges.

This is a reasoned approach. It means that those who violate the Act repeatedly, or with worse motives, receive harsher sanctions. If "even a dog distinguishes between being stumbled over and being kicked" (O.W. Holmes, *The Common Law* 3 (1881)), the Board may make the same sort of distinction. Repeat violations also call for stiff treatment because the repetition reduces the chance that a single violation was a mistake—on the part of a subordinate employee who did not follow management's wishes (as the employee who interrogated Hatfield may not have) or on the part of the Board in finding a violation where there was none. Multiple violations are more likely to reflect the management's considered choice and to be real rather than imagined.

The Board mentioned that the elimination of reinstatement and back pay for isolated violations of *Weingarten* will reduce the incentive of management and union to act as adversaries, and again this is a permissible consideration. The availability of back pay and reinstatement raises the stakes of any dispute; higher stakes make it worthwhile to have more disputes (and to fight harder in each). This is a real cost that the Board may consider, as managers and unions will. See *Camacho v. Ritz-Carlton Water Tower*, No. 85-1948, —— F.2d ——, —— - —— (7th Cir. Feb. 3, 1986). In *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the Court held that a union need not take every grievance to arbitration, in part because a union

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sensibly may elect to reduce the level of contentiousness and in part because a persistent use of the maximum leverage granted by contract may lead the employer to withhold arbitration in the future (or extract greater concessions for an arbitration clause). The Board expressed a similar concern here: if back pay and reinstatement follow inexorably from violations of *Weingarten*, employers may respond by holding fewer interviews and acting on suspicion without offering the employee the opportunity to explain. Employees as a group would not find this comforting.

The Union reminds us that reinstatement and back pay are the Board's usual remedies, employed "as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious, or inexcusable." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419–20, 95 S.Ct. 2362, 2372–73, 45 L.Ed.2d 280 (1975) (dictum). See also *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969); *Phelps Dodge, supra*, 313 U.S. at 197, 61 S.Ct. at 854. The historical practice is not so uniform, however. Until 1977, when it decided *Certified Grocers*, the Board used only cease and desist orders as remedies for employers' failure to allow union representatives to attend disciplinary interviews. When the Supreme Court approved the Board's position in *Weingarten*, it did not urge the Board to employ stronger sanctions. As policies of the Board go, the

Certified Grocers and *Kraft Foods* doctrines had relatively short lives—too short to be treated as if incorporated in the Act. The *Weingarten* doctrine is itself a recent one, and when endorsing the Board's decision the Court remarked on the Board's discretion to change the implementation of the Act. 420 U.S. at 264–67, 95 S.Ct. at 967–68. The Court has since treated *Weingarten* as an example of the Board's authority to decide certain questions either way. *Transportation Management, supra,* 462 U.S. at 402–03, 103 S.Ct. at 2474–75. So the Board's power, capacious in the usual case, is enlarged here by the principle that who controls the right may choose the remedy. E.g., *United States v. Caceres,* 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *In re Klein,* 776 F.2d 628, 635 (7th Cir.1985). The Board's decision is

ENFORCED.

Arlington Hotel Company, Inc. v. NLRB

785 F.2d 249 (8th Cir.), March 4, 1986; cert. denied Oct. 20, 1986—273 NLRB 210

On petition to review Board Order

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge

HEANEY, Circuit Judge: This case is before the Court on the petition of Arlington Hotel Co., Inc. (the Hotel) for review of an order of the National Labor Relations Board. The Board found that the Hotel violated section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and (1), by implementing a striker recall policy which restricted the recall of strikers to their prestrike positions and resulted in the preferential hiring of new employees in jobs that the strikers were qualified to perform. For reversal, the hotel argues that its recall system complied with the law inasmuch as returning strikers were offered their old jobs or substantially equivalent jobs, and that it is not obligated to offer returning strikers any available job for which they are qualified. We enforce the Board's order.

BACKGROUND

On March 12, 1981, the Southern Missouri-Arkansas District Council, International Ladies Garment Workers Union, AFL–CIO (the Union) notified Horst Fischer, General Manager of the Hotel, that employees seeking Union representation would strike the next day. The Union's purpose in organizing the strike was to obtain recognition as collective-bargaining representative for a unit of service workers at the Hotel. On March 13, 1981, approximately sixty-six employees—including waitresses, maids, busmen, kitchen help, bellmen, and maintenance workers—did not report to work.

This strike occurred during the busiest time of the year for the Hotel. The Hotel was ninety-nine percent full with over one thousand guests registered. Consequently, Fischer immediately began hiring replacement workers in order to carry on business.

On March 16, 1981, three days after it began, the strike ended. At 5:00 p.m., the Union sent the Hotel the following telegram:

> On behalf of all striking employees we hereby apply unconditionally for reinstatement to their old positions andor their maximum employments rights under the law.

On March 17, the striking employees began returning to the Hotel, individually, and presented management with a form letter:

> I hereby apply unconditionally for my old job back, or if my old job is not available, my maximum employment rights under the law.

Upon notification of the strike's end, the Hotel ceased hiring replacements. Fischer then devised and administered a system for recalling strikers. Striking workers were categorized by their job titles, and were listed by Hotel-wide seniority within each title. Where no opening existed in the employee's pre-strike position, the employee was required to wait for such an opening, and was not considered for any other job regardless of his qualifications. The Hotel was fully aware that the strikers were qualified to fill many different hotel jobs, because it employed a practice of cross-training employees. Using this system, thirty-one strikers were immediately reinstated. Ten were recalled within several weeks. Twenty-five striking employees were not recalled and were locked into a job—specific chart.

From the end of the strike until December 11, 1981, when the record in this case closed, the Hotel hired over two hundred new employees in positions that the unrecalled strikers were qualified to fill. Also during that period, consistent with its policy of cross-training and developing multiple capabilities for its employees, the Hotel filled numerous vacancies by transferring employees, who had not been strikers, between departments.

On March 23, 1981, the Union filed an unfair labor practice charge alleging that the Hotel had violated section 8(a)(1), and (3), and (5) of the Act. This charge was subsequently amended and consolidated with a second charge. An administrative hearing was held on December 9, 10, and 11, 1981 before Administrative Law Judge Robert A. Gritta. On August 9, 1982, the ALJ issued his opinion, finding that the Hotel had violated section 8(a)(1) and (3) of the Act by failing to recall strikers to any position other than to their former jobs or their substantial equivalent, rather than recalling strikers to available positions for which they were qualified. On December 13, 1984, the Board adopted the findings and decision of the ALJ. The Board's order requires the Hotel to offer strikers reinstatement to their former jobs or, if unavailable, to substantially equivalent positions or, if unavailable, to positions for which they are qualified. The Board's order further requires the Hotel to make strikers whole for any loss of earnings suffered because of the discrimination against them. The Hotel filed a petition for review in this Court.

ANALYSIS

The Hotel argues that, with this decision, the Board has departed from its own precedent. In its view, the Act and prior Board decisions require employers to recall strikers only to their former or substantially equivalent positions, imposing no obligation upon employers to recall strikers to other positions for which they are qualified.

In determining that the Hotel was obligated to recall strikers to jobs for which they are qualified, the Board relied on *N.L.R.B. v. Fleetwood Trailer Co.,* 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614. *Fleetwood* addressed the question of whether a striker's right to reinstatement expires if, on the date he first applies for reinstatement, his position is filled by a replacement worker, or whether this right continues until a job becomes available. The Court determined that this right continues: "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." *Fleetwood,* at 381, 88 S.Ct. at 547, 19 L.Ed.2d at 619. We need not definitively rule as to the scope of this statement from *Fleetwood.*

Under the facts of this case, we find that the Board did not err in holding that the Hotel discriminated against the strikers by not offering them jobs for which they were qualified. The Hotel had a policy of cross-training and developing multiple capabilities for its employees. After the strike, the Hotel filled numerous vacancies by transferring employees, who had not been strikers, between unrelated jobs and departments. The transfers included: painter to dishwasher to houseman; houseman to hotel trainee; bar porter to furniture refinisher; bartender to room service manager; Tack Room waiter to room service waiter; Tack Room waitress to Venetian dining room waitress; maid to bath attendant; houseman to garage attendant; busboy to engine room worker; and busboy to room service waiter.

Although the hotel was hiring new employees and transferring non-strikers, it did not consider a striking housekeeping inspectress for any of twenty-two maid openings. Two bellmen were not considered for twenty-six new housemen openings. Three engine room employees, a maintenance man, a furniture refinisher, and a carpenter, were not considered for jobs as housemen either—despite the fact that the Hotel considered them qualified.

Further, a waitress, who had worked in the Venetian dining room before the strike, was not offered a job in the Tack Room, although a non-striking employee was transferred between the two rooms. In addition, the Hotel delayed reinstating at least eleven employees whose pre-strike or similar jobs became available.

The discriminatory restrictiveness in the Hotel's recall policy is particularly clear when viewed in light of the Hotel's long-term policy of favoring cross-training and multiple capabilities of all Hotel employees. As General Manager Fischer testified at the hearing: "I believe in cross-training."

The Hotel's recall policy, therefore, clearly discriminated against unreinstated strikers in favor of new job applicants and employees—including permanent striker replacements—already on the payroll. Thus, the burden was on the Hotel to establish a substantial and legitimate business justification for its discriminatory conduct.

The Hotel has asserted two justifications for its conduct, neither of which involves its ability to operate its business efficiently. Its first justification is that it did not offer the strikers any of the vacancies because it feared liability under the Act if it offered a striker anything but "substantially equivalent employment." Its other justification is that, in its view of the law, the strikers had no entitlement to those vacancies. Neither purported justification excuses its conduct. The decision of the Board is enforced.

NLRB v. Chaim Badad, Bernard Steinmetz and Emanuel Steinmetz, a Co-Partnership d/b/a J.R.R. Realty Co.

785 F.2d 46 (2d Cir.), March 4, 1986; rehearing denied April 8, 1986; cert. denied Oct. 6, 1986—273 NLRB 1523

On petition to enforce Board Order

Before LUMBARD, VAN GRAAFEILAND and MESKILL, Circuit Judges

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MESKILL, Circuit Judge: The National Labor Relations Board (NLRB or Board) found that respondent J.R.R. Realty Co. (J.R.R.) had violated subsections 8(a)(1), (3) and (5) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(a)(1), (3) and (5) (1982). The Board seeks enforcement of a remedial order requiring J.R.R. to cease and desist from the unfair labor practices, to recognize and bargain with intervenor, Local 32B–32J, Service Employees International Union, AFL–CIO (union), and to offer reinstatement and back pay to the discharged employees.

The petition to enforce the order is granted.

BACKGROUND

This labor dispute concerns events that took place in 1980 and 1981 at an apartment building in Queens, New York. The building was owned by JARU Properties, Inc. and ASCR Realty, Inc. (JARU and ASCR) and was managed by J.A.R. Management Corp. (J.A.R.). J.A.R. employed six members of Local 32B–32J to **48** run the building. The collective bargaining agreement between J.A.R. and the union contained a provision which stated that if J.A.R. sold the apartment building, it would require the purchaser to agree in writing to adopt the agreement and to offer employment to all of the employees.

In November 1980, JARU and ASCR entered into a contract to sell the apartment building to Joshua Estates, Inc., a nominee corporation for J.R.R. Realty.[1] The sale contract provided that the purchaser would take title "subject to" a variety of specified permitted encumbrances. The collective bargaining agreement with the union was specifically listed as one of the permitted encumbrances and a copy of the agreement was attached to the sale contract. J.App. at 179.

On March 31, 1981, at the title closing, attorney Harry Newman, on behalf of Joshua Estates, and Chaim Babad, on behalf of J.R.R. Realty, executed an assignment of the sale contract to J.R.R. Realty. At the same time, the former owners and J.A.R. specifically assigned the collective bargaining agreement between J.A.R. and the union to J.R.R. Realty. Finally, Joshua Estates and J.R.R. executed an indemnity agreement in which they agreed that title to the building was subject to all obligations of the sellers under the leases, contracts and agreements in effect on the closing date and to hold the sellers harmless from any claims and liabilities arising thereunder. Immediately after the closing, Babad and Newman told the attorney for JARU and ASCR that J.R.R. intended to replace all of the building employees.

On April 1, 1981, the day following the closing, one of J.R.R.'s partners, Chaim Babad, sent a family of five employees to live in and staff the building. That same day, Babad informed the superintendent, an elevator operator and a porter that they were discharged. Babad offered these three employees money to give up their jobs. Only one of the three accepted the offer. On April 2, the other two employees contacted the union. On April 3, union-organized picketing of the building began. Several days later, Babad again tried to induce the superintendent to leave his job and asked the superintendent to communicate Babad's offer to the other employees to make a "better deal but [with]out the union." J.App. at 45–47. Picketing continued throughout most of April. Late in the month, Babad and the union tried to settle the dispute. An agreement between J.R.R. and the union was prepared but never signed. Babad continued to negotiate directly with the six employees. By the end of the month all six employees had reached individual settlements with Babad; these settlements were conditioned upon release of all of the employees' claims against J.A.R. and J.R.R.

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[1] J.R.R. is a partnership composed of Chaim Babad, Bernard Steinmetz, Emanuel Steinmetz and members of their families. Coincidentally, Alfred Rose, J.R.R.'s secretary, was secretary of JARU and vice president of J.A.R. Management. J.App. at 266, 269, 270.

The union filed charges with the NLRB in April and May of 1981. The union alleged that J.R.R. committed unfair labor practices under subsections 8(a)(1), (3) and (5) of the Act when it refused to recognize and bargain with the union, when it discharged the employees because of their union membership and when it bypassed the union and negotiated individually with the employees.[2] At about the same time, the union filed a notice of intention to arbitrate against J.A.R. and J.R.R. in state court.[3]

In NLRB proceedings, the ALJ found that J.R.R. had committed an unfair labor practice when anti-union sentiment led it to discharge the predecessor's employees. The ALJ also found that J.R.R. was a successor employer under *NLRB v. Burns International Security Services,* 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), and thus had an obligation to recognize and bargain with the union. The ALJ concluded that J.R.R. breached that obligation when it bypassed the union and dealt individually with the employees.

A three member panel of the Board affirmed the ALJ's findings, conclusions and rulings. It adopted the ALJ's recommended order with a minor modification not relevant here. The Board now petitions for enforcement of its order. In response, J.R.R. contends that it did not assume the collective bargaining agreement and thus had no duty to bargain with the union or to recognize the union as the representative of the discharged employees. J.R.R. also contends that valid business purposes, not anti-union animus, prompted it to discharge its predecessor's employees.[4]

DISCUSSION

The Board's findings of fact are conclusive when they are supported by substantial evidence on the record as a whole. The Court should defer to the Board's interpretation and application of the Act in doubtful situations. *Local 259, U.A.W. v. NLRB,* 776 F.2d 23, 26 (2d Cir.1985); *see also NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers,* 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978); *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 691–92, 71 S.Ct. 943, 952–53, 95 L.Ed. 1284 (1951); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

There was substantial evidence from which the Board could conclude that J.R.R. assumed the labor contract. Once covered by the contract, J.R.R. could not "terminate or modify" the contract without adhering to the requirements of 29 U.S.C. § 158(d)(1)–(4). Since J.R.R. makes no pretense of such adherence, the question of whether J.R.R. had legitimate business reasons for refusing to continue its predecessor's employees in their jobs is irrelevant to this decision.

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[2] The relevant language of the Act provides:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with . . . or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> * * * *
>
> (3) by discrimination in regard to . . . tenure of employment . . . to . . . discourage membership in any labor organization . . .;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . .

29 U.S.C. § 158(a) (1982).

[3] J.A.R. and J.R.R. moved to vacate the notice of intention to arbitrate. The New York Supreme Court granted the motion, finding no evidence before it to indicate that J.R.R. was bound by the arbitration provision of the contract and finding that the union's filing of an unfair labor practice claim with the Board deprived it of jurisdiction to order arbitration. The Appellate Division modified the judgment of the Supreme Court. It affirmed the judgment of the lower court that J.R.R. was not bound by the arbitration provision. *J.A.R. Management Corp. v. Sweeney,* 86 A.D.2d 596, 446 N.Y.S.2d 193, 194 (1982).

[4] J.R.R. also argues that the Board was collaterally estopped from finding that it assumed the union contract because the New York Supreme Court found that J.R.R. did not expressly agree to adopt the contract. This argument is without merit. Collateral estoppel does not apply to issues that were not "essential to the judgment." *Tucker v. Arthur Andersen & Co.,* 646 F.2d 721, 728 (2d Cir.1981). The New York courts determined that J.R.R. was not bound by the *arbitration provision* of the labor contract. The New York court relied on cases requiring an express agreement *to arbitrate. American Utex Int'l v. ICC Corp.,* 74 A.D.2d 747, 425 N.Y.S.2d 579, 580 (1980), *aff'd,* 52 N.Y.2d 888, 437 N.Y.S.2d 304, 418 N.E.2d 1323 (1981); *Kahn v. Biernbaum,* 55 A.D.2d 589, 390 N.Y.S.2d 92, 93 (1976). The New York courts did not decide, and did not need to decide, whether J.R.R. was bound by the *other* provisions of the labor contract.

1. *Adoption of the Collective Bargaining Agreement*

There is no legal obligation to hire all of a predecessor's employees when one purchases the predecessor's business, but one may voluntarily assume the predecessor's labor contract. *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union,* 417 U.S. 249, 261, 94 S.Ct. 2236, 2243, 41 L.Ed.2d 46 (1974); *Burns,* 406 U.S. at 287, 92 S.Ct. at 1582. In determining whether an employer has assumed its predecessor's labor contract, the NLRB is not bound by technical

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rules of contract law; rather, it may adapt those rules to the collective bargaining context. *American Federation of Television & Radio Artists v. Inner City Broadcasting Corp.,* 748 F.2d 884, 886–87 (2d Cir.1984); *NLRB v. World Evangelism, Inc.,* 656 F.2d 1349, 1355 (9th Cir.1981); *NLRB v. Donkin's Inn, Inc.,* 532 F.2d 138, 141–42 (9th Cir.), *cert. denied,* 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179 (1976).

There is substantial evidence in the record in this case that J.R.R. assumed its predecessor's labor contract. The sale contract between JARU and ASCR, and Joshua Estates, specifically provided that the labor contract was a permitted encumbrance. At the closing both the sale contract and the labor contract were assigned to J.R.R. Moreover, J.R.R. agreed to indemnify JARU and ASCR from "all claims and liabilities arising under the . . . service and maintenance contracts." J.App. at 275. Joshua Estates, the named purchaser, was clearly acting as J.R.R.'s agent in the sale transaction. The immediate assignment of the sale contract and the deed to J.R.R. is evidence of this, as is the fact that Babad and Steinmetz, two J.R.R. partners, furnished personal checks for $110,000 of the $165,000 down payment for the sale. Furthermore, Alfred Rose, an officer of JARU and ASCR, stated that Babad and Steinmetz "were the intended purchasers of the building." J.App. at 18. Babad's repeated attempts to induce the union members to quit the union and sign releases of their claims are evidence of J.R.R.'s awareness of its obligations under the labor contract.

J.R.R. asserts that the agreement in the sale contract to take the property "subject to" the labor contract was not an agreement to assume the labor contract. This assertion is premised on J.R.R.'s view of New York property and contract law. Even if that view were correct, however, the Board is not bound here by principles of state contract law.

J.R.R. also claims that it did not execute the assignment of the labor contract. It fails to mention that Alfred Rose, who executed the agreement for the assignor, was also an officer of J.R.R. The Board was therefore permitted to conclude that Rose accepted the assignment for J.R.R. *See* note 1, *supra.*

The Board thus properly found that J.R.R., having assumed its predecessor's labor contract, was bound to abide by the terms of that contract.

2. *The Unfair Labor Practices*

The Board's finding that J.R.R. committed the unfair labor practices charged to it is supported by substantial evidence. One of J.R.R.'s partners, Babad, bypassed the union and bargained individually with the employees over the discharge of employees. This failure to bargain collectively with the union violated section 8(a)(5) of the Act. *See, e.g., NLRB v. Pepsi-Cola Bottling Co.,* 449 F.2d 824, 831 (5th Cir.1971), *cert. denied,* 407 U.S. 910, 92 S.Ct. 2434, 32 L.Ed.2d 683 (1972).

J.R.R. violated section 8(a)(3) of the Act when it discharged employees because of their union membership and replaced them with non-union employees. *See NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 692 (7th Cir.1982) ("Where anti-union considerations result in the layoff of employees, the employer has violated section 8(a)(3). . . ."). J.R.R. violated section 8(a)(1) of the Act when its partner, Babad, tried to induce union members to forego the protections of their union contract by renouncing their membership in the union and releasing J.R.R. from any claims that the union or its members might have against it. *Cf. NLRB v. Monroe Tube Co.,* 545 F.2d 1320, 1327 (2d Cir.1976) (solicitation of employee's withdrawal from union would violate section 8(a)(1) if facts and circumstances suggested that coercion was likely).

The Board's petition for enforcement of its remedial order is hereby granted.

NLRB v. Jarm Enterprises, Inc. d/b/a Blu-Fountain Manor

785 F.2d 195 (7th Cir.), March 4, 1986—270 NLRB 199

On petition to enforce Board Order

Before FLAUM and EASTERBROOK, Circuit Judges, and WILL, Senior District Judge *

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FLAUM, Circuit Judge: This appeal is before the court on an application for enforcement of a decision and order of the National Labor Relations Board ("the NLRB") and a cross-petition for review filed by Jarm Enterprises ("Jarm"). This dispute arose out of Jarm's purchase of a nursing home which was operating with replacement employees while its represented employees were striking for higher wages. By refusing to bargain with the union representing the nursing home's striking employees and by refusing to rehire the strikers, Jarm became enmeshed in an unfair labor practice proceeding before the NLRB. The Board ruled against Jarm issuing an order requiring bargaining, reinstatement, and backpay, and the present appeal was commenced. Before this court Jarm raises a number of issues concerning its status as a "successor" employer, the continued vitality of the union's role as a representative of the employees, its liability for the prior employer's replacement of striking employees and conduct of labor negotiations, and the appropriateness of the relief ordered. Finding that the administrative record adequately supports the NLRB's conclusions, we affirm.

I

This dispute arose out of Jarm's purchase of the Blu-Fountain Manor nursing home in Godfrey, Illinois from Fountainhead Development Corporation ("Fountainhead") on April 29, 1981. Since July 1, 1980 the United Food and Commercial

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Workers Union, Local 35, affiliated with the United Food and Commercial Workers International Union, AFL-CIO-CLC ("the Union"), had been the exclusive bargaining representative of a unit encompassing Fountainhead's employees. After certification the Union commenced collective bargaining negotiations which did not prove to be fruitful. The Union directed the employees to go on strike on October 14, 1980. This action continued until Jarm assumed control in May of 1981.

The strike began as an "economic" strike, a labor action designed to achieve an increase in benefits. However, according to the NLRB, certain activities in early 1981 transformed the strike into an unfair labor practice strike. On January 27, 1981, the Union, claiming that Fountainhead had asserted an inability to afford wage increases, demanded the right to examine the company's financial records. Approximately two weeks later Fountainhead refused to allow the Union access on the grounds that the company, in its view, never presented an inability to pay argument during any bargaining session. The Union responded by filing unfair labor practice charges against Fountainhead. These charges were dismissed by the Regional Director and subsequently appealed to the NLRB along with the Union's subsequent claims against Jarm.

Acting pursuant to its belief that the strike was economic, Fountainhead exercised its right to hire strike replacements. The record does not indicate whether the striking employees were replaced before or after the character of the strike allegedly changed on February 8, 1981. The NLRB concluded that the timing of the hiring of replacements was irrelevant since the absence of an actual discharge of the strikers prevented the replacements from being considered "permanent strike replacements."

This was the context which Jarm entered by exercising its option to purchase the Blu-Fountain Manor nursing home on May 1, 1981. Upon assumption of ownership Jarm immediately retracted the package of employee benefits provided by Fountainhead and rehired under new terms the Fountainhead employees working at the time of transfer of ownership, including the striker replacements. On May 8, 1981 the Union contacted Jarm and presented an unconditional offer to return to work and a request to commence collective bargaining. Jarm refused both submissions on the grounds that as a new employer it was not subject to the labor relationships established by Fountainhead and that the Union could not be deemed to represent the existing contingent of employees at

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

the nursing home. The refusal to rehire any of the strikers was not attributable to an inability to find available positions since the record indicates that in the months following the takeover Jarm either filled vacancies or advertised for enough positions such that they could have, if they wished, reemployed the strikers.

The Union filed unfair labor practice charges against Jarm. These charges were consolidated with the preexisting claims against Fountainhead, which had been revived on appeal from the Regional Director's decision, and presented before an administrative law judge. The ALJ found for the Union with regard to all issues and the NLRB sustained that decision.

The NLRB's decision as it relates to Jarm (Fountainhead did not seek review or refuse to comply with the order) relies on three related conclusions. First, the Board concluded that Jarm was a "successor" to Fountainhead. Jarm's contention that it was "radically different" enterprise was rejected. Second, as a successor Jarm was held to be subject to a duty to bargain with the exclusive bargaining representative of its predecessor. Since the Union was still within the one-year certification bar to challenges to its majority support at the time of the takeover, Jarm violated sections 8(a)(5) and derivatively 8(a)(1) of the NLRA. Third, the NLRB found that Jarm committed an unfair labor practice by failing to rehire the striking employees for the dual reasons that (1) Jarm refused reinstatement on the basis of anti-union animus and (2) Jarm, as a successor with knowledge, acquired Fountainhead's obligation to reinstate unfair labor practice strikers. Implicit in this final reason is that Fountainhead transformed the nature of the strike by committing an unfair labor practice through its refusal to reveal financial information.

In crafting a remedy with respect to Jarm it was held that Jarm purchased the nursing home with knowledge of the unfair labor practices alleged against Fountainhead. Under these circumstances Jarm was deemed to be in a position in which it could be held responsible for the violations attributable to its predecessor. Therefore the NLRB required Jarm to reinstate all striking employees with backpay starting from May 8, 1981, the date the Union unequivocally offered to end the walkout, and ordered the company to commence collective bargaining with the Union. Jarm refused to comply and the NLRB brought an enforcement action in this court. Jarm cross appealed for purposes of challenging the Board's determination.

II

This appeal hinges on the resolution of two interrelated issues. The first centers on Jarm's status as a successor under *NLRB v. Burns International Securities Services,* 406 U.S. 272, 275, 92 S.Ct. 1571, 1576, 32 L.Ed.2d 61 (1972), and its progeny. If there is a substantial continuity between Jarm and Fountainhead there is the potential for Jarm to be deemed to have acquired certain labor obligations of its predecessor. The second issue, which is contingent on affirming the NLRB on the first, relates primarily, but not entirely, to activities that occurred prior to the sale of Blu-Fountain Manor. Jarm's argument against rehiring the striking employees is based on establishing that Fountainhead's refusal to provide financial records did not convert the strike into an unfair labor practice strike where reinstatement would be required. Furthermore, the argument that the strikers were legally terminated is central to Jarm's claim that the lack of represented employees at the time of the takeover constituted unique circumstances that prevent application of the NLRB's one-year certification bar rule.

Appellate review of the labor board's actions is limited. "Factual findings supported by substantial evidence in the record as a whole are conclusive." *International Union of Operating Engineers v. NLRB,* 755 F.2d 78, 81 (7th Cir.1985) (citing *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951)). In *Operating Engineers* substantial evidence was held to exist where "the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" 755 F.2d at 81 (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)). *See also Bloomer Shippers Assoc. v. ICC,* 679 F.2d 668, 672 (7th Cir.1982). On the record before this court the NLRB did not commit reversible error in finding that Jarm had a duty to bargain with the Union and the obligation to reinstate the striking employees.

A. *Jarm's Obligations Under the Successorship Doctrine*

The threshold issue in this appeal is Jarm's status as a successor. From this status stems any possible obligation for its predecessor's duty to bargain and unfair labor practices. As a successor an employer is deemed to be operating, from the employees' perspective, the same entity as the previous employer, thus justifying an assumption that the change in ownership has not affected employee attitudes towards union representation. *See NLRB v. Burns International Securities Services,* 406 U.S. 272, 275, 278–80, 92 S.Ct. 1571, 1576, 1577–78, 32 L.Ed.2d 61 (1972); *Dynamic Machine Co. v. NLRB,* 552 F.2d 1195, 1201–03 (7th Cir.), *cert. denied,* 434 U.S. 827, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977); *NLRB v. Jeffries Lithograph Co.,* 752 F.2d 459, 463–64 (9th Cir.1985). Therefore the successorship inquiry revolves around the question of "whether there has been an essential change in the business that would have affected employee attitudes toward representation." *Premium Foods v. NLRB,* 709 F.2d 623, 627 (9th Cir.1983). *See also NLRB v. Hudson River Aggregates,* 639 F.2d 865, 869 (2d Cir.1981); *International Union of Electrical Workers v. NLRB,* 604 F.2d 689, 694 (D.C.Cir.1979); *NLRB v. Boston Needham Industrial Cleaning Co.,* 526 F.2d 74, 77 (1st Cir.1975).

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The NLRB in *Premium Foods,* 260 NLRB 708, 714 (1982), *enforced,* 709 F.2d 623, 629 (9th Cir.1983), enunciated a non-exhaustive list of the factors relevant in determining successorship, including whether:

> [a] there has been a substantial continuity of the same business operations; [b] the new employer uses the same plant; [c] the same or substantially the same work force is employed; [d] the same jobs exist under the same working conditions; [e] the same supervisors are employed; [f] the same machinery, equipment, and methods of production are used; and [g] the same product is manufactured or the same service [is] offered
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> * * *

206 NLRB at 714. *See also Jeffries Lithograph,* 752 F.2d at 463. There is, and can never be, however, a formal definition of a successor. Factors can be identified, as the NLRB has done, but the determination in each case involves the facts and the labor policy at issue. *See Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 262, 94 S.Ct. 2236, 2243, 41 L.Ed.2d 46 (1974).[1] Thus a finding that there has been no significant change in the enterprise from an employee perspective does not necessarily translate into a duty to bargain with the union or liability for a predecessor's unfair labor practices.

Jarm has proposed an exhaustive list of changes that it claims establish that Blu-Fountain Manor is a radically new enterprise under its current management. These substantial changes include: (1) the withdrawal from Medicare and Title 19 skilled care programs; (2) the abandonment of previous personnel policies in favor of Jarm policies; (3) the creation and elimination of certain supervisory positions and job classifications; (4) the introduction of a new computerized billing and accounting system; (5) the renovation of the doors, the sprinkler system, and the storage area at a cost of $60,000. The ALJ summarily concluded that the changes were not substantial enough to remove Jarm from the successor doctrine. A review of the administrative record demonstrates that there is substantial evidence for the NLRB's conclusion that generally speaking Jarm was a successor in the absence of countervailing policy considerations that may exist in this particular setting.

Most of the evidence that Jarm presents reveals only basic cosmetic modifications of the physical and organizational structure.[2]

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[1] The Court in *Howard Johnson* stated:

> The question whether Howard Johnson is a "successor" is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded to operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the Union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

417 U.S. at 262, 94 S.Ct. at 2243.

[2] *Cf. Tom-A-Hawk Transit, Inc. v. NLRB,* 419 F.2d 1025, 1027 (7th Cir.1969) (successor status found where wages and benefits differed and new bus routes, schedules and fares implemented but where basic operations and services remained the same); *NLRB v. Middleboro Fire Apparatus Inc.,* 590 F.2d 4, 8 (1st Cir.1978) (successor status found where new

Continued

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To the extent changes of substance were made, the overriding aspect of the acquisition by Jarm was the continuity of identity of the work force. Jarm hired *en masse* all of the employees of the nursing home as of the time of the takeover. *See, e.g., Howard Johnson Co.,* 417 U.S. at 263, 94 S.Ct. at 2244; *NLRB v. Wayne Convalescent Center, Inc.,* 465 F.2d 1039, 1041 (6th Cir.1972) ("the hiring of a large portion of the predecessor's employees is persuasive in finding successorship status"). *See also Dynamic Machine Co. v. NLRB,* 552 F.2d 1195, 1204 (7th Cir.), *cert. denied,* 434 U.S. 827, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977).

Jarm attempts to bolster its argument that it was not a successor bound to recognize the Union by claiming that while it did hire all of Fountainhead's employees at the nursing home these people were largely strike replacements who could not be deemed to support the Union.[3] Whatever intuitive appeal this argument may have, it is unpersuasive because it assumes away the core of the dispute. Jarm ignores the questions of (1) whether the striking employees remained part of the bargaining unit by virtue of Fountainhead's activity and thus were entitled to priority to employment over the replacements; and (2) whether the one-year certification bar rule prevents Jarm from contesting the Union's support among the nursing home's employees. Thus, the ALJ's summary treatment of the continuity of enterprise issue was supported by the record. Jarm's "new business" claim relying on the strike replacement work force should not be used to distract attention from the salient fact that unlike *Howard Johnson,* a case heavily relied on by Jarm, the transaction here involved simply a transfer of ownership, not a substantial revamping of organizational structure where either a small percentage of the predecessor's employees were hired or the modifications in operations resulted in an undermining in attitudes toward representation.

B. *Duty to Reinstate Striking Employees*

The NLRB offered two justifications for ordering Jarm to reinstate the strikers. The first rationale was that Jarm's refusal to rehire the strikers was motivated by anti-union animus and was thus in violation of sections 8(a)(1) and 8(a)(3) of the NLRA. The prime evidence of animosity was Jarm's insistence on not hiring the former striking employees despite a substantial number of openings in the months following the purchase. There is no *direct* evidence of any anti-union animosity. As Jarm correctly points out,

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drawing an inference of animus from hiring practices alone is particularly troublesome where a successor purchases based on a belief, albeit erroneous, that recent events have rendered the enterprise non-unionized and where the former strikers were involved in an occasionally violent labor action. While intent can be proved circumstantially, *see NLRB v. Industrial Erectors, Inc.,* 712 F.2d 1131, 1136–37 (7th Cir.1983), courts have required more than the failure to hire union people for available positions. *See, e.g., Industrial Erectors,* 712 F.2d at 1137 ("Among the factors the Board may consider in determining whether there were discriminatory discharges are a record of *manifest* hostility toward unionization, combined with knowledge of the discharged employees' union activity; coincidence in time between the employees' union activity and their discharges; good work records of discharged employees; and implausible or shifting explanations

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employer did more "refurbishing" of equipment than predecessor and planned "to expand into manufacturing" but where "projects continue[d] to use essentially the same skills & tools"); *NLRB v. Band-Age Inc.,* 534 F.2d 1, 6 (1st Cir.), *cert. denied,* 429 U.S. 921, 97 S.Ct. 318, 50 L.Ed.2d 288 (1976) (successor status found where, despite the production of a somewhat different product, "most of its employees were doing the same jobs they had performed previously"); *NLRB v. Polytech, Inc.,* 469 F.2d 1226, 1230–31 (8th Cir.1972) (successor status found where, despite the discontinuation of some of predecessor's products—which did not demonstrate that "essential nature of the enterprise" had changed—new employer continued in the same industry).

[3] Jarm also relies on dicta from *Burns Security Service* where the Court stated that the case "would be different if Burns had not hired employees already represented by a union certified as a bargaining agent." This argument begs the question by assuming that the striker replacements are not "deemed" to support the Union and that the striking employees are effectively and permanently discharged.

As an additional point Jarm argues that there was no finding that the bargaining unit at the nursing home under Fountainhead was appropriate after Jarm's takeover. It is argued that the administrative law judge misunderstood a stipulation by Jarm as to the scope of the unit certified for Fountainhead by finding that the parties stipulated to the appropriateness of the bargaining unit. While the transcript of the hearing evidences the source of any possible confusion, Jarm is not completely wrong in stating that it did not make the stipulation for which it is credited. Even without the stipulation, however, there are, as noted by the administrative law judge, adequate facts in the record to affirm the finding of successorship. If, as Jarm conceded, the unit was appropriate for Blu-Fountain Manor under Fountainhead and it is established that no substantial changes were made by Jarm there is no reason to doubt that the change in ownership did not alter the proper unit. This is particularly persuasive where the existing unit is limited to a specific facility rather than firm-wide.

for the discharges.") (emphasis added). *See also NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187, 192 (7th Cir.1982). The record here does not establish a prima facie case against Jarm of hiring based on anti-union animus.

The second rationale for imposing a reinstatement obligation on Jarm, however, is more persuasive. A successor with notice of an existing unfair labor practice charge against the predecessor can be held accountable for remedying these past wrongs. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182–86, 94 S.Ct. 414, 424–26, 38 L.Ed.2d 388 (1973) (approving principles announced in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enforced sub nom., United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir.1968)). The basis for this principle is not focused on the conduct of the successor but rather the need to prevent mere changes in the title to the business from frustrating the national labor policy of remedying unfair labor practices. *See generally Golden State Bottling Co.*, 414 U.S. at 174–86, 94 S.Ct. at 420–26. Thus Jarm can be found to have committed an unfair labor practice by refusing to rehire the workers if the actions of Fountainhead created a right to reinstatement which Jarm was derivatively obligated to fulfill.

When a strike starts as or becomes an unfair labor practice strike, a labor action in response to the proscribed activities of the employer, the striking employees are entitled to immediate reinstatement whenever they so request regardless of whether permanent strike replacements have been hired.[4] *See Griffin Pipe Division v. NLRB*, 320 F.2d 656, 659 (7th Cir.1963); *NLRB v. Top Manufacturing*, 594 F.2d 223, 225 (9th Cir.1979); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir.1978). A successor with notice of the unfair labor practice can be subject to the duty to rehire under the principles of *Golden State Bottling*. NLRB v. Fabsteel Co. of Louisiana, 587 F.2d 689, 693 (5th Cir.1979).

1. *Fountainhead's Unfair Labor Practice*

The Union's strike against Fountainhead started as an economic strike. It was not until Fountainhead allegedly committed an unfair labor practice by asserting an inability to pay and then refusing to give the Union access to its books that the character of the strike was deemed to be transformed. In order to comply with the duty to bargain in good faith under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), an employer must furnish information necessary for a union to discharge intelligently its duties as bargaining agent. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956). The key issue in disclosure of information cases is relevancy, and financial information becomes relevant whenever the employer asserts a financial inability to meet union demands. *See Truitt Manufacturing*, 351 U.S. at 152, 76 S.Ct. at 755; *Tony's Meat, Inc.*, 211 NLRB 625, 626 (1974) (employer who claims inability to pay must provide information which allows "the Union to intelligently determine whether the [employer] was making its best offer."); *Stanley Building Specialties Co.*, 166 NLRB 984 (1976).

With regard to Fountainhead's conceded refusal to provide financial information this question comes down to a credibility contest between various witnesses over whether Fountainhead actually asserted an inability to pay. The Board resolved these credibility determinations in favor of the Union. Both parties devote extensive portions of their briefs to arguing over who made what comment and what was actually meant by various statements. Jarm is essentially requesting this court, on the basis of briefs and a cold record, to reevaluate the credence and weight that should be given to testimonial evidence of whether or not Fountainhead claimed an inability to pay. This is not the role of an appellate court. These types of credibility determinations "will not be overturned by a reviewing court absent extraordinary circumstances." *NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 687 (7th Cir.1982). In *Medline Industries, Inc. v. NLRB,* 593 F.2d 788, 795 (7th Cir.1979), "extraordinary circumstances" were described as a "complete disregard for sworn testimony, coupled with a tongue in cheek characterization of those utterances." In this case, the ALJ and the Board gave specific and thoughtful reasons for crediting the testimony of the Union officials over that of Fountainhead's officers.

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[4] Jarm's argument that if the strike remained economic it was relieved of any obligation to rehire mischaracterizes the law. In fact the stakes are not so high: the characterization of the strike only impacts upon the dates on which Jarm should have rehired. The hiring of permanent strike replacements is permissible activity during an economic strike. *NLRB v. Cutting, Inc.*, 701 F.2d 659, 662 (7th Cir.1983) ("an employer has the right to continue business operations during a strike and presumably cannot obtain replacements for that purpose unless it offers them permanent employment"). Nevertheless, a legal economic strike (there is no allegation that this was an illegal strike) is protected activity under the NLRA. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379, 88 S.Ct. 543, 546, 19 L.Ed.2d 614 (1967). This court has held that when economic strikers offer to return to work they are entitled to return unless the employer provides a legitimate business reason. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir.1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100 (1970). The returnees, unlike unfair labor practice strikers, however, are not given priority over permanent strike replacements but are entitled to any openings that develop after the termination of the strike. *Laidlaw*, 414 F.2d at 103–04. Thus, Jarm as a successor had an obligation to rehire the strikers because under *Laidlaw* they remained "employees" of a business in which the successor hired all existing employees. Since the record indicates that openings existed in the months following the strike, Jarm committed an unfair labor practice by refusing to rehire the strikers. Therefore, the unfair labor practice issue is relevant only to the issue of whether the backpay order can date back to the date when the return to work offer was made.

> It should also be noted and pointed out that the credited testimony and facts found in this Decision are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial records and exhibits with due regard for the logic of probability, the demeanor of the witnesses and the teaching of *N.L.R.B. v. Walton Manufacturing Company,* 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. As has been frequently indicated in these types of cases—the ultimate choice between conflicting testimony rests on the *demeanor* of the witnesses, the weight of the evidence, the established or admitted facts, the inherent probabilities, the reasonable inferences drawn from the incidents and events, and in sum, all of the other variant factors which a trier of fact must consider in resolving credibility.

On this record Jarm has presented nothing that would seriously undermine this court's confidence in the agency's determination that Fountainhead committed an unfair labor practice.

2. *Conversion of the Economic Strike*

The mere fact that an unfair labor practice was committed during the course

of a strike does not automatically transform the action into an unfair labor practice strike. This transformation is contingent on the employer's activities serving to "aggravate or prolong the strike." *Vulcan Hart Corp. v. NLRB,* 718 F.2d 269, 276 (8th Cir.1983). *See also NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 840 (5th Cir.1978) ("The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor."). The NLRB concluded that Fountainhead's failure to bargain in good faith prolonged the strike and this inference will be sustained if supported by "substantial evidence on the record as a whole." *NLRB v. Colonial Haven Nursing Homes, Inc.,* 542 F.2d 691, 704 (7th Cir.1976).

This is not the classic example of strike conversion where the unfair labor practice becomes an issue that further motivates the strikers. *Cf. Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1079–82 (1st Cir.1981) (no evidence that unfair labor practice prolonged strike where it had no impact on bargaining and was not part of striker's protests). *See also Colonial Haven,* 542 F.2d at 704–06. There is no evidence that the refusal to provide financial information ever became an issue among the strikers. The ALJ did find, however, that Fountainhead's actions precluded the Union from evaluating the employer's position, as well as its own, and thus precluded meaningful bargaining which could have expedited settlement of the wage dispute. In fact, the record reveals that the refusal to reveal financial data resulted in a cessation of all bargaining.

The primary motivation of the strike appears to be the failure to make any progress on the wage increase issue. If this failure can be attributed to a hardline bargaining position taken by Fountainhead, as Jarm contends, then the strike would remain economic. *Soule Glass,* 652 F.2d at 1082 (adamant insistence on a position does not equal bad faith); § 8(d) of the Act, 29 U.S.C. § 158(d) (the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"). However, Fountainhead's bargaining can be characterized as bad faith on the basis of its position with regard to the financial information. Bad faith bargaining which precludes settlement of an economic strike can serve to convert the strike into an unfair labor practice action. *See NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir.1978). Given the evidence that the Union was willing to arbitrate and the conclusion of the ALJ that the bargaining history and testimony established that the Union was willing to make meaningful concessions if necessary, there is sufficient evidence to support the inference that Fountainhead's unfair labor practice substantially lengthened the strike. This evidence also supports a conclusion that the strike was in part "caused" by what was revealed to be the employer's bad faith bargaining.

3. *Remedial Relief Against Jarm*

The foregoing analysis establishes a right to reinstatement against Fountainhead. For this obligation to extend to Jarm it must be determined that Jarm is a successor for these purposes. *See Howard Johnson*, 417 U.S. at 262, 94 S.Ct. at 2243. As discussed in Part II, there is no basis for disturbing the NLRB's conclusions regarding the continuity of the enterprise. Successor liability for past unfair labor practices, however, requires more than continuity of operation; the Board must evaluate the facts in order to strike "a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." *Golden State Bottling Co.*, 414 U.S. at 181, 94 S.Ct. at 423. Central to this balance in a case of derivative remedial relief is a finding that the successor had notice of the unfair labor practice. *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enforced sub nom., U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir.1968).

Jarm does not contest the NLRB's broad discretion in the formulation of remedial relief. *See Fibreboard v. NLRB*, 379 U.S.

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203, 215–16, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964); *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943). In fact, the Fifth Circuit in *NLRB v. Fabsteel Co. of Louisiana*, 587 F.2d 689 (5th Cir.1979) held that the NLRB could order a successor to reinstate unfair labor practice strikers "*regardless* of the fact that permanent replacements have been hired." 587 F.2d at 693. Jarm contends that the balance of interest struck by the Board was improper since Jarm bought the nursing home unaware of the potential liability.

The record reveals quite clearly that Jarm's attorney was put on notice by Fountainhead prior to the close of the transaction of an appeal of the Regional Director's denial of the Union's Section 8(a)(5) claim against the nursing home. Jarm contends that this did not constitute notice since it was also informed by Fountainhead's counsel that in his opinion the claim was meritless.

This argument is unpersuasive. A party who acts in reliance upon an initial determination despite the pendency of an appeal assumes the risk that the actions may later be found to be unlawful. *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir.1984). Jarm was aware of the labor problems at Blu-Fountain at the time of purchase and its reliance on the future prospects of the Union's claim was misplaced. This awareness of Fountainhead's violation is further reflected in the contract of sale in which Jarm attempted explicitly to deny any obligation running from Fountainhead's collective bargaining relationship. On these facts the Board was within its discretion in finding that Jarm was under an obligation to reinstate the strikers on May 8, 1981, the date of the unconditional offer to return to work. By refusing this offer Jarm itself violated Section 8(a)(5) and is justifiably required to reinstate the strikers.

In addition to the reinstatement order, the NLRB also requested that Jarm provide backpay starting from May 8, 1981. Jarm contests the fairness of the order on the grounds that it is being required to bear the burden for its predecessor's wrongs.[5] In reality, however, the backpay remedy is limited to Jarm since it extends back only to the beginning date of Jarm's individual, albeit derivative, wrongful conduct.

C. *The Duty to Bargain with the Union*

The majority status of a certified union is irrebutably presumed for a reasonable period, ordinarily one year after certification. *Brooks v. NLRB*, 348 U.S. 96, 98, 75 S.Ct. 176, 178, 99 L.Ed. 125 (1954).

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[5] Jarm also claims that the omission of an indemnity clause in the contract with Fountainhead adds to the inequity of the backpay award. This argument lacks merit for two reasons. First, a party to a contract's failure to obtain adequate protection cannot be allowed to have ramifications to the national labor policy. Second, the relief ordered here does not extend liability to periods prior to Jarm's actionable wrong of failing to reinstate.

This "certification year bar" precludes a challenge to majority status in the absence of "unusual circumstances" even if a successor is involved. *Dynamic Machine Co.,* 552 F.2d 1204–05. Three circumstances that are sufficient to rebut the presumption have been identified:

> (1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time.

Brooks, 348 U.S. at 98–99, 75 S.Ct. at 178. Jarm does not argue and the record does not indicate that any of these circumstances exist in the instant case. While this list is not exhaustive "[o]nly circumstances of comparable magnitude can overcome the certification bar when it is applied, as in *Burns,* to successor employers who hire a majority of their predecessor's employees and continue their predecessor's operations and practices." *Dynamic Machine Co.,* 552 F.2d at 1205.

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Jarm argues that a special situation in this case is the hiring of strike replacements who should not be presumed to support the Union. This contention presents an opportunity for this court to enter the fray that has developed over the continued validity of the NLRB's presumption that strike replacements support the union in the same percentage as did the strikers. *Compare NLRB v. Randle-Eastern Ambulance Service, Inc.,* 584 F.2d 720, 728 (5th Cir.1978) (presume strike replacements do *not* support the union); *National Car Rental System, Inc. v. NLRB,* 594 F.2d 1203, 1206 (8th Cir.1979) (in accord); *Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1110 (1st Cir.1981) (in accord); *with NLRB v. Windham Community Memorial Hospital,* 577 F.2d 805, 813 (2d Cir.1978) (approving Board presumption); *NLRB v. Pennco, Inc.,* 684 F.2d 340 (6th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982). *See also Pennco, Inc.,* 459 U.S. at 996, 103 S.Ct. at 356 (White, J. dissenting from the denial of certiorari, joined by Blackmun, J. and Rehnquist, J.).

Despite Jarm's arguments this case does not require this court to deepen the existing rift between the circuits. First, the cases supporting Jarm's argument with regard to strike replacements (cases cited above) all dealt with the presumption of majority status *after* the one-year certification bar has expired. After one year the presumption can be rebutted by a showing of loss of majority status. *See National Cash Register Co. v. NLRB,* 494 F.2d 189, 193–94 (8th Cir.1974). Jarm has cited no cases where the existence of strike replacements was sufficient to overcome the certification bar rule.

Second, and more significantly, even the courts that presume strike replacements do not support the union would not apply the same rule where the loss of majority is caused by an unfair labor practice by the employer. *See Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 687, 64 S.Ct. 830, 834, 88 L.Ed. 1007 (1944); *Soule Glass,* 652 F.2d at 1110. As discussed above, under these circumstances the strikers were still employees of the nursing home at the time of the transfer and were entitled to immediate reinstatement. Thus, in light of the validity of the reinstatement order, Jarm has failed to establish that there is a reasonable doubt that a majority of the employees *properly in the unit* do not support the Union, even if strike replacements are presumed to not want representation. Since the burden is on the employer to rebut the certification bar rule's presumption, Jarm has failed to present an analysis of the employment situation that would allow the evaluation of any claim of loss of majority status. Based upon the record before this court, a record Jarm as a party had a major role in developing, this case must be viewed as a situation where a successor's improper refusal to reinstate unfair labor practice strikers is the cause of the claimed loss of majority status. Under the circumstances of this case the NLRB's bargaining order must be affirmed.

III

For the foregoing reason the enforcement of the Board's order is granted.

Quality Inn Waikiki v. NLRB

NLRB v. Quality Inn Waikiki

783 F.2d 1444 (9th Cir.), March 4, 1986; rehearing denied April 22, 1986—272 NLRB 1

On petition to review Board Order

Before GOODWIN, NELSON and CANBY, Circuit Judges

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NELSON, Circuit Judge: The Quality Inn Waikiki Hotel ("Quality Inn") petitions for review of a decision of the National Labor Relations Board ("NLRB" or "Board") ordering Quality Inn to cease its refusal to bargain in violation of Sections 8(a)(1) and (a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5) (1982). Quality Inn admits its refusal to bargain with the Culinary and Service Workers Union, Local 555, AFL-CIO ("Local 555"), but argues that Local 555 should not have been certified because of a disqualifying conflict of interest. We have jurisdiction under 29 U.S.C. § 160(e, f) (1982), and we grant the NLRB's cross-application for enforcement.

FACTUAL AND PROCEDURAL HISTORY

This case revolves around a complex relationship among Arthur Rutledge, his non-profit corporation, his son Anthony, two hotels, an International Union, and two Locals affiliated with the International. The events surrounding this relationship, all occurring in Hawaii, are not in dispute.

In 1951, Arthur Rutledge founded Unity House as a nonprofit corporation intended to benefit all present and past members and friends of labor. Arthur is, and always has been, the President of Unity House. In 1957, Unity House constructed a building "to provide offices and administrative services for Unity House and other labor organizations." A loan from the Hotel Restaurant Employees and Bartenders Union Local 5 ("Local 5"), an affiliate of the Hotel Restaurant Employees and Bartenders International Union, AFL-CIO ("HERE International"), helped finance this construction. Local 5 located its offices in this building after construction.

In 1972, Arthur and Unity House built the Waikiki Marina Hotel in order to provide income to Unity House. The Waikiki Marina voluntarily recognized Local 5 as the collective bargaining representative of certain of its employees in October 1973. At that time, Arthur Rutledge was the Chief Executive Officer of Local 5, and a Vice President of HERE International. In light of Arthur's relationship to both Local 5 and the Waikiki Marina, and Local 5's loan to Unity House, the ILWU Local 142 filed unfair labor practice charges in response to this voluntary recognition. The parties reached a settlement agreement which prohibited the Waikiki Marina from recognizing Local 5 until Local 5 had divested itself of all management control over the hotel.

HERE International chartered the Culinary and Service Workers Union, Local 555, AFL-CIO ("Local 555") in 1974. Twenty-five applicants, all former Local 5 members, signed the charter petition. HERE International appointed Anthony Rutledge, Arthur's son, as Local 555's Administrative Agent. At the same time, Anthony was a Vice President of Local 5. In its early years, Local 555 also located its offices in the Unity House building, but did not pay rent. Local 5 provided Local 555 with bookkeeping, secretarial and telephone services.

The Waikiki Marina voluntarily recognized Local 555 in August 1974, prompting a reaction similar to that surrounding the voluntary recognition of Local 5. Proceeding on the theory that Local 555 and Local 5 were alter egos, the ILWU Local 142 filed unfair labor practice charges. The parties again reached a settlement agreement in which "the Waikiki Marina agreed to cease recognizing Local 5 andor Local 555 . . . until said labor organization, their agents, officers, and representatives, have divested themselves of all management control over the Waikiki Marina. . . ." [1]

HERE International placed Locals 5 and 555 under trusteeship in late 1978 or early 1979, appointing Joseph Belardi as trustee and Anthony Rutledge his assistant. In April 1979, HERE ordered Anthony to turn over all of his duties regarding Local 555, including those of assistant trustee, to Belardi. In January 1980, after dissolution of the trusteeship, Local 5's newly-elected President fired both Arthur and Anthony from their positions with Local 5, and moved Local 5 out of the Unity House building. Arthur Rutledge resigned his position as a HERE International Vice President in January 1981, and his only remaining union position apparently was as President Emeritus of Local 5. Subsequently HERE International appointed Anthony Rutledge as its Vice President. Thus, he no longer held any position in Local 5 or Local 555, but was a Vice President of HERE, sat on its Ex-

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[1] The Ninth Circuit enforced the NLRB's order February 11, 1976, Civil No. 75-3613.

ecutive Board, and was its organizer for the State of Hawaii.

August 3, 1979, after Local 555 elected new officers, it petitioned to represent the employees of petitioner, the Quality Inn Hotel. Pursuant to a stipulation executed by Quality Inn and Local 555, the NLRB held an election December 30, 1980, in which 64 employees voted for representation by Local 555, and only 24 voted against it. Among Quality Inn's objections to the election was that Local 555 and its alter ego Local 5 either own or effectively control the Waikiki Marina, a direct competitor of the Quality Inn. This involvement, Quality Inn claimed, creates for Local 555 a disqualifying conflict of interest. The Hearing Officer rejected this claim, and the NLRB agreed, certifying Local 555 as a bargaining representative on December 6, 1982.

Following this certification, Quality Inn refused to bargain with Local 555. Local 555 filed an unfair labor practice charge January 17, 1983, and the NLRB issued a complaint February 28, 1983. Quality Inn admitted its refusal to bargain, but claimed that Local 555's certification was improper. The NLRB, refusing to relitigate the conflict of interest question because Quality Inn presented no relevant new evidence, granted summary judgment in favor of Local 555 on September 17, 1984.

Quality Inn filed this timely petition for review January 17, 1985, and the Board filed its cross-application for enforcement March 20, 1985.

STANDARD OF REVIEW

We will enforce the Board's order if the Board correctly applied the law and if substantial evidence in the record viewed as a whole supports the Board's findings of fact. *NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir.1981). We yield to the Board's reasonable interpretation and application of the Act. *NLRB v. Action Automotive, Inc.*, —— U.S. ——, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985).

DISCUSSION

In assessing a conflict of interest claim, we look to "those key powers which a [L]ocal bargaining agent must be able to exercise with undivided loyalty if it is to engender confidence at the bargaining table." *NLRB v. David Buttrick Co.*, 361 F.2d 300, 307 (1st Cir.1966). Chief among these powers is the Local's ability to disregard the advice of the International and to conclude collective bargaining negotiations independently. *Id.* at 306–07. The resisting employer need not show that the Local has, in fact, abused its trust; it is sufficient to show that the Local has sufficient power and temptation to do so. *Id.*

However, in light of the strong policy favoring the right of employees to have a bargaining representative of their own choosing, an employer who refuses to bargain with an elected representative has "a considerable burden . . . to come forward with a showing that the danger of a conflict of interest interfering with the collective bargaining process is clear and present." *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir.1968). Furthermore, the NLRB has "considerable discretion in conducting elections and resolving disputes concerning representation." *NLRB v. Pinkerton's Inc.*, 621 F.2d 1322, 1324 (6th Cir.1980). Due to its expertise, the NLRB is peculiarly qualified to assess a Local's motivation in representing employees. *NLRB v. H.P. Hood, Inc.*, 496 F.2d 515, 519 (1st Cir.1974). Thus, we will **1447** not second-guess the Board's decision regarding disqualifying conflicts of interest so long as substantial evidence supports it. *See NLRB v. Action Automotive, Inc.*, —— U.S. ——, 105 S.Ct. 984, 989, 83 L.Ed.2d 986 (1985) (refusal to second-guess Board's informed judgment that employees excluded from bargaining unit due to familial relationship with employer). The legality of Quality Inn's conduct is judged in light of the situation as it existed when Quality Inn refused to bargain. *H.P. Hood, Inc.*, 496 F.2d at 518. Since Quality Inn admits its refusal to bargain, substantial evidence supports the Board's order if the Board properly certified Local 555. *Pinkerton's, Inc.*, 621 F.2d at 1325.

A. Control and Influence By Arthur Rutledge

Quality Inn first argues that the combination of Anthony Rutledge's power over Local 555 and his familial relationship with Arthur Rutledge disqualifies Local 555 from representing Quality Inn employees. It claims that there is an inherent familial allegiance between Anthony and his father Arthur, as evidenced by parallel career paths, a continuous and close relationship, and use of their positions to provide each other with special benefits. Through the combination of this allegiance and Anthony's positions with HERE International, Quality Inn concludes that Anthony has "sufficient power and temptation to use his position to benefit his father, who operates a competitor of Quality Inn, when negotiating on behalf of Local 555. . . ."

The Hearing Officer ("H.O."), after noting the heavy burden on Quality Inn to establish a disqualifying conflict of interest, rejected this argument. As to Anthony's control over Local 555, the H.O. stated that "[t]he record is uncontroverted that the chief executive officer of Local 555 is free to accept or reject advice from Anthony Rutledge." As to the inherent allegiance between Anthony and Arthur, the H.O. found "no evidence sufficient to establish that Anthony . . . is subject to the control of his father. Nor does the record contain any evidence to suggest that Anthony . . . will take his father's interests into account should he be called by Local 555 to assist in negotiating [a] collective bargaining agreement. . . ."

Substantial evidence supports these findings.[2] Before a hearing officer, Anthony testified that he has not had control or authority over Local 555 since HERE International removed him as administrative agent in 1979. He also testified that he plays no part in the performance of the duties and responsibilities of Local 555's executive officers, giving them assistance and advice only if asked. Thus, Anthony stated, Local 555's officers have complete autonomy, and are free to ignore any advice or assistance he might give.

The testimony of other witnesses corroborates that of Anthony. Frank Rutgers, Jr., past-President of Local 555, testified that Anthony had no control, supervision or authority over the running of Local 555. Rutgers stated that he had not taken orders from Anthony in any way since 1979, when Anthony was removed from his job as an officer of Local 555. JoAnn Ferreira, Secretary-Treasurer of Local 555, testified that Anthony assists in negotiations for Local 555 because of his knowledge of the employers and their backgrounds. She also stated that only employees and officers can finalize contracts, and that Anthony has never signed a contract, hired employees, or fired employees for Local 555, or been compensated by Local 555 for his work. Finally, William Kurch, a business agent and organizer for Local 555, testified that Local 555 asked Anthony to assist in negotiations because of his familiarity with the hotel industry. Kurch also testified that Local 555's officers prepared any contract proposals Anthony presented on Local 555's behalf.

The testimony does not support the claim that Anthony and Arthur used their respective positions to provide each other with "special benefits." For instance, Quality Inn claims that Arthur procured a reduced rate for Anthony at the Waikiki Marina. However, according to Hugh Menefee, Jr., manager of the Waikiki, Anthony received the same discount available to all of those who, like Anthony, were renting on a monthly basis. Menefee also stated that Anthony did not get special privileges or discounts in the hotel restaurant.

Thus, substantial evidence supports the Board's decision that Local 555 should not be disqualified because of its relationship with Anthony. The testimony supports the finding that Anthony, through HERE International, did not have sufficient power to direct Local 555. *Cf. NLRB v. H.P. Hood, Inc.*, 496 F.2d 515, 519 (1st Cir.1974) (powers of International limited and possibility of its intervening in local bargaining remote). This finding distinguishes this case from *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314, 317 (1971), in which the person with the alleged conflict of interest was a "business agent . . . with 'exclusive control or jurisdiction over [the collective bargaining negotiations in] the Harlem area,'" and the overseer of contract execution and grievance processing. Quality Inn has failed to meet its considerable burden of showing that Local 555 lacks the autonomy necessary to rebut the conflict of interest claim.

B. Relationship Between Local 5 and Local 555

Quality Inn's second argument centers on the relationship between Local 5 and Local 555. Quality Inn claims that "Local 555 is the 'illegitimate child' of Local 5, created in direct response to the problems Local 5 encountered when it attempted to gain recognition as bargaining representative for

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[2] We review the H.O.'s findings of fact because the Board adopted those findings.

Quality Inn employees."[3] Quality Inn points to the fact that 25 former members of Local 5 signed Local 555's charter petition, and to the various administrative services provided by Local 5 to Local 555. In addition, Quality Inn relies on the fact that both Locals are "subservient" to HERE International. From this complex of relationships, Quality Inn concludes that there is "an innate and proximate danger that HERE International may exert pressure upon Local 555 to take action adverse to or refrain from taking action favorable to Quality Inn employees in order to protect Local 5's loans to Unity House."

The H.O. rejected this argument, stating:

> [I]t is uncontroverted that since July 1979, Local 555 and Local 5 have had separate offices and that Local 555's elected officials have run the local on a day-to-day basis. The record contains no evidence to suggest [that] any official of Local 5 has exercised or attempted to exercise any authority over Local 555 during this period. In these circumstances I am compelled to conclude that Local 5 and Local 555 are separate and distinct labor organizations. The mere fact that both locals are members of the same international union does not compel a different conclusion.

Substantial evidence supports these findings. Arthur Rutledge testified that "Local 555 is an organization . . . separate and apart from Local 5." Contrary to Quality Inn's assertion regarding the creation of Local 555, Anthony Rutledge testified that HERE International chartered Local 555 because of a perceived need to organize services industries and restaurants in smaller hotels not organized by Local 5. Indeed, it appears that Local 5 and Local 555 have become rivals, not allies; Local 5's complaint arising out of a jurisdictional dispute with Local 555 prompted HERE International's decision to transfer 10 hotels from Local 5 to Local 555. Though at one time, a disqualifying relationship may have existed between the two Local un-

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ions,[4] Local 555 is not "unredeemably tainted by its history—relevant though that history may be." *National Food Stores Of Louisiana, Inc.*, 186 NLRB 127, 128 (1970). Substantial evidence supports the conclusion that at the time Quality Inn refused to bargain with Local 555, there was not a disqualifying relationship between Local 5 and Local 555.

Quality Inn's petition for review is DENIED. The NLRB's cross-petition for enforcement is GRANTED.

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[3] Petitioner probably intended to make this statement with reference to the Waikiki Marina hotel, not the Quality Inn. HERE International chartered Local 555 in 1974 during the controversy surrounding the voluntary recognition of a bargaining representative for the Waikiki Marina's employees. This controversy occurred well before Local 555's representation of Quality Inn's employees came into question.

[4] Anthony stipulated that until April 1979, business agents conducted common servicing and organizing for Local 5 and Local 555; that the Locals transferred bargaining units from one union to the other; that Local 555 may have used the facilities assigned to Local 5; and that Local 555 utilized some of the same support staff. We need not decide whether these entanglements, which ended well before Local 555 even petitioned to represent Quality Inn's employees, constituted a disqualifying relationship.

Miles T. Jackman v. NLRB

784 F.2d 759 (6th Cir.), March 5, 1986—Case 7—CA—19480

On petition to review Board Order

Before KEITH and KRUPANSKY, Circuit Judges, and PECK, Senior Circuit Judge

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KRUPANSKY, Circuit Judge: Petitioner Miles T. Jackson seeks review of a decision of the National Labor Relations Board's (the Board) General Counsel to withdraw an unfair labor practice complaint and enter into an informal settlement agreement.

On June 25, 1981, Jackman filed an unfair labor practice charge against Q.C. Design Services, Inc. (the Company) alleging that it had unlawfully provided financial assistance and support to Local 155, International Union of Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the Union) which was seeking to become the bargaining agent for the Company's employees by monthly contributions to the Union, which contributions were equal to Union dues that would have been payable by the affected employees, in violation of Section 8(a)(2) of the National Labor

Relations Act (the Act) 29 U.S.C. § 158(a)(2) [1] and that he had been discharged because of his activities on behalf of the Union in violation of Section 8(a)(3) of the Act 29 U.S.C. § 158(a)(3)). [2] On August 10, the Regional Director of the Board's Seventh Region issued a complaint against the Company alleging that it had rendered unlawful aid, assistance and support to the Union by, *inter alia,* contracting with and recognizing the Union as the exclusive collective bargaining representative of the Company's employees when the Union did not represent an uncoerced majority of the employees in the unit [3] in violation of Sections 8(a)(2) and (3) of the Act. The complaint also asserted that the Company unlawfully laid off andor constructively discharged Jackman because of his protected concerted activities of complaining to other employees about the Company's actions and decisions concerning the terms and conditions of employment in violation of Section 8(a)(1) of the Act. [4] Further, the complaint noticed that a hearing would be conducted before a designated administrative law judge on July 12, 1982. On September 11, the Company filed its answer to the complaint. [5]

Ten days later, and prior to the commencement of the scheduled hearing, settlement discussions between the Regional Office and the Company proved successful, and on September 21, 1981, the Regional Director and the Company entered into an informal settlement of all outstanding charges against the Company. Pursuant to the settlement, the Company agreed not to recognize the Union until the Union demonstrated that it duly represented an uncoerced majority of the Company's affected employees in the bargaining unit. It also agreed to pay Jackman two weeks' back wages and not retaliate or discriminate against employees who had engaged in protected concerted activities during the time period here in issue. The Company agreed to post a notice essentially incorporating its concessions. Jackman, however, was not offered reinstatement under the conditions of the agreement because the Regional Director's investigation had disclosed evidence that Jackman had sabotaged Company property and had made damaging telephone calls to Company customers.

On September 28, in a letter to the Regional Office, Jackman objected to the settlement agreement, asserting that its terms were not reasonable or acceptable to him. Jackman's objections were predicated solely upon the limited relief the agreement provided him. Jackman demanded full backpay with interest, and reinstatement to his former position. Further, he denied that he had sabotaged Company property or made damaging phone calls. [6]

On September 30, 1981, the acting Regional Director notified Jackman by letter that he had approved the settlement agreement, a copy of which he enclosed, stating:

> In view of the undertakings contained in the settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time.

Jackman thereupon appealed the Regional Director's approval of the agreement to the General Counsel, Office of Appeals in Washington, D.C. In his appeal Jackman argued that he had been denied due process and again denied making damaging telephone calls or destroying Company property. Finally, he contended that the witnesses who provided information concerning the phone calls and damage to Company property were biased against him.

Subsequent to an independent investigation by the Regional Director of Jackman's allegations of witness bias, the General Counsel rejected Jackman's appeal for substantially the same reasons set forth in the Regional Director's letter of September 30, 1981. Additionally, General Counsel's rejection letter fully addressed each of the

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[1] Section 8(a)(2) provides, in pertinent part, that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .".

[2] Section 8(a)(3) provides, in pertinent part, that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .".

[3] The applicable bargaining unit consisted of all the Company's employees except plant guards, firemen, and office and clerical employees.

[4] Section 8(a)(1) states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7 of the Act. Section 157 mandates the employees' right to organize, bargain collectively, etc.

[5] Jackman voluntarily withdrew the Section 8(a)(3) charge, which alleged his unlawful discharge for union activity. The Acting Regional director approved the withdrawal.

[6] Jackman admitted telephoning one Company supplier to advise it to cease doing business with the Company until the supplier had been paid in full for past service. While Jackman denied any damaging aspect of the call, it carried overtones questioning the financial integrity of the Company.

allegations advanced by Jackman in his appeal.

Jackman continued to file charges with the Regional Office concerning the issues of property damage, the phone calls and witness bias. In a letter dated May 28, 1982, the Regional Director responded to the allegations by directing Jackman to the results of his investigations. Further, the Regional Director suggested that Jackman could formally move for reconsideration the Regional Director's settlement agreement. Jackman refused to avail himself of that opportunity. [7]

Jackman now seeks review in this court of the General Counsel's adverse disposition of his appeal. The Board posits that this court lacks jurisdiction to review the General Counsel's decision because it is not a final appealable order of the Board but rather it is a nonreviewable discretionary prosecutorial act of General Counsel.

The jurisdiction of an appellate court to review Board action rests upon Section 10(f) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(f) which provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in any circuit court of appeals of the United States . . . by filing in such court a written petition praying that the order of the Board be modified or set aside.

The narrow issue joined in this appellate review is whether General Counsel's dismissal of an unfair labor practice complaint, filed by the Regional Director, before hearing and disposition of the complaint by an administrative law judge constitutes a nonreviewable discretionary prosecutorial act of General Counsel or a reviewable "final order of the Board."

The National Labor Relations Board Rules and Regulations, Series 8, as amended, Sections 101.1 *et seq.*, 29 C.F.R. §§ 101.1 *et seq.* provide two approaches to settlement of unresolved pending complaints charging unfair labor practices. One procedure is characterized as a "formal" settlement agreement under which practice "the parties agree to waive their right to a hearing and agree that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement." 29 C.F.R. § 101.9(b)(1). Formal settlement agreements require approval by the Board as well as the General Counsel. Inasmuch as Board approval is required, the disposition is a "final order" of the Board subject to appellate review. In contrast, Section 101.9(b)(2) provides for an informal settlement agreement concluded prior to commencement of a hearing before an administrative law judge. This type of accord "is not subject to the approval of the Board and does not provide for a Board order." 29 C.F.R. § 101.9(b)(2).

It would appear that under the regulations, only a formal settlement agreement is a "final order" of the Board subject to review by a court of appeals. The Supreme Court has recently stated that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc. et al.,* —— U.S. ——, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985) (citations omitted). A review of the Act's legislative history readily discloses that the Board's interpretation does not conflict with the intent of Congress.

As originally promulgated, the Act vested in the Board complete discretion to issue and prosecute unfair labor practice complaints. Under this statutory scheme, the Board acted simultaneously as investi-

gator, prosecutor, judge and jury. [8] This controversial amalgamation of the prosecutorial and judicial functions generated a continuing dialogue which was highly critical of the centralized authority that had been delegated to the Board. *See International Union of Electrical, Radio and Machine Workers, AFL–CIO v. NLRB,* 289 F.2d 757, 761 (D.C.Cir.1960).

In response to complaints of a lack of uniformity of enforcement and Board bias directed primarily against charged respondents, the Office of General Counsel was created by the Taft-Hartley amendments of 1947. Section 3(d) amended the Act to provide that the General Counsel be vested with "final authority . . . in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board . . .".[9] The obvious intent of amended Section 3(d) was a complete separation of the prosecutorial and adjudicatory functions of the Act, with the former to be exercised by the General Counsel and the latter by the Board.[10]

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[7] In addition to the foregoing, there were related proceedings before the Board dealing with separate allegations raised by Jackman. Jackman sought review of those proceedings in this court. A previous panel of this court granted the Board's motions to dismiss those actions. *Jackman v. NLRB,* 720 F.2d 679 (6th Cir.1983) (Order).

[8] See comments of Representative Hartley, 1 *NLRB, Legislative History of the Labor Management Relations Act of 1947* at 613 (1947) (hereafter "Legislative History").

The House Conference Report reflects the congressional intent without ambiguity.

> The General Counsel . . . is to have the *final authority to act in the name of but independently of any direction, control, or review by the Board* in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect to the prosecution of such complaints before the Board.

1 *Legislative History* at 541 (1947) (emphasis added).

Moreover, General Counsel's currently delegated prosecutorial authority was expressly characterized as "vast and unreviewable" and analogous to the broad and unreviewable discretionary prosecutorial authority vested in state attorney generals and prosecutors.[11]

Given this articulation of congressional intent to afford General Counsel the broadest reviewable discretion in the prosecution of unfair labor practices, this court concludes that regulations which authorize General Counsel to finally dispose of complaints through informal negotiated settlements without board action or approval and prior to hearing are not in conflict with the intent and purposes underlying the Act.

The Supreme Court has stated that "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes,* 386 U.S. 171, 182, 87 S.Ct. 903, 913, 17 L.Ed.2d 842 (1967). Moreover, numerous courts of appeals have routinely concluded that such action by the General Counsel is not subject to judicial review. *See, e.g., Echols v. NLRB,* 525 F.2d 288 (6th Cir.1975); *Pacific Southwest Airlines v. NLRB,* 611 F.2d 1309, 1311–12 (9th Cir.1980) and cases cited therein. *See generally,* 69 A.L.R.Fed. 870 § 3.[12]

Jackman, however, argues that the rationale underlying the cited cases do not apply to this controversy. He argues that prior to issuance of the complaint, General Counsel acts in a purely investigatory and prosecutorial posture, but once the complaint has issued, the prosecutorial function is concluded and the proceedings enter the adjudicatory stage.

As previously noted, existing precedent reflects that General Counsel's refusal to issue a complaint is within his prosecutorial discretion and the courts are without jurisdiction to review that discretionary act. This court's research has disclosed that neither the congressional history nor existing legal precedent has confined General Counsel's broad prosecutorial authority announced in Section 3(d) of the Act to the parameters suggested by Jackman's contention.

The authority to initiate and prosecute complaints granted to General Counsel by Section 3(d) "must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it." *Local 282 Teamsters v. NLRB,* 339 F.2d 795, 799 (2d Cir.1964). The issuance of a complaint is merely one of several pretrial discretionary nonreviewable evaluations and/or actions undertaken by General Counsel prior to the commencement of the actual hearing before the administrative law judge.

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[9] Section 3(d) provides, in pertinent part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

[10] Representative Hartley commented during the debates on the Taft-Hartley amendments:

> Unlike the old Board, [the new Board] will not act as prosecutor, judge and jury. Its sole function will be to decide cases.

1 *Legislative History* at 297.

[11] Comments of Senator Taft, 2 *Legislative History* at 1623.

[12] It should be noted that there is legal authority that recognizes certain exceptions to the broad prosecutorial discretion vested in General Counsel by the 1947 Taft Hartley amendments to the Act; however, the exceptions relate to General Counsel's arbitrary refusal to issue complaints. *See, e.g., Associated Builders & Contractors, Inc. v. Irving,* 610 F.2d 1221 (4th Cir.1979), *cert. denied,* 446 U.S. 965, 100 S.Ct. 2941, 64 L.Ed.2d 823 (1980) (General Counsel's refusal to issue unfair labor practice complaint not subject to judicial review, unless this act is in excess of delegated powers); *NLRB v. International Brotherhood of Electrical Workers,* 445 F.2d 1015 (9th Cir.1971) (where decision of General Counsel not to issue complaint is wholly without basis in law, district court may mandate issuance of complaint). *See generally* 69 A.L.R. Fed. 870 § 4. Since in the case at bar a complaint did issue, this court is not confronted with the question.

Because the Board's regulations promulgated pursuant to the Act are not in conflict with the expressed intent of Congress and are reasonable, this court concludes that it is without jurisdiction to review the General Counsel's decision to withdraw the unfair labor practice complaint.[13]

This court's disposition, moreover, is in keeping with the generally accepted doctrine of promoting settlement agreements, which has been characterized as the "lifeblood of the administrative process,"[14] and is of utmost importance to the administration of the Act. Settlement agreements achieved by the General Counsel permit the Board to concentrate its quasi-judicial activities on other matters, thereby enhancing its overall efficient administration. *See Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740, 742–43 (4th Cir.1951), *cert. denied,* 342 U.S. 954, 72 S.Ct. 626, 96 L.Ed. 709 (1952). Thus, the necessity for the General Counsel to retain final, nonreviewable pretrial discretion to reasonably dispose of all pending controversies before the Board is essential to the implementation of the Act. This authority permits the General Counsel the necessary latitude and flexibility to negotiate informal settlements without the necessity of time consuming formal proceedings—a desirable objective of the Act.

For the foregoing reasons, the petition for review is hereby DENIED.

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[13] The conflicting conclusions articulated in *See International Ladies' Garment Workers Union, 415–475 v. NLRB,* 501 F.2d 823 (D.C.Cir.1974); *Leeds & Northrup v. NLRB,* 357 F.2d 527 (3d Cir.1966) misconstrue the purposes and policy of the Act. In *Local 282, International Brotherhood of Teamsters v. NLRB,* 339 F.2d 795, 798 (2d Cir.1964), the court stated that "the only person to whom the National Labor Relations Act expressly grants the right to a hearing in an unfair labor practice is the person charged . . .". The articulated conclusion is inescapable when viewed in light of the pronouncements in *Vaca v. Sipes,* that prosecutions under the Act are brought to vindicate "the public interest in effectuating the policies of federal labor laws, not the wrong done the individual employee . . ." 386 U.S. at 182–83, no. 8, 87 S.Ct. at 913, n. 8.

[14] Final Report, Att'y Gen.Comm.Admin.Procedure, Sen.Doc. No. 8, 77th Cong., 1st Sess. p. 35.

NLRB v. Harvstone Manufacturing Corp., Duray Fluorescent Manufacturing Co., America Fluorescent Corp. and House-O-Lite Corp.

785 F.2d 570 (7th Cir.), March 6, 1986

On petition to enforce Board Order

Before WOOD and ESCHBACH, Circuit Judges, and SWYGERT, Senior Circuit Judge

HARLINGTON WOOD, JR., Circuit Judge: The National Labor Relations Board (the "Board") petitions this court for enforcement of its order against Harvstone Manufacturing Corp. ("Harvstone"), Duray Fluorescent Manufacturing Co. ("Duray"), American Fluorescent Corp. ("American") and House-O-Lite Corp. ("House-O-Lite") (collectively the "Respondents"). This action arises out of unfair labor practice charges filed against the Respondents by Local 134, International Brotherhood of Electrical Workers (the "Union"). The charges against the four Respondents were consolidated and, after a hearing, the Board ruled[1] that the Respondents had violated section 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 151, *et seq.*,[2] by bargaining in bad faith and by unilaterally changing various terms and conditions of employment prior to reaching a *bona fide* bargaining impasse. The Board's order was predicated on a finding that the Respondents had made a claim of "inability to pay" and failed, after appropriate Union request, to disclose financial data substantiating their claim. The Board determined that the Respondents' failure to disclose the requested financial records was itself bad faith bargaining that precluded the negotiating parties from reaching a *bona fide* impasse. By definition, therefore, the Respondents' unilateral changes in wages and other terms of employment were violative of the Act.

The primary issue before us, consequently, is whether there is substantial evidence in the record as a whole to support the Board's finding that the Respondents pleaded inability to pay. A tangential issue we must also decide is whether a cost-of-living adjustment in the collective bargaining agreements between the Union and the Respondents became effective and therefore due to be implemented prior to the expiration of the agreements. The Union argues that the adjustment had already accrued to the employees' benefit before the agreements expired and was therefore a permissive subject of bargaining over which a bargaining impasse could not lawfully be reached.

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[1] The Board's decision and order are reported at 272 N.L.R.B. No. 144.

[2] In pertinent part the Act provides:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(1) and (5).

For the reasons stated below, we deny enforcement of the Board's order as it relates to Respondents Harvstone, American, and House-O-Lite and modify and enforce the order as it applies to Respondent Duray.

I.

The Respondents are all manufacturers of fluorescent lighting fixtures in the Chicago **573** area. Since 1964 the Respondents have recognized, bargained with and individually executed several collective bargaining agreements with the Union. The last of these agreements were three-year pacts that expired on August 31, 1982. The unfair labor practice charges which are the subject of this action arose out of negotiations between the Respondents and the Union beginning in August 1982. During these negotiations, all four Respondents were represented by Ray J. Schoonhoven. Although theoretically each bargaining session was limited to negotiations regarding one particular employer, the parties recognized that the final agreements between the Union and each Respondent would be substantially identical.

The Respondents came to the bargaining table seeking concessions from the Union claiming that they were operating at a competitive disadvantage relative to their counterparts in other portions of the United States. To substantiate their claim, the Respondents prepared a schedule comparing the wages and benefits paid by several of their competitors, also represented by the International Brotherhood of Electrical Workers, with their own labor costs. This schedule, which was given to the Union, purported to show that the costs paid by these competing manufacturers were significantly less than those incurred by the Respondents.

Armed with these figures, the Respondents met with Union representatives during pre-negotiation sessions during the spring and summer of 1982, and commenced actual negotiations toward new collective bargaining agreements on August 11 of that year. During these sessions, the Respondents proposed a reduction in wages, insurance and pension benefits, and the elimination of cost-of-living adjustment clauses. The Union, on the other hand, stated that it would make no concessions and, in fact, initially proposed a wage increase. Additionally, in response to the claims of competitive disadvantage, the Union sought the Respondents' financial records claiming that if the employers were predicating their bargaining stance on economic problems, they were required to produce substantiating data. The Respondents' only response was that they were not pleading inability to pay.

In total, the parties met eight times during August 1982, with the final session taking place on August 31, the day the collective bargaining agreements between the parties expired. Throughout these eight sessions, apart from the concessions the Respondents were seeking, another bone of contention was a cost-of-living adjustment which the Union claims accrued to the employees' benefit on August 30, 1982. The Respondents contend that the cost-of-living adjustment was not part of the expired collective bargaining agreements. During the life of the agreements, cost-of-living adjustments became effective each March 1 and September 1. The adjustments were based on reviews of the Bureau of Labor Statistics Consumer Price Index (the "CPI"). These reviews were to take place during each January and July immediately preceding the March 1 or September 1 effective dates. The Respondents contend that no adjustment was due on September 1, 1982, since the collective bargaining agreements expired prior to the time the adjustment was to become effective.

The parties were unable to resolve their differences, especially with respect to the cost-of-living adjustment issue, and after the August 31 meeting the parties did not meet again until November 8, 1982. The parties met several more times during November and December but failed to reach an accord. Although several negotiating sessions did take place after August 31, the parties do not contest the fact that, if we find the Respondents to have bargained in accordance with the Act, a *bona fide* impasse was reached on that date.

Following the expiration of the collective bargaining agreements, the Respondents instituted several unilateral changes including alteration of vacation schedules and elimination of paid five-minute wash-up periods, certain Christmas bonuses, gifts and parties, and group insurance benefits for the dependents of employees. In addition, the Respondents never implemented the cost-of-living adjustment that the Union claims was due and payable. In December 1982, the Union filed unfair labor practice charges against the four Respondents individually. The four charges were consolidated and a hearing was held before an administrative law judge (the "ALJ") on June 28–30, 1983.

The ALJ ruled that the Respondents violated section 8(a)(5) and (1) of the Act by unlawfully making unilateral changes in wages and other terms and conditions of employment before a *bona fide* impasse had been reached and by, after pleading inability to pay, refusing to supply financial data requested by the Union. The ALJ determined that the cost-of-living adjustment had in fact accrued prior to the expiration of the collective bargaining agreements and that the adjustment was therefore a permissive subject of bargaining over which the Respondents could not lawfully bargain to an impasse. The ALJ also ruled that no *bona fide* impasse had been reached since the Respondents' bad faith refusal to supply financial information precluded their right to pronounce such an impasse.

The Board summarily affirmed the decision of the ALJ. Notably, however, the Board did not rely on the ALJ's conclusion with respect to the cost-of-living adjustment. Rather, the Board based its decision solely on the finding that the Respondents failed to bargain in good faith by refusing to disclose financial data after pleading inability to pay.

The Board ordered the Respondents, among other things, to cease and desist from the unfair labor practices found, to reinstate the terms of employment unilaterally changed by the Respondents (including the cost-of-living adjustment), [3] to compensate the employees for losses sustained as a result of the unilateral changes, to make the Respondents' financial records available to the Union and to bargain in good faith with the Union upon its request. The Board now petitions this court for enforcement of its order. The Union has intervened in these proceedings contending that the Board should have also affirmed the ALJ's finding that the cost-of-living adjustment was a permissive subject of bargaining over which the parties could not lawfully bargain to impasse.

II.

We acknowledge the maxim that a decision of the Board should not be set aside if it is supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487, 71 S.Ct. 456, 463, 95 L.Ed. 456 (1951); *NLRB v. Lewis University,* 765 F.2d 616, 620 (7th Cir.1985); 29 U.S.C. § 160(f). Review of a Board decision requires that the court examine the entire record, "including the evidence opposed to the Board's view from which conflicting inferences reasonably could be drawn." *NLRB v. Adam and Eve Cosmetics, Inc.,* 567 F.2d 723, 727 (7th Cir.1977). Although the entire record is examined, judicial review of Board action is still "quite limited." *International Union of Operating Engineers v. NLRB,* 755 F.2d 78, 81 (7th Cir.1985). Even in those cases in which the reviewing court "would justifiably have made a different choice had the matter been before it *de novo,*" the court is still obliged to uphold "the Board's choice between two fairly conflicting views. . . ." *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 465. Nonetheless, and recognizing that the findings of the Board "are entitled to respect," *id.* at 490, 71 S.Ct. at 466, this deference should never so blind the reviewing court that it becomes a mere rubber stamp substituting "judicial abdication for judicial review." *NLRB v. Truck Drivers, Oil Drivers, Etc.,* 630 F.2d 505, 507 (7th Cir.1980), *cert. denied,* 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981). *Accord Atlas Metal Parts Co. v. NLRB,* 660 F.2d 304, 308 (7th Cir.1981). It is imperative that the reviewing court examine all of the evidence in context to ensure that the Board's findings fairly and accurately represent the picture painted by the record. With this in mind, we proceed to an examination of the Board's findings here.

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[3] The ALJ found that the Respondents' unilateral actions with respect to the Christmas bonuses, parties and gifts to be in violation of the Act. The Board, to the contrary, ruled that such items were gifts, rather than terms and conditions of employment, and consequently that the Respondents' unilateral changes were lawful. Since this issue is not raised here, we express no opinion regarding its resolution.

It is well-established that when an employer makes a claim of financial inability to pay a proposed wage rate, it generally has an obligation, in order to meet its duty to bargain in good faith, to provide substantiating financial data to its employees' bargaining representative upon request. *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 153, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956); *United Fire Proof Warehouse Co. v. NLRB,* 356 F.2d 494, 498 (7th Cir.1966); *Craig and Hamilton Meat Co.,* 271 N.L.R.B. No. 135, 117 L.R.R.M. (BNA) 1210 (1984). "Although no magic words are required to express an inability to pay, the words and conduct must be specific enough to convey such a meaning." *Atlanta Hilton and Tower,* 271 N.L.R.B. No. 214, 117 L.R.R.M. (BNA) 1224, 1227 (1984). *Accord New York Printing Pressmen and Offset, Etc. v. NLRB,* 538 F.2d 496, 500 (2d Cir.1976). As the Board acknowledged at oral argument, the mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay. *Empire Terminal Warehouse Co.,* 151 N.L.R.B. 1359, 1360 (1965), *enforced sub nom. Dallas General Drivers, W. and H., Local No. 745 v. NLRB,* 355 F.2d 842 (D.C.Cir.1966); *Charles E. Honaker,* 147 N.L.R.B. 1184, 1187–88 (1964). The relevant test, as articulated by this court, is to ascertain whether the employer said it "would not" as opposed to "could not" pay the employees' proposed demands.[4] *United Fire Proof,* 356 F.2d at 498. Only in the latter situation where the employer communicated that it "could not" pay the demands has it made a claim of inability to pay. *See New York Printing Pressman,* 538 F.2d at 500; *Atlanta Hilton,* 271 N.L.R.B. No. 214, 117 L.R.R.M. (BNA) at 1227. *See also NLRB v. Unoco Apparel, Inc.,* 508 F.2d 1368, 1370 (5th Cir.1975) (holding that the employer's statement that the " 'employees came to the wrong well . . . the well is dry' " constituted a plea of inability to pay). We must therefore determine whether the four Respondents here, in asserting that they were in a competitive disadvantageous position, were claiming they "would not pay" or whether they "could not pay" for the contractual provisions proposed by the Union.

Resolving this issue with respect to Respondent Duray is relatively simple. Although counsel for the Respondents argued in its brief and during oral argument that Duray had made no claim of inability to pay, Duray in fact concedes this point in its answer to the Board's complaint. *See* Answer to Consolidated Complaint XII(c). On this basis alone, we hold that there is substantial evidence to support the Board's finding that Respondent Duray pleaded inability to pay.

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[4] In several early decisions the Board had concluded that a claim of competitive disadvantage was itself a plea of inability to pay. *E.g., Cincinnati Cordage and Paper Co.,* 141 N.L.R.B. 72, 77 (1963); *Peerless Distributing Co.,* 144 N.L.R.B. 1510, 1514 (1963) (ruling that employer's claim that it was not pleading inability to pay but was resisting union demands out of a desire to remain competitive is "self-contradictory"; "if granting economic benefits would . . . have the effect of reducing [the employer's] competitiveness, it follows that the [employer] was asserting its financial inability to grant economic benefits") (footnote omitted); *Stockton District Kidney Bean Growers, Inc.,* 165 N.L.R.B. 223, 224–25 (1967). As conceded during oral argument, the Board apparently no longer subscribes to such a stringent view. Indeed, this court has already rejected the Board's once-held notion that a claim of competitive disadvantage was ipso facto a claim of inability to pay. *United Fire Proof Warehouse Co. v. NLRB,* 356 F.2d 494 (7th Cir.1966).

Two cases cited by the Board in its brief, *NLRN v. Celotex Corp.,* 364 F.2d 552 (5th Cir.), *cert. denied* 385 U.S. 987, 87 S.Ct. 601, 17 L.Ed.2d. 450 (1966) and *United Steelworkers of America, AFL–CIO, Local 5571 v. NLRB,* 401 F.2d 434 (D.C.Cir.1968), *cert. denied sub nom. Stanley-Artex Windows v. NLRB,* 395 U.S. 946, 89 S.Ct. 2020, 23 L.Ed.2d 465 (1969), *enforcing Stanley Building Specialties Co.* 166 N.L.R.B. 984 (1967), are not to the contrary. Although we acknowledge there is language in these opinions that could be construed as supporting the Board's position, we do not find the Board's reading of these decisions controlling here. In *Celotex,* for example, the court enforced a Board order finding that an employer had pleaded inability to pay when it insisted that concessions were necessary to make its *"plant competitive and to insure that plant's survival,"* 364 F.2d at 553 (emphasis added), and not solely on the basis of a claim of competitive disadvantage. Indeed, the trial examiner found that the bargaining between the parties had taken place in the context of what wage rate the plant *"could* afford." *The Celotex Corp.,* 146 N.L.R.B. 48, 54 (1964) (emphasis added).

Similarly, in *United Steelworkers* (Burger, J.), the court, in enforcing a Board order finding that the employer had pleaded inability to pay, noted: "When the final wage offers were exchanged, the Company returned to its claim that the money to pay for the Union's proposal *just wasn't there."* 401 F.2d at 436 (footnote omitted) (emphasis added). Again, the issue apparently was not that the employer "would not" pay, but rather that the employer "could not" pay.

Interestingly enough, however, the Board contended during oral argument that the *United Steelworkers* case stood for the proposition that a claim of competitive disadvantage was necessarily a claim of inability to pay, even though just earlier in its argument the Board had conceded that this could not rationally be the case. Moreover, the Board overlooks *Dallas General Drivers, W. and H., Local Union No. 745 v. NLRB,* 355 F.2d 842 (D.C.Cir.1966) (Burger, J.), that was decided by the same court that decided *United Steelworkers.* In *Dallas General,* in refusing to overturn a Board decision finding that an employer had not pleaded inability to pay, the court noted: "The Company's position on wages was not based on a claim of financial inability to pay but on the ground that it was paying rates in excess of prevailing rates of its competition in the same labor market." 355 F.2d at 845. In short, the court refused to find that a claim of competitive disadvantage was the equivalent of a plea of inability to pay. Since the *United Steelworkers* court does not overrule or even criticize the *Dallas General* decision, we must assume that *Dallas General* is still good law and consistent with the reading of *United Steelworkers* noted above.

The question with respect to Respondents Harvstone, American and House-O-Lite cannot be disposed of as easily, however. In his opinion, which was summarily affirmed by the Board, the ALJ knitted together a smattering of words and phrases, and from this compilation derived his finding that the Respondents pleaded inability to pay. A review of the record as a whole leads us to conclude, however, that the ALJ took much of the testimony out of context and that in the proper perspective the three Respondents, in seeking concessions, had not claimed inability to pay. The Respondents' position throughout was that they needed the concessions to be competitive; they never implied that they were financially unable, as opposed to unwilling, to meet the Union's demands.

The ALJ correctly points out that the Respondents' bargaining representative, Ray Schoonhoven, had disclosed that Duray was losing money. However, we believe that Duray's financial condition is not attributable to the other three Respondents as a means of finding that they pleaded inability to pay. There was never any confusion among the parties as to which company was losing money. Moreover, although negotiations were conducted jointly, the parties understood that each Respondent was ultimately an independent entity seeking its own contract with the Union. Duray's disclosure of its financial posture in this context is therefore irrelevant to the status of the other three Respondents.[5]

The ALJ in his decision also relies heavily on statements made by Schoonhoven during the course of the negotiations. For example, on one occasion Schoonhoven noted that if the Respondents "don't make a reasonable profit so they can be a viable competitive business, they won't stay in business, and no one will have jobs." Statements such as this one are, however, nothing more than truisms. Clearly, if an employer operates at a competitive disadvantage for a long enough time, its profit margin, as a matter of pure economics, will decline eventually forcing it out of business. There would then come a time when these three companies could be expected to plead inability to pay, but that time has not yet arrived. In context Schoonhoven's statements did not constitute a plea of inability to pay. The relevant time period we must concern ourselves with is that of the term of the new collective bargaining agreement. It is quite conceivable that an employer, already operating at a competitive disadvantage with respect to employee compensation, could afford to pay increased wages during the course of a new agreement. While it is axiomatic that this scenario cannot be played out indefinitely, it does not preclude a finding that, at least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages. In such a case, we think that the employer's claim of competitive disadvantage is not a plea of inability to pay.[6]

After reviewing the record, we find that this is precisely the situation here. Respondents Harvstone, American and House-O-Lite, although acknowledging in response to Union inquiries that they could lose money and eventually go out of business if their competitive position did not improve, never communicated to the Union that they were financially unable to pay the Union's proposed demands for the duration of the new agreements. Rather, the record indicates that the Respondents were simply unwilling to meet the Union's demands. In short, "[w]here the evidence disclosed 'won't', the Board found 'can't.'" *United Fire Proof*, 356 F.2d at 498. Accordingly, we hold that there is not substantial evidence to support the

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[5] In any event, the Board has held that simply because an employer acknowledges the incurrence of losses does not necessarily place it in the posture of having pleaded inability to pay. *Vore Cinema Corp.*, 254 N.L.R.B. 1288, 1292 (1981) (ruling that an employer's proposal to reduce employee earnings in light of employer's comment that he had lost money in 1978 and did not intend to do so in 1979 and employer's statement that his final proposal was the "best offer he felt he could make" was not equivalent to a claim of inability to pay).

[6] To the extent that the foregoing is inconsistent with *Wheeling Pacific Co.*, 151 N.L.R.B. 1192, 1225 (1965) (ruling that the "basic principles which underlay *Truitt* cannot be considered less relevant merely because [the employer] may have expressed the view that wage increases would ultimately *lead to poverty*, rather than that such increases were precluded by *present* poverty") (emphasis in original), we disagree with the Board's rationale in that case. Carried to its logical end, the Board's decision in *Wheeling* would transform any discussion by an employer of an unfavorable position vis-a-vis competitors into a plea of inability to pay. As even the Board concedes, this result stretches the logic of *Truitt* far beyond its rational limit. *See supra* p. 575.

Board's conclusion that Harvstone, American and House-O-Lite bargained in bad faith by refusing to provide substantiating financial data after pleading inability to pay.

Respondent Duray, on the other hand, although conceding that it pleaded inability to pay, nonetheless contends that it too was under no obligation to disclose its financial records. Duray first argues that the Union's request for information was inadequate to give rise to its disclosure duty. Duray acknowledges that the Union did request to see financial documentation prior to the impasse that was reached on August 31. In fact, the parties stipulated that on August 26 the Union representative had asked the Respondents to "show us your books," and that the Respondents refused claiming that they were not "pleading poverty." Duray contends that since the Union's request was overly broad, was not zealously pursued and was not in writing that it was under no duty to disclose its financial records. We disagree.

There is no requirement that a request for financial records to substantiate a plea of inability to pay be in writing. *International Telephone and Telegraph Corp. v. NLRB*, 382 F.2d 366, 371 (3d Cir.1967), *cert. denied*, 389 U.S. 1039, 88 S.Ct. 777, 19 L.Ed.2d 829 (1968). Moreover, we find that the Union's request was not so overly broad or vague that Duray could not reasonably have responded to it. Indeed, in *NLRB v. Bagel Bakers Council of Greater New York*, 434 F.2d 884 (2d Cir.1970), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 648 (1971), the court found the following almost identical request sufficient to give rise to a duty to

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disclose: " 'Bring your books to us. Bring an audit, accountant's report. Show us where you are losing money so we can guide ourselves and know in which direction we're going.' " 434 F.2d at 887. It is also clear from the record that Schoonhoven understood what the Union was seeking. He never once sought clarification regarding the Union's request; rather, his only response was that no plea of inability to pay had been made and that therefore no financial records would be forthcoming.[7] After reviewing the record, we conclude that Duray understood what financial information the Union was seeking and simply refused to disclose it; a more specific or detailed request would have been to no avail.

We also find no merit in Duray's argument that the Union's request was not made with sufficient zeal. The Union's zeal was minimal, but sufficient. Employees are not required to request the substantiating data on more than one occasion or hound the employer when the information is not produced. This is especially true where, as here, the employer fully understands that the employees are seeking substantiating documentation and yet simply refuses to deliver. Under these circumstances we find the Union's request of "show us your books" adequate to give rise to Duray's disclosure obligation.

Duray next argues that even if the Union's August 26 request was adequate, the Union waived the right to review the substantiating data on August 31. At the hearing, Schoonhoven admitted that he had stated at the August 31 meeting that Duray had lost $92,000 in the last six months and then had waved a document, which was purportedly Duray's profit and loss statement, in the air and asked if the Union wanted to see it. The Union's representative acknowledged, again according to Schoonhoven's testimony, that he would at some point want to see the document. From this, Duray concludes that the Union waived its right to review substantiating financial data. We find Duray's contention without merit.

Without "a clear and unmistakable showing of a waiver" we are reluctant to deprive the Union of its right to examine Duray's financial records. *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949). *Accord Tucker Steel Corp., and Steel Supply Co.*, 134 N.L.R.B. 323, 332 (1961). There is no indication that the Union's representative even contemplated the possibility that his statement would be construed as a waiver of the Union's rights. Schoonhoven concedes, moreover, that he waved the profit and loss statement in the air merely as an "aside." Viewed in this context, the Union's conduct did not come close to constituting a "clear and unmistakable" waiver of its rights.

Nor did the Union's conduct serve to rescind its request for substantiating data. Duray argues that the August 26 request was at the very least nullified by the Union's refusal to examine the proffered data on August 31, and that after August 31 Duray was under no obligation to provide data absent a new request by the Union. We disagree. Duray, by its own admission, did not present the profit and loss statement to the Union in fulfillment of its disclosure obligation. Indeed, Schoonhoven contended throughout that he refused to disclose any financial data because there had been no plea of inability to pay. Simply because Duray later conceded that it had pleaded inability does not alter the fact it refused to disclose financial data not because the Union's request had been withdrawn, but because at the time Duray was contending that it had not pleaded inability to pay. Moreover, Duray produced no evidence establishing that the Union considered its request for information withdrawn. Under these circumstances, we find that the Union's August 26 request was not rescinded by its actions on August 31.

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[7] The fact that Duray waited until after the unfair labor practice charges were filed to concede that it had pleaded inability to pay does not change our analysis. The simple fact is that Duray pleaded inability to pay and that it, given the proper request, was under an obligation to supply substantiating financial data.

Even if this were not true, Duray's rescission argument still lacks merit. Although Duray seeks to exonerate itself with this argument for the actions it took after August 31, Duray still remains unable to explain its refusal to supply the requested data between August 26 and August 31. The simple truth is that during this time the Union made the necessary request for substantiating data and Duray, in violation of the Act, refused to deliver.

Duray's next contention is that even if the Union properly requested information, its refusal to supply such data is not *per se* bad faith bargaining. Although there is language in the Supreme Court's decision in *Truitt* that might support Duray's position,[8] the general consensus today is that "for all practical purposes" a refusal to disclose alone constitutes a failure to bargain in good faith.[9] *Teleprompter Corp. v. NLRB,* 570 F.2d 4, 9 n. 2 (1st Cir.1977) (*citing, inter alia, C-B Buick v. NLRB,* 506 F.2d 1086, 1091 (3d Cir.1974); *NLRB v. Bagel Bakers Council,* 434 F.2d at 888; *NLRB v. Southland Cork Co.,* 342 F.2d 702, 706 (4th Cir.1965)). Even if this is not the case, Duray advances no additional circumstances that would justify our classifying its refusal as other than bad faith bargaining. *Cf. Western Massachusetts Electric Co. v. NLRB,* 589 F.2d 42, 47 (1st Cir.1978). Accordingly, we hold that there is substantial evidence to support the Board's conclusion that Duray violated section 8(a)(5) and (1) of the Act by refusing to disclose its financial records.[10]

The final issue we consider is whether a cost-of-living adjustment accrued to the benefit of the Respondents' employees prior to the expiration of their bargaining agreements with the Union. The Union contends that the adjustment had accrued prior to the expiration of the agreements and that it was therefore a permissive subject of bargaining over which the parties could not bargain to impasse. The Union argues that the Respondents violated the Act by insisting on the elimination of this adjustment.

Before reaching the merits of the Union's argument, we must first acknowledge the Respondent's contention that the Union is not properly before this court. The Respondents argue that the Board's order gives the Union all of the relief it sought, even though the Board did not rely on the ALJ's finding that the cost-of-living adjustment accrued prior to August 31, 1982. The Respondents rely on section 10(f) of the Act which provides that only those persons "aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order. . . ." 29 U.S.C. § 160(f). The Respondents contend that since the Union received all the relief it sought it is not an "aggrieved" party and should not be allowed to intervene in this proceeding. The Respondents fail, however, to distinguish between the right to

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[8] In limiting its decision in *Truitt,* the Court noted:

> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

351 U.S. at 153–54, 76 S.Ct. at 756 (footnote omitted).

[9] Our decision in *J.I. Case Co. v. NLRB,* 253 F.2d 149 (7th Cir.1958), is not to the contrary. In *J.I. Case* we simply noted that a union has, absent a showing of relevance, no "'per se' right to information" it requests from an employer during the course of collective bargaining. *Id.* at 154–55. In the instant case, no question has been raised regarding the relevance of Duray's financial records. Indeed, since Duray conceded inability to pay, we may assume, absent a showing otherwise, that such records which substantiate its claim are relevant and should be disclosed.

[10] Duray was not relieved of its obligation to disclose substantiating data by the Union's failure to bargain in good faith. Although Duray argues to the contrary, there is no evidence in the record indicating that the Union failed to engage in good faith bargaining as required by the Act.

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petition for review and the right to *intervene* in ongoing proceedings. By its own terms, section 10(f) governs only the right to petition this court for review; it is silent as to a party's right to intervene after a petition for review is filed. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Scofield,* 382 U.S. 205, 209, 86 S.Ct. 373, 376, 15 L.Ed.2d 272 (1965). Contrary to the Respondents' position, the Supreme Court has held that a successful charging party, in this case the Union, has the right to intervene in proceedings either reviewing or enforcing an order of the Board. *Id.* at 208, 86 S.Ct. at 376. There is no requirement that the intervening party be "aggrieved" as that term is used in section 10(f). In short, the Union "should not be prejudiced by [its] success before the agency." *Id.* at 222, 86 S.Ct. at 384. We therefore hold that the Union is a proper party and is free to raise the cost-of-living adjustment issue in this proceeding.

Intrinsically, the adjustment issue itself involves nothing more than a debate over contractual interpretation. The collective bargaining agreements, which expired on August 31, 1982, provided that cost-of-living adjustments would be effective on each March 1 and September 1 during the life of the agreements. The amount of each adjustment was to be calculated based on changes in the CPI. The relevant review date of the CPI for the March 1 adjustment was the preceding January and the review date for the September 1 adjustment was the preceding July. The debate centers around whether the Respondents were obligated to make an adjustment effective September 1, 1982, even though the agreements between the parties expired on August 31, 1982.

The Union, arguing that the relevant point of reference is the July 1982 review date, maintains that since the changes in the CPI took place during the life of the agreements, that the parties must have intended the adjustment to reflect these changes even though the actual adjustment was not effective until after the agreements expired. In support of its proposition the Union cites *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), *enforced without opinion,* 593 F.2d 1371 (D.C.Cir.1979).[11] In *Meilman,* the Board ruled that a cost-of-living adjustment had accrued to the employees' benefit even though its effective date fell after the expiration of the collective bargaining agreement. In so doing, however, the Board relied explicitly on the fact that the agreement clearly established that the relevant time for determining when the adjustment had accrued was the review date, which fell during the life of the agreement. 234 N.L.R.B. at 698, 704. Basing its decision on the specific language of the agreement, which "is clear on its face and requires no construction or interpretation beyond its plain meaning," the Board held that the adjustment was due and payable even though the effective date fell outside of the life of the agreement. *Id.*

Although the Union contends otherwise, the instant case differs from *Meilman.* The Union's agreements with the Respondents did not place importance on the review dates for determining when the cost-of-living adjustments actually accrued. Our reading of these agreements leads us to conclude that the January and July review dates were merely points of reference from which the amount of the adjustments was to be ascertained. There is no language in the agreements establishing the review dates as the time at which the cost-of-living adjustments became contractually enforceable rights in the hands of the employees. Indeed, unlike *Meilman* in which the review dates were definitively established as being each May 15 and November 15, the review dates in the Respondents' agreements were to occur sometime following the publication of the CPI for the appropriate January or July. This lack of any established date for such review is further evidence that the review dates have no significance in determining the Respondents' obligations to pay cost-of-living adjustments. We therefore find that the Respondents' contractual duty to pay such adjustments arose, and the employees' rights to such adjustments accrued, only on the effective dates during the life of the agreements. Since the September 1, 1982, effective date occurred after the expiration of the collective

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[11] The Union's reliance on *Struthers Wells Corp.*, 262 N.L.R.B. 1080 (1982), *modified,* 721 F.2d 465 (3d Cir.1983), is inapposite. In *Struthers* the court held that an employer did not violate the Act by refusing to grant a cost-of-living adjustment where both the review and effective dates were beyond the term of the collective bargaining agreement. *Id.* at 472. The court expressed no opinion as to the vitality of *Meilman* in the Third Circuit other than to note that *Meilman* was distinguishable from the case before it.

bargaining agreements, the Respondents were not obligated to pay the adjustment in question.

Even conceding the above, the Union nonetheless contends that the adjustment actually became payable to the employees on August 30, 1982, just prior to the expiration of the agreements. To support its assertion, the Union relies on language contained in Art. XIX, § 4 of the agreements that mandated that the adjustment be paid beginning "on the first day of the pay week nearest the date on which the increase becomes due." The Union contends that since September 1, 1982, was a Wednesday that the adjustment, in accordance with the agreements, became payable to the employees on Monday, August 30. This argument, however, puts the cart before the horse. Pursuant to the agreements themselves, the adjustment was due on the first day of the week in which it became effective. What the Union's argument overlooks is that the adjustment in question here *never* became effective. Since no adjustment was due on September 1, the employees were not entitled to any increase on August 30. The Respondents did not violate the Act or their agreements by bargaining to an impasse over the cost-of-living adjustment.

III.

We hold that the Board's finding that Respondents Harvstone, American and House-O-Lite violated section 8(a)(5) and (1) of the Act by refusing to disclose financial records after pleading inability to pay is not supported by substantial evidence. Furthermore, we find that all four Respondents did not violate the Act by bargaining to an impasse over the elimination of the cost-of-living adjustment. The unilateral changes in mandatory subjects of bargaining made by Harvstone, American and House-O-Lite, therefore, occurred after a *bona fide* impasse had been reached and were lawful under the Act. *See NLRB v. Katz,* 369 U.S. 736, 747–48, 82 S.Ct. 1107, 1113–14, 8 L.Ed.2d 230 (1962); *Atlas Metal Parts,* 660 F.2d at 309. Enforcement of the Board's order as it relates to Respondents Harvstone, American and House-O-Lite is accordingly denied.

With respect to Respondent Duray, we hold that there is substantial evidence to support the Board's finding that Duray pleaded inability to pay and thereafter refused, in violation of the Act, to provide substantiating financial data. The unilateral changes implemented by Duray were consequently made, also in contravention of the Act, prior to reaching a *bona fide* bargaining impasse. We therefore grant enforcement of the Board's order as it relates to Respondent Duray except insofar as it mandates the implementation of the September 1 cost-of-living adjustment. The Board's order, predicated on the erroneous conclusion that the adjustment accrued on August 30, 1982, requires Duray to make its employees "whole" by implementing the adjustment with interest. Since we find that the cost-of-living adjustment never accrued to Duray's employees, we deny enforcement of the Board's order as it relates to this adjustment.[12]

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Enforcement denied as to Respondents Harvstone, American and House-O-Lite. The Board's order as to Respondent Duray is modified and enforced.

SWYGERT, Senior Circuit Judge, concurring in part and dissenting in part: I concur with the enforcement of the Board's order as it applies to the Duray Company. I must, however, dissent from the denial of enforcement against Harvstone Manufacturing Company, American, and House-O-Lite.

The issue before us, as the majority states, is whether there is substantial evidence in the record as a whole to support the Board's findings. This case involves a difficult factual situation for the court to review. As Justice Burger, then Circuit Judge, said in *Dallas General Drivers, W & H Local No. 745 v. NLRB,* 355 F.2d 842, 844–45 (D.C.Cir.1966), in the whole complex of industrial relations there are few issues less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a Board which deals constantly with such problems. In the instant case, the administrative law judge and the Board had to draw inferences from a variety of verbal statements and documentary assertions made in the context of bargaining. Although the facts make this a fairly close case, I believe that the judge and the Board drew reasonable inferences which should not be disturbed by an appellate court.

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[12] We are mindful of the fact that under the Act "an expired collective bargaining agreement continues to define the status quo as to wages and working conditions," and that this status quo must be maintained until a new agreement is reached or the parties negotiate in good faith to an impasse. *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C.Cir.1982) (*citing NLRB v. Carilli,* 648 F.2d 1206, 1214 (9th Cir.1981)). In Duray's case, the status quo is defined as of August 31, 1982, when its collective bargaining agreement expired. Since no cost-of-living adjustment was due on that date, Duray will not be obligated to implement one after it resumes negotiations with the Union pursuant to the Board's order.

The distinction which the Board had to make was a fine one: Did the employers make a claim of financial inability to pay a proposed wage rate? (If so, the employers potentially triggered an obligation on their part to provide substantiating financial data to their employees' bargaining representative. The disclosure is required to the extent necessary to permit a union to make a meaningful evaluation of the claim of financial inability. *Teleprompter Corp. v. NLRB,* 570 F.2d 4, 10 (1st Cir.1977).) Or, did the employers indicate that they "would not" as opposed to "could not" pay the employees' proposed demands? (The Board recognized in *United Fire Proof Warehouse Co. v. NLRB,* 356 F.2d 494, 498 (7th Cir.1966), that such meeting-competition assertions are not necessarily the equivalent of inability-to-pay assertions and may not trigger an obligation to disclose. *Empire Terminal Warehouse Co.,* 151 N.L.R.B. 1359, 1360 (1965), *enf'd,* 355 F.2d 842 (D.C.Cir.1966); *Charles E. Honaker,* 147 N.L.R.B. 1184, 1187–88 (1964).)

The facts are crucial in cases which turn upon the inability-to-payrefusal-to-pay distinction. The inquiry must always be whether, under the circumstances of the particular case, the statutory obligation to bargain in good faith has been met. *NLRB v. Truitt,* 351 U.S. 149, 153–54, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956). It is not necessary that the claim of inability-to-pay be expressed with any particular magic words. *Atlanta Hilton & Tower,* 271 N.L.R.B. No. 214, sl. op. at 7, 117 L.R.R.M. 1224, 1226 (1984). The statements must be judged within the context of the bargaining setting: if an employer's refusal to meet a wage demand reasonably interpreted is the result of financial inability to meet the employees' demands rather than simply unwillingness to do so, the exact formulation used by the employer in conveying this message is immaterial. *Id.*

Duray Company concededly raised a plea of "poverty" to support its claim of economic necessity for its demands to scale down the wages and benefits to its unit employees. Respondents' "Answer to Consolidated Complaint, XII(c)," denying allegations "except that Respondent Duray pleaded inability to pay." The facts are not as clear cut with respect to Harvstone, American, and House-O-Lite. Ray Schoonhoven, representing the employers, "skillfully avoided using the precise word 'poverty,'" according to the administrative law judge. In fact, Schoonhoven explicitly asserted that the employers were "not pleading poverty." Tr. 235. When asked whether the companies were claiming that they would be forced out of business if the unions would not forego reductions in labor costs, Schoonhoven replied: "No. They might or they might not." Tr. 166, 267. Additionally, Schoonhoven referred to the "business judgment" of the companies to seek relief, Tr. 165, 235, and the need to be "more closely aligned" with competitors' labor costs "to be competitive." Tr. 166, 169, 235–36.

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Schoonhoven, however, did not make only these "meeting competition" or "would not pay" assertions. He coupled those statements with operating-loss/going-out-of-business assertions that amounted to "could not pay." The majority dismisses the Board's compilation of these "smattering of words and phrases" as being "out of context," and holds that the assertions never implied financial inability to meet the employees' demands (*see supra* at 576). I believe that the effect of all the statements taken as a whole and within the entire bargaining context could lead the union rationally to conclude that the companies were claiming financial inability to meet the union's demands.

First of all, it is undisputed that at the August 31, 1982 session, Schoonhoven stated that Duray Company was "losing money and had lost $92,000 during the past six months." Tr. 233, Schoonhoven; Tr. 320, Solomon, American Company; Tr. 326, Mayer, Duray Company. On this basis, the majority enforces the Board's order against Duray Company. But the majority does not believe that this clear assertion of a plea of poverty with respect to one employer is relevant to the position taken by the other three. Instead, it argues that Duray Company's financial condition is not attributable to the other three companies because there was "never any confusion among the parties as to which company was losing money." Although negotiations were conducted jointly, the majority states, the parties understood that each company was ultimately an independent entity seeking its own contract with the union. Therefore, under this view, Duray Company's disclosure of its financial posture is irrelevant to the status of the other three.

I cannot agree that the plea of poverty by Duray Company is irrelevant to the position of the remaining companies. The companies had traditionally bargained separately with the union, but signed essentially identical contracts. During the negotiations for a contract to replace the one expiring in August 1982, the four employers were represented by the same attorney. Although each bargaining session was theoretically limited to a particular employer, the four employers and the union all treated the discussions at each bargaining session as relating to all four companies.

There was no attempt by Schoonhoven to separate the effect of the announcement that one company was losing money from the message he was conveying regarding the other three companies. Schoonhoven testified that he followed his reference to Duray Company's $92,000 loss with a "long discussion about competitiveness and if you don't make a profit, you can't be in business." Tr. 279. Schoonhoven explicitly stated that "one company was losing money and the rest might." Tr. 160, Moreland.

The majority characterizes these statements by Schoonhoven as mere "truisms." It states that the plea of poverty by Duray Company was irrelevant with respect to the other three employers represented at the August 31, 1982 bargaining session. Instead, I believe that Schoonhoven effectively coupled his "can't pay" assertion with other "won't pay" assertions to create a reasonable concern by the union that the employers *as a group* were raising financial inability to meet bargaining demands.

This same message was effectively conveyed to the union at other bargaining sessions. For example, Schoonhoven later asserted that "relief on labor costs" because of "poor competitive positions" was essential for the companies to "stay in business, [otherwise] no one will have jobs." Stipulation signed June 28, 1983, p. 13. He also stated that the companies "need economic relief," Tr. 98, Lane, and that if economic concessions demanded by the companies were not met by the union, the companies "could, but . . . not necessarily would . . . go out of business." Tr. 101, Lane, December 21, 1982 bargaining session.

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Immediately before negotiations commenced, two employers sent letters directly to their employees asserting that the wages paid them were higher than those of their competitors, and warning that "if we are going to continue in the Chicago area as a strong competing employer . . . we must have a relief from this intolerable situation." The letters, drafted by Schoonhoven, also stated that "your future as well as the Company's will be vitally affected by these negotiations." Tr. 194, Joint Exhibits 18(a) and 18(b). *

Based on this documentary evidence, stipulations, and testimony, the Board concluded that although Schoonhoven had skillfully avoided using the "talismanic" word "poverty," he had triggered the requirement of fair substantiation during the collective bargaining sessions with respect to all the employers. I do believe that the Board's conclusion is supported by substantial evidence. The statements must be judged in the context of the bargaining setting, taken as a whole. Moreover, we should give weight to the administrative law judge's appraisal of the testimony he heard and appreciate his superior vantage point in gauging the demeanor of the witnesses.

I further believe that today's holding frustrates the statutory policy requiring substantiation of bargaining positions where necessary to allow peaceful, successful, collective bargaining. We condone the stratagem of maintaining a position during the bargaining and then denying such a position is in fact being taken when the opposing party demands substantiation. Such "gamesmanship" is, in my view, encouraged by the majority's opinion. I respectfully dissent.

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* During the November 24, 1982 bargaining session, the respondent employers for the first time proposed a change in the management rights clause, Article III, to the effect that the employers retained "the right to shut down or relocate the plant in whole or part and to select the site of any such relocation." Joint Exhibits 15(a)–(d). On the heels of the letters and the bargaining statements, this proposed change in language also could have rationally fueled union fears that the employers as a group were losing money and pleading inability to pay.

NLRB v. McEver Engineering, Inc.

784 F.2d 634 (5th Cir.), March 10, 1986—275 NLRB 921

On petition to enforce Board Order

Before Politz, Garwood and Jolly, Circuit Judges

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E. Grady Jolly, Circuit Judge: This case is before the court upon application of the National Labor Relations Board (the "Board"), pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (the "Act") for enforcement of its unfair labor practice order against McEver Engineering, Inc. ("McEver"). The Board found[1] that McEver had violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by firing seven employees who, faced with unusually hazardous working conditions, had concertedly engaged in a work stoppage. The Board also found that one of the seven employees, although alleged by McEver to be a foreman, was not a supervisor within the meaning of section 2(11) of the Act, 29 U.S.C. § 152(11), and was therefore protected by section 7, 29 U.S.C. § 157. The Board ordered McEver to reinstate the seven men and to make each of them whole for any earnings lost as a result of the discharges. We find substantial evidence in the record as a whole to support the Board's findings, and therefore enforce the Board's order.

I.

In October 1982, eleven of McEver's construction crew employees were working at the Texas Lime Company plant near Cleburne, Texas. McEver was serving as the Texas Lime Company's independent contractor. The work consisted of installing new equipment, rebuilding old equipment, and repairing and replacing guard rails, all on the tops and sides of eighty-foot-tall lime tanks. The work was done outside and required the use of electricity for the necessary welding, cutting, and grinding. A large crane was available to lift workers from the ground to their work stations and back. The men had no shelter from the elements. They were not represented by a labor organization.

The weather on October 21, 1982, was rainy, at times heavily so, with intermittent showers, mist, and fog. Early in the day there was thunder and lightning. The project superintendent, Bill Brickell, testified at trial that he expected a "rain-out" to be declared and work to be called off for the day. However, a power outage had caused a shutdown of the Texas Lime plant, and Texas Lime officials pressured Mel Steger, the project manager for McEver, to put the men to work. Thus, despite shouts and complaints about working in the rain from some employees assembled in the tool house awaiting orders from Brickell and Steger, the men were ordered to start work.

Brickell testified that the working conditions at this plant were hazardous even in the best weather. "There [are] no good working conditions. . . . You have either got lime in your eyes, you['ve] got quick lime on you, it is burning you. If it rains, it is slick, it is muddy, it is messy. If it is dry and the wind is blowing, it gets in your nose and in your lungs . . . the working conditions were not good at the lime plant." No one has claimed otherwise. The administrative law judge (ALJ) therefore found that on the morning in question the employees faced serious hazards arising from the already dangerous conditions at the lime plant.

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Some of the employees testified at trial that they received electrical shocks while working with power tools in the wet weather, and that they were subjected to slips, falls, and near-falls on the lime-encrusted surfaces of the catwalks and the tanks' sloping sides. The four-foot guard rails on top of the tanks had gasps in them, thus failing to offer complete protection. Visibility was poor because of the lime blowing in the wind and sticking to work surfaces, muddying the men and their equipment. The windshield of the crane was useless; the crane operator was forced to lean out of the window of his cab in order to see the hand signals used to direct him in transporting the men, tools, and equipment. Attached to the end of the crane boom was a sliding basket, four feet square, where the men were carried with the equipment to the guard rail area of the tank. Once he reached his destination, a man had to climb out over the top of the basket, then crawl down the other side of the guard rail to the catwalk. The crane operator, leaning out of the cab to see what he was doing, had to stretch from an awkward position to operate the crane controls.

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[1] The Board's order was issued on June 28, 1985, and is reported at 275 N.L.R.B. No. 128 (1985). Members Hunter and Dennis formed the majority, with Chairman Dotson dissenting.

The employee passengers confronted these conditions and the maneuverings in and out of the basket at considerable heights, onto surfaces slickened by wet lime, in the control of an operator handicapped by wind, rain, and blowing lime, at various times through the morning; as the rain fell harder, the men were brought down from their perches, assembled in the tool shed, and then ordered back up again whenever the rain slackened. They had no protective clothing. Other employees, assigned to work at lower elevations or on the ground, reported to supervision that weather conditions made it impossible to work.

During an interval of hard rain while the men were assembled in the tool shed, many of them discussed how hazardous it was on top of the tanks. Preston Ray testified, and the ALJ found, that he had received electrical shocks that morning while welding, and that he told Brickell, "This is a bunch of bull, working in these kinds of conditions." Brickell acknowledged Ray's complaint by saying, "I know it. I tried to get him [Mel Steger] to send them home, but it's not me, it's Mel." Ray also complained to Steger at this time, but Steger merely referred to the fact that a Texas Lime official wanted the work done. The ALJ also found that Thomas Murray, another member of the crew, told Steger and Brickell that it was too dangerous and slick outside, and that nearly everyone complained at one time or another to the supervisors. When again the rain slackened, however, the men were ordered back to work.

Shortly after this return to their positions, the men were once again forced by renewed heavy rainfall to descend and seek shelter in the tool shed where, as it continued to rain, they remained until the noon lunch period.

At noon, the seven employees whose discharges are at issue here drove together to have lunch at a location approximately three-quarters of a mile from the worksite. The ALJ found that during their half-hour lunch break, the seven men discussed the working conditions. Some expressed an unwillingness to return to work in their wet clothes; others feared that a dangerous fall would occur and the person involved would never be able to work again. Finally, the men together decided not to return to work at the conclusion of the lunch break.

When the seven employees failed to return from lunch at 12:30, Brickell sent the company clerk, Eddie Challenger, to investigate. Brickell and Challenger knew where the men had gone for lunch because they had seen their parked vehicles when they themselves had returned from lunch in town. The ALJ found that when Challenger questioned the men, he was told by two of them that they were not going to return to work until the rain stopped, and that when it stopped they would return.

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When Brickell learned from Challenger only that the men "were not ready to come back to work," he instructed Challenger to fill out termination slips for all of them. The stated reason for the discharges was failure to return to work. Shortly thereafter, Steger confirmed Brickell's decision to fire the men. The ALJ found that despite his knowledge that the men were three-quarters of a mile away, Steger did no investigation of their reasons for failing to return beyond asking some substitute electricians on the tanks if they knew what the problem was.

The seven men returned to the jobsite when the rain stopped at approximately 1:30 p.m. At this time they were told that they had been discharged. The ALJ found that after some heated discussions between Steger and a Texas Lime official and some of the men, the employees packed their tools and left the premises. Steger and Brickell admit that the men were discharged solely because they had failed to return to work at 12:30 p.m.

II.

On November 29, 1982, Thomas Murray, one of the seven terminated employees, filed a charge with the Board's regional office in Fort Worth, Texas, alleging that he, Ector Yzaguire, Kevin Morgan, Ron Emerson, Kenny Hampton, Arthur Wallace, and Preston Ray had been discharged "because they concertedly refused to work in abnormally dangerous working conditions." After investigating the charges, the Board issued a complaint on December 23, 1982, alleging that McEver had discharged, and failed and refused to reinstate, the seven employees because they had "engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Following an evidentiary hearing, the ALJ found that McEver had discharged the seven for taking concerted activity protected by section 7 of the Act. The ALJ therefore charged McEver with having violated section 8(a)(1) of the Act, and ordered it to offer the men reinstatement without prejudice to their seniority or other rights or benefits, and to make them whole for any loss of earnings they had suffered. McEver was also ordered to expunge from its records any reference to the seven discharges, and to notify the men in writing that evidence of their discharges would not be used for future personnel actions.

The ALJ also found that Preston Ray was not a supervisor under section 2(11) of the Act. Ray was therefore held to be protected by section 7 and covered by the ALJ's order.

The Board affirmed the findings and conclusions of the ALJ and adopted his recommended order.

McEver contends on appeal that because they were not engaged in protected activity, it was no violation of section 8(a)(1) to fire the seven employees. McEver alleges that the employees' refusal to return to work after lunch constituted a "partial" strike, unprotected by the Act. McEver argues in the alternative that even if the men were not engaged in a partial strike, their work stoppage was simply a refusal to perform activities that were a legitimate part of their job duties, and therefore was not protected activity. McEver also contends that no substantial evidence supports a finding that either the clerk Eddie Challenger or the seven discharged men had put McEver on notice as to a reason for the work stoppage. Next, McEver claims that it had no unlawful intent to interfere with the employees' allegedly protected, concerted activity, and that therefore the Board's decision in *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984), *vacated and remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C.Cir.1985), *cert. denied*, ––– U.S. –––, 106 S.Ct. 313, 88 L.Ed.2d 294, and ––– U.S. –––, 106 S.Ct. 352, 88 L.Ed.2d 320 (1985), mandates a finding that there was no violation of the Act. Finally, McEver disputes the Board's finding that Preston Ray was not a statutory supervisor.

In regard to the Board's order of reinstatement for all of the alleged discriminatees, McEver argues that post-discharge

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misconduct by Morgan and Ray precludes their being awarded that remedy.

There are thus three issues presented by this case. First, we must examine whether the Board's decision that McEver discharged the seven employees for engaging in protected concerted activities is supported by substantial evidence in the record as a whole. *See Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Second, we examine under the same standard the Board's conclusion that Preston Ray, one of the discharged employees, is not a supervisor under section 2(11) of the Act. Third, we are faced with the question of the appropriateness of the reinstatement remedy granted to Morgan and Ray.

III.

Section 7 of the National Labor Relations Act guarantees statutory employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the Act enforces this guarantee by making it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their section 7 rights. The guarantees and protection of section 7 are afforded equally to nonunion employees and union employees; a collective bargaining agreement need not be in effect for the Act to apply. *E.I. du Pont de Nemours and Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir.1983); *NLRB v. Columbia University*, 541 F.2d 922, 931 (2d Cir.1976). Employees' activities are protected by section 7 if they might reasonably be expected to affect terms or conditions of employment. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir.1981).

Here the alleged protected activity is the right to engage in a work stoppage as a means of protesting an unsafe working condition. We recognize, of course, that not all work stoppages are protected. Employee refusals to perform some established job duties are generally not deemed protected activities; such conduct is viewed as an attempt to dictate unilaterally the terms and conditions of employment. Thus an employee who continues to work, but refuses to obey the employer's orders to perform activities forming a legitimate part of his work, is considered to be conducting a partial strike and is not protected. *See, e.g., NLRB v. GAIU Local 13–B, Graphic Arts International Union*, 682 F.2d 304, 308 (2d Cir.1982); *Excavation Con-*

struction, Inc. v. NLRB, 660 F.2d 1015, 1020–21 (4th Cir.1981); *Audubon Health Care Center,* 268 N.L.R.B. 135, 137 (1983); *Daniel Construction Co.,* 267 N.L.R.B. 1213, 1221–22 (1983).

A partial strike, however, is to be distinguished from a one-time strike of short duration. A brief, one-time strike is presumptively protected activity. *See NLRB v. Pace Motor Lines, Inc.,* 703 F.2d 28 (2d Cir.1983); *Richard Schubert Associates, Inc.,* 222 N.L.R.B. 867, 872 (1976); 2 *The Developing Labor Law* 1017–18 (C. Morris 2d ed. 1983). The seven McEver employees did not refuse to perform certain tasks while accepting others. Instead, they completely stopped working—in effect, walked off the job—and refused to work at all until the rain had stopped. We therefore hold that the employees' action, a one-time work stoppage of short duration, is presumptively protected by the Act.

McEver's contention that the work stoppage was a simple refusal to perform legitimate, i.e., not unusually unsafe, job duties is equally without merit. The Board found that the unsafe conditions present on October 21, 1982, were not a routine circumstance of the job. *McEver Engineering, Inc.,* 275 N.L.R.B. No. 128, slip op. at 2. Superintendent Brickell testified at trial that he "would have declared a rain-out" if he had not been under pressure from Texas Lime officials to complete the work. Employees testified that although they had worked in the rain in the past, they had not done so during "downpours," nor while on top of the tanks.[2] Transcript at 111. The Board's finding that working in the hard rain of October 21 on top of a lime tank was not a routine legitimate job requirement is more than adequately supported by substantial evidence in the record.

The ALJ found that the seven discriminatees had not made a "specific demand" to McEver to relieve them of the unsafe working conditions, but that the failure to do so did not render their conduct unprotected. Where, as here, the employees are unrepresented, and the employer "should reasonably see that improvement of working conditions is behind the employees' action," the ALJ found no need for a specific demand.

Before an employer can be held to have discriminated against its employees for their protected activity, the Board must show that the supervisor responsible for the alleged discriminatory action knew about the protected activity, and that the employees' protected activity was a motivating factor in the employer's decision. *Air Surrey Corp. v. NLRB,* 601 F.2d 256, 257 (6th Cir.1979); *cf. NLRB v. Gulf States United Telephone Co.,* 694 F.2d 92, 95 (5th Cir.1982), and *Pioneer Natural Gas Co. v. NLRB,* 662 F.2d 408, 412 (5th Cir.1981) (substantial evidence must support a finding that the employer knew about the employees' union activities and that the employer's conduct was motivated by anti-union animus). McEver claims that it was not on notice of the seven employees' reasons for not returning to work. According to McEver, several other employees continued to work on the tank after lunch; the rain had stopped by 12:30, the end of the employees' lunch break;[3] the seven employees left their tools in place during lunch, indicating an intent to return; and the seven men, as well as other employees, had worked during the morning in rainy conditions more severe than those existing after lunch. For these reasons, argues McEver, it was not "readily apparent" to company officials that the employees' work stoppage was a protest against dangerous working conditions.

McEver's argument does not persuade us, however, in the light of the fact that supervisor Brickell specifically sent a company representative, the clerk Eddie Challenger, to ask the seven men why they were not returning to work. The ALJ credited the testimony of two employees that Challenger was told that they were not going to return to work until it stopped raining, and that when it stopped, they would return. Challenger, however, reported to Brickell only that the men "were not ready to come back to work."

Under these circumstances, Brickell and McEver are charged with constructive knowledge of what was said to Challenger. Challenger was a McEver employee acting as a McEver agent in questioning the men. It does not advance the purposes of the

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[2] One employee, Thomas Murray, testified at trial, "We never go to work when it is raining as it was, especially some place that it is too dangerous to work." Transcript at 109. The Board expressly found that "the dangers of working that day as perceived by the employees and the Respondent's project superintendent were not inherent in the job, and the risks attendant to working in those conditions were not assumed by the employees when they accepted employment with Respondent." *McEver Engineering, Inc.,* 275 N.L.R.B. No. 128, slip op. at 2.

[3] McEver's claim is contrary to the ALJ's finding that the rain stopped about 1:30 p.m., when the employees returned to work. We are bound to accept the ALJ's finding for which there is ample support in the record.

Act, nor is it equitable or fair, to require the seven employees to bear the harm or prejudice resulting from the failure of the employer's agent to communicate the reasons given him for the work stoppage. The company appointed Challenger to act as its agent, and it must bear the consequences.

Brickell did not discharge the men as soon as he realized they were not returning to work. Instead, he and Steger did some preliminary investigation, through Challenger and by speaking to some other employees, to ascertain the men's reasons. Only after this investiga-

tion, however incomplete, were the men fired. Furthermore, Brickell had earlier been put on notice that the employees considered the working conditions to be dangerous—Ray had complained to Brickell that "this is a bunch of bull, working in these kinds of conditions," and Brickell himself had acknowledged the danger when he told Ray that he thought it was "kind of crazy to try to work in that kind of weather." Substantial evidence in the record thus supports the Board's conclusions that before it discharged the men, the company was aware both of the danger of the working conditions and of the connection between fear of that danger and the work stoppage. McEver was on reasonable notice that the seven men were protesting unsafe working conditions, and it was in a position to make an informed judgment as to how to respond. In such circumstances, there is no need for the protesting employees to confront their employer with a "specific demand" for relief from the circumstance precipitating their concerted action. *See, e.g., Diversified Case Co.*, 263 N.L.R.B. 873, 874 (1984). *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–15, 82 S.Ct. 1099, 1103, 8 L.Ed.2d 298 (1962) ("The seven employees here were part of a small group of employees who were wholly unorganized. They had no . . . representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. . . . [They had made] more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and now says the Board should have treated as nothing more than 'the same sort of gripes as the gripes made about the heat in the summertime' ").

In addition, we note that the facts in this case are in all significant respects identical to those of *NLRB v. Service Machine & Shipbuilding Corp.*, 662 F.2d 1125 (5th Cir.1981) and *Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir.1981). In both of those cases, as here, a group of employees together refused to work with electrical equipment while outside in the driving rain. In both of those cases, as here, the employees had in the past worked outside during drizzling or light rain. And in both of those cases we held, as we do here, that the employees' short-term refusal to work in such perceived dangerous conditions is protected activity, and therefore the employer violated section 8(a)(1) when it discharged those employees for participating in that work stoppage.

Finally, McEver urges us to hold that the Board erred by not specifically applying the standard articulated in its recent decision, *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984). The Board in *Meyers* adopted a new definition of concerted activities. Under the test enunciated there, an employee's conduct is not "concerted activity" unless it is "engaged in with or on the authority of other employees." The Board went on to say,

> once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the protected nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (*e.g.*, discharge) was motivated by the employee's protected concerted activity.

Meyers, 268 N.L.R.B. at 497. McEver argues that all of the *Meyers* elements have not been established, and that we therefore must vacate the Board's order.

We find that the Board's *Meyers* standard, if even applicable here, presents no barrier to our affirming the Board's finding that the seven employees were discharged for having engaged in protected, concerted activity.[4] Certainly the work

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[4] We note that *Meyers* was vacated and remanded by the District of Columbia Circuit in February 1985. *Prill v. NLRB*, 755 F.2d 941 (D.C.Cir.), *cert. denied, sub nom Meyer's Industries, Inc. v. Prill*, ––– U.S. –––, 106 S.Ct. 313, 88 L.Ed.2d 294, and ––– U.S. –––, 106 S.Ct. 352, 88 L.Ed.2d 320 (1985). The Board has continued to use its *Meyers* standard when deciding whether or not an employee action is concerted and protected by the Act. *See, e.g., Daniel International Corp.*, 277 N.L.R.B. No. 81, 120 L.R.R.M. 1289 (1985); *Squier Distributing Co.*, 276 N.L.R.B. No. 133, 120 L.R.R.M. 1155 (1985); *Churchill's Restaurant*, 276 N.L.R.B.

Continued

stoppage was a concerted action, having been undertaken by several employees who acted together after discussing among themselves their common grievance. We have already discussed the question whether "the employer knew of the protected nature of the employees['] activity" in the light of Fifth Circuit case law; substantial evidence in the record supports the ALJ's finding that McEver knew of both the risk inherent in the working conditions and the men's safety-related reasons for temporarily refusing to work. Finally, even McEver admits that the discharges were motivated by the employees' work stoppage, the protected activity involved in this case.[5] Thus, although the Board did not expressly mention *Meyers* in its memorandum decision and order, its finding that the men exercised their section 7 rights in concert is not inconsistent with the requirements of *Meyers.*

IV.

> Section 2(11) of the Act defines a supervisor as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Because the statute is written in the disjunctive, an individual who has the authority to use independent judgment in the execution or effective recommendation of any of the listed functions is a statutory supervisor. *Abilene Sheet Metal, Inc. v. NLRB,* 619 F.2d 332, 343 (5th Cir.1980); *Hydro Conduit Corp.,* 254 N.L.R.B. 433, 436 (1981). Because section 7 rights are granted only to "employees," statutory supervisors are not covered by the Act.

McEver claims that the ALJ's finding that Preston Ray was not a statutory supervisor is not supported by substantial evidence in the record as a whole. Specifically, McEver claims that Ray received a higher rate of pay than the other crew members; that Ray made work assignments after consultation with the superintendent, similar to the modus operandi of McEver supervisors; that Ray attended weekly management planning meetings; that Ray was consulted by management on layoff decisions and occasionally was present at job applicant interviews; and that Ray shared office space with an office manager.

There is no doubt that at one time Preston Ray was a supervisor at McEver. In 1981, after approximately six months of working as a fitter, Ray was made foreman of the construction crew. The ALJ found that he remained in that position until the spring of 1982, when a series of layoffs reduced the crew from approximately forty-five to eleven employees. At that time, Ray was reduced to the position of working foreman, the equivalent of a leadman's position. Approximately eight weeks before his termination, Ray was told by Steger that he was to be "working with the hands [crew members], just like one of the hands."

The ALJ found that Ray never hired or fired any employee. Like the crew-members, Ray was paid by the hour, and had no privileges or benefits that were not accorded to them as well. He received pay for overtime work, and spent ninety percent of his time performing manual work alongside the crew members. His hourly rate was about twenty-five cents more than that of the next classification below his, a difference common in a leadman situation. He did not assign overtime, recommend pay increases, grant time off, or discipline the employees. He reviewed job assignment lists with Brickell after Steger had indicated what jobs he wanted done; Ray then assigned the men to the various jobs, "depending on whether it called for a welder or a fitter or a helper or so forth." Transcript at 129. The ALJ found that this was a routine matter for Ray, not involving the exercise of independent judgment; he simply divided the available men among the various jobs that he had been told needed to be done

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No. 87, 120 L.R.R.M. 1233 (1985). We express no opinion as to whether the Fifth Circuit, if presented with the precise issue in the future, will apply the *Meyers* standard in order to define protected concerted activity.

[5] *See Daniel International Corp.,* 277 N.L.R.B. No. 81, 120 L.R.R.M. 1280 (1985) ("we find that the employees' spontaneous refusal to work for one day in protest of unique and adverse working conditions . . . is protected by the Act. . . . Such a single concerted walkout is presumptively protected, absent evidence that the work stoppage is part of a plan or pattern of intermittent action inconsistent with a genuine withholding of services or strike. . . .").

that day. The job assignments he made were frequently changed by Steger.

Although prior to a layoff Brickell occasionally asked Ray if he had any disagreements with the decision who was to be laid off, the ALJ found that the one time that Ray did disagree with Brickell, his recommendation was rejected. It is also telling to note that despite Ray's repeated, albeit informal, recommendations on October 21 that because of the unsafe conditions he and the other crew members not continue to work on the tanks in the rain, he and the others were ordered to resume their positions.

As an appellate court, we generally give special deference to a Board finding of supervisory status because the Board is best able to determine the various gradations of authority within the workplace. *Abilene Sheet Metal,* 619 F.2d at 344. Substantial evidence supports the Board's finding that, in view of the indicia of supervisory status reviewed above, Ray was not a supervisor.

V.

We now turn to McEver's contention that the Board erred in ordering reinstatement for two of the employees despite their alleged misconduct immediately after being fired. Kevin Morgan and Preston Ray were involved in unrelated confrontations with a McEver official and with a Texas Lime official, respectively. The ALJ found that when Morgan was told of his discharge, he angrily questioned Steger about safety shoes and an expected pay raise, threatening to assault Steger unless given a reply. When Steger calmly answered Morgan,[6] Morgan left. The ALJ also found that while Ray was loading his truck preparing to leave the premises after being discharged, Texas Lime official James Thompson approached Ray, ordered him to leave, and threatened to call the police. Steger testified that Ray responded by once shoving away Thompson and threatening to put him in the hospital. A vice president of Texas Lime, however, characterized the incident as "some verbal exchange between Jim and Preston. Preston made some threatening gestures and additional heated conversation occurred. Jim backed away. They both kind of backed off at that point. . . ." When asked on direct examination if anything else had occurred, the Texas Lime official said, "Nothing really of significance, I think."

The ALJ ordered reinstatement for all of the discriminatees, including Ray and Morgan. In the absence of any exceptions by McEver to this ruling, the Board affirmed the ALJ's order. *See McEver Engineering, Inc.,* 275 N.L.R.B. No. 128, slip op. at 1, n. 1. McEver now raises for the first time on appeal its claim that the reinstatement order is inappropriate as to Morgan and Ray. We find that because the issue was not raised during the proceedings before the Board and because the Board expressly did not consider the issue, judicial review is barred by section 10(e) of the Act. *Woelke & Romero Framing, Inc. v.*

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NLRB, 456 U.S. 645, 665-66, 102 S.Ct. 2071, 2083, 72 L.Ed.2d 398 (1982).[7]

ENFORCEMENT GRANTED.

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[6] Steger testified that he told Morgan, "Cotton, if you will shut up, I will give you an answer," and reminded him of the wage freeze then in effect at McEver. The ALJ found that to be the end of the incident.

[7] 29 U.S.C. § 160(e) provides in relevant part: No objection that has not been urged before the board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Roberto Sanchez and Elva Rodriguez v. NLRB

785 F.2d 409 (2d Cir.), March 11, 1986—270 NLRB 451

On petition to review Board Order

Before Oakes, Kearse and Pierce, Circuit Judges

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Pierce, Circuit Judge: Petitioners Roberto Sanchez and Elva Rodriguez seek review pursuant to Section 10(f) of the National Labor Relations Act (Act), as amended, 29 U.S.C. §§ 151, 160(f) (1982) of an order of the National Labor Relations Board (Board) dated April 30, 1984, that dismissed in part an unfair labor practice complaint against Goodie Brand Packing Corp. (Goodie Brand or Company). While the Board agreed with the Administrative Law Judge (ALJ) that Goodie Brand had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by displaying union animus, the Board modified that portion of the ALJ's recommended order which found that Goodie Brand had violated Section

8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by discharging petitioner Sanchez and other employees who had participated in a strike.

The petition for review is granted and the Board's order is modified to provide for the reinstatement of petitioner Sanchez. The case is remanded for further proceedings with respect to the striking employees.

BACKGROUND

The findings of fact as made by the ALJ and adopted by the Board chronicle a pattern of unfair labor practices at Goodie Brand. Goodie Brand is a wholesale fruit and vegetable distributor in New York City that purchases produce at the Hunts Point Market (Market) in the Bronx as well as from growers throughout the United States and Mexico and sells the produce to retail stores and restaurants. Goodie Brand is run by four brothers; Abe Solomon, the President, is in charge of labor relations.

The Company employs floor workers who sort and package the produce, and drivers who pick up the produce at the Market and make deliveries. These employees are represented by Local 202, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Local 202), which has two associationwide collective bargaining agreements with Goodie Brand. These agreements, one of which covers the drivers while the other covers the floor workers, have been in existence since 1959 and, according to the findings, contain valid union security clauses, no-strike and no-lock-out clauses, and provide for the adjustment of grievances and arbitration. In addition, both agreements provide that the Union may designate shop stewards.

Goodie Brand has a telling history of hostility to Union activities. Felix Liciaga, a floor worker, was the shop steward for both the drivers and the floor workers for several years until 1978 or 1979. In February, 1980 Petitioner Elva Rodriguez, a floor worker, was elected shop steward and also represented both the floor workers and the drivers. Despite the fact that both collective bargaining agreements contained union security clauses which required union membership after 30 days of employment, only eleven out of sixty of the Company's eligible workers were Union members in 1980. Rodriguez' efforts to increase union membership and to represent Goodie Brand's employees met with considerable Company resistance. After distributing union membership cards to the employees, Rodriguez was told by one of the Solomon brothers not to talk about the Union inside the plant. In April, 1980, Rodriguez, who lives in Yonkers, was discharged from the Company for failing to report to work during the transit strike. Sol Solomon told the employees that Rodriguez would not be allowed back at work because she was a "son of a bitch." Rodriguez was the only employee discharged, despite the fact that other employees did not report to work during the transit strike. Rodriguez was reinstated only after the employees walked out and Teddy Mogilnicki, the Union business agent, interceded on her behalf. In August and September 1980, the Union received letters from the Company complaining about Rodriguez' work performance. Thereafter, Rodriguez and her sister were told that they would be required to lift thirty-two pound boxes of tomatoes which, until then, had been lifted for them by a male worker. When she protested to Abe Solomon and presented him with a doctor's note, he told her that the alternative was to quit; when she complained to Mogilnicki, he said that she must follow orders. In June 1981, Rodriguez resigned as shop steward and Roberto Sanchez, a driver, was elected on July 1.

Sanchez was hired as a driver by Goodie Brand in 1975 and became a member of the Union in 1978. Sanchez testified that when one of the Solomon brothers asked him why he joined the Union and he responded that he sought Union benefits, he was told that he should have talked it over with the management first. After attending a Union meeting, Sanchez was told by the management that he had better be careful and that he was being followed; he was also told not to talk to other employees about Union activities. Thereafter, the Union received letters complaining about Sanchez' work performance. As the ALJ pointed out, there is no record of prior complaints about Sanchez.

According to the findings, after Sanchez' election as shop steward in July, 1980, he was subjected to threats and warnings by Goodie Brand's management and assigned more onerous working conditions. For example, Abe Solomon told Sanchez that he could not represent both the floor workers and the drivers (despite the fact that one shop steward had traditionally represented both units) because the Company had two separate contracts with the Union. Solomon asked Sanchez why he was organizing the workers and threatened Sanchez saying "from now on, you me [sic] going to have a fight every single day, and let's see how

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long you last in your job." App. at 103. Sanchez was also told to advance his own money for tolls contrary to prior Company practice, and he was put on the night shift contrary to seniority rules. In addition, after Sanchez' election as shop steward, a number of complaint letters were sent to the Union regarding his work performance. Despite this harassment, Sanchez filed over forty-five grievances with the Union.

The following events gave rise to petitioners' present predicament. At approximately 5:30 a.m. on September 25, 1981, Sanchez left the Market driving a Company truck. He unwittingly turned south onto a northbound lane of the Bruckner Boulevard. When he realized his mistake, he crossed the concrete divider that separates the north and south lanes. The divider was approximately twelve inches wide and five and one half inches high and the truck was damaged to the extent of $2,300. Nat Solomon observed the incident and when Sanchez returned to the Goodie Brand plant, Abe Solomon asked him what had happened; according to Sanchez, upon hearing Sanchez' story Solomon walked away. Abe Solomon testified that "[Sanchez] told me what happened and I said to him that at this particular time you're being suspended for a period of time." Solomon told the ALJ that he meant an "indefinite suspension." App. at 661. Thereafter, Sanchez received a letter from Goodie Brand addressed to the Union informing him that he had been indefinitely suspended. Solomon testified that after discussions with Goodie Brand's attorneys and Mogilnicki he decided to convert the indefinite suspension to a two week suspension. *See also* app. at 1098 (pre-hearing letter to Board claiming that Sanchez was suspended). Mogilnicki testified that he understood that the suspension would be for one week, but at most Solomon had agreed to a two week period. Apparently, no one told Sanchez about the conversion to a two week suspension. In fact, after Sanchez received the letter from Goodie Brand and asked the Union's attorney what it meant, he was told "[w]hat the hell you think it is? You're fired." App. at 331 (testimony of Roberto Sanchez).

On October 5, 1981, Sanchez, with the help of other union members, set up a picket line outside the Goodie Brand plant to protest his discharge. Approximately forty employees joined the picket line. On October 6, the Company sent the following letter to all these employees with the exception of Sanchez:

> Please be advised that your are [sic] engaged in an unlawful work stoppage—A WILDCAT STRIKE—which is a ground for DISCHARGE.
>
> Unless you terminate your strike and return to work at 8 AM on Friday, October 9, 1981, you may consider yourself discharged at 8:01 AM on Friday, October 9, 1981.

App. at 1121. Several employees returned to work; of those that did not return on October 9, eight were reinstated by October 19. At the March 2, 1982 hearing before the ALJ, the Company offered unconditional reinstatement to thirteen of the remaining fifteen employees, excluding only Elva Rodriguez and her sister. Sanchez was never sent the above-quoted discharge letter and was never offered reinstatement. *See* app. at 15 n. 24.

The Decisions of the ALJ and the Board

Petitioners filed several complaints between July and October, 1981 alleging violations by Goodie Brand of Sections 8(a)(1), (3) and (4) of the Act. These complaints were consolidated and a hearing was held before ALJ Herman who issued a decision and recommended order dated January 28, 1983. The ALJ first credited Sanchez' testimony because he "testif[ied] in a straight forward and logical manner. [Abe] Solomon, on the other hand, was evasive in his responses." The ALJ held that the Company had no right to refuse to recognize Sanchez as the shop steward; the refusal to advance Sanchez toll money and the warnings about discussing union activities as well as the complaint letters regarding Sanchez' work performance were found to be "methods of intimidation." The imposition of more stringent work conditions was, according to the ALJ, "[t]he ultimate act of

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retribution" and the purpose of Sanchez' placement on the night shift was "to scrutinize his union activities."

The ALJ concluded that "[b]y threatening, warning, and interrogating Sanchez, and by assigning him more onerous working conditions, all because of his protected concerted activities, [Goodie Brand] thereby restrained and coerced employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act." The ALJ also found that the indefinite suspension meted out to Sanchez on September 25, 1981 was tantamount to a discharge and that the "precipitous action . . . was the direct result of Sanchez' union activities and therefore constituted an unfair labor practice in violation of Section 8(a)(3) of the Act."

Applying *Arlan's Department Store of Michigan, Inc.,* 133 NLRB 802 (1961), which held that a strike by employees in the face of serious unfair labor practices is immune from a no-strike clause in a collective bargaining agreement, the ALJ held that the employees engaged in the strike were also unlawfully discharged. The ALJ found that Local 202 had so seriously failed to represent the Goodie Brand employees, that when Sanchez was presumably fired the employees were left with virtually no representation. Thus, in dismissing Sanchez, the Company was in effect trying to deprive its employees of proper representation which, the ALJ concluded, was a serious unfair labor practice that nullified the no-strike clause in the contract. As the strike was caused by Sanchez' discharge, itself a violation of the Act, the ALJ reasoned that the striking employees were engaged in protected concerted activity and therefore the discharges meted out pursuant to the Company's October 6 letter were in violation of Sections 8(a)(1) and (3) of the Act.

The ALJ recommended that Goodie Brand be ordered to reinstate Sanchez as well as the striking employees to their former or substantially equivalent positions with backpay. In addition, the Company was ordered to cease and desist from future unfair labor practices.

The Board modified that portion of the ALJ's order that found a Section 8(a)(3) violation by Goodie Brand and that required the reinstatement of Sanchez and the striking employees. While the Board agreed with the ALJ's credibility determinations and with the finding that Sanchez was discharged rather than suspended, the Board noted that the ALJ had failed to apply the *Wright Line* test to determine the motivation of the employer in dismissing Sanchez. *See Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), *enf'd,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982). Applying this test, the Board held that Goodie Brands' violations of Section 8(a)(1) were clearly sufficient to support a prima facie showing that union activity was a motivating factor in the Company's decision to discharge Sanchez. The Board found, however, that the Respondent had established that it would have discharged Sanchez in the absence of his Union activities because of the driving incident. Concluding that "Sanchez' conduct in driving a company truck down the wrong side of a major highway for some distance, crossing the median, and damaging the truck is such gross negligence that it would have provoked discharge of any employee irrespective of any animus the Respondent may have harbored against that employee," the Board dismissed that portion of the complaint that alleged unlawful discharge of Sanchez. As the Board found the discharge of Sanchez lawful, it held that the employees' strike in protest of the dismissal was unprotected activity in violation of the no-strike clause of the collective bargaining agreement and dismissed that portion of the complaint that alleged a violation of Section 8(a)(3) with respect to the discharge of the striking employees.

Petitioners appeal the Board's modification of the ALJ's recommended order, claiming that the Board's conclusions are not supported by substantial evidence. Petitioners contend that Sanchez was not

fired for the driving incident—he was merely suspended; therefore the Board's conclusion that the Company discharged Sanchez for driving the wrong way and crossing the median on September 25 is not sustained by the record. Even if Sanchez was discharged, petitioners claim that the ALJ's finding that he was dismissed as a result of union animus, not the driving mishap, cannot be disregarded. Furthermore, the petitioners contend that the ALJ's analysis satisfies the rationale of *Wright Line* and thus his failure to cite to that decision should not prove fatal. Finally, even if this court upholds the Board on the issue of Sanchez' dismissal, petitioners urge us to remand the case of the striking employees for a determination of whether they nevertheless had the right to strike given their lack of effective representation.

DISCUSSION

Under Section 7 of the Act, 29 U.S.C. § 157, employees of an employer covered by the Act have a right to form, join, or assist labor organizations. Section 8(a)(1) makes it an unfair labor practice to interfere with, restrain, or coerce the exercise of those rights; Section 8(a)(3) prohibits discrimination in hire or tenure to encourage or discourage membership in a Union. The Board and the courts have set forth certain guiding principles to determine whether a discharge violates the Act. In addition, the Board's decision must be affirmed if it is supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *Local One, Amalgamated Lithographers v. NLRB,* 729 F.2d 172, 175 (2d Cir.1984).

In *NLRB v. Transportation Management Corp.,* the Supreme Court observed that under the Act:

> it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the [Act], however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause.

462 U.S. 393, 398, 103 S.Ct. 2469, 2472, 76 L.Ed.2d 667 (1983). When there is evidence that an employer has dual or mixed motives for the discharge, the Board has applied the *Wright Line* test approved by the Supreme Court in *Transportation Management. See Local One,* 729 F.2d at 175. Once the charging party has established a prima facie case that the employee's dismissal was the result of conduct protected by Section 7 of the Act, the burden then shifts to the employer to show, by a preponderance of the evidence, that the discharge would have occurred "in any event and for valid reasons." *Transportation Management,* 462 U.S. at 400, 103 S.Ct. at 2473. If protected union conduct was a substantial or motivating factor in the dismissal and the employer does not establish that it would have discharged the employee anyway for other reasons, the employer has failed to meet his burden. *Id.* at 401, 103 S.Ct. at 2474.

The Board held that the violations of Section 8(a)(1) as found by the ALJ were sufficient to support the inference that protected activity motivated Goodie Brand's decision to fire Sanchez. However, the Board concluded that the driving incident provided an independent and valid reason for the discharge. We are unable to agree with the Board's or the ALJ's initial premise that Sanchez was discharged for the driving incident.

We must affirm the Board's decision if it is supported by substantial evidence. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938); *see Allbritton Communications Co. v. NLRB,* 766 F.2d 812, 822 (3d Cir.1985), *cert. denied,* —— U.S. ——, 106 S.Ct. 850, 88 L.Ed.2d 891 (1986); *Local One,* 729 F.2d

at 175. This court may not review the matters before the Board de novo; we are required to accept the Board's conclusions if supported by substantial evidence even if another contrary view is tenable. *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 464; *see Local One,* 729 F.2d at 175–76. On the other hand, "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 465; *see Bon-R Reproductions, Inc. v. NLRB,* 309 F.2d 898, 903 (2d Cir.1962).

Reviewing the record of the testimony and the exhibits presented at trial, we cannot "conscientiously" uphold the finding that Sanchez was discharged for the driving incident. In fact, all the evidence suggests that Sanchez was merely suspended for one or at most two weeks. The testimony of Abe Solomon as well as that of Mogilnicki refutes the notion that Sanchez was fired for the driving mishap. Both men testified that Solomon had agreed to suspend Sanchez. Furthermore, the letter sent by Goodie Brand's attorney to the Board protests that the "Employer, with our advice, intended to convert the indefinite suspension to a one week suspension." App. at 1090. The fact that Sanchez thought he was discharged for the driving incident does not shed much light on the Company's motivation for purposes of applying the *Wright Line* test. Rather it is the unrefuted testimony of the employer, supported by the corroborative testimony of Mogilnicki and the Respondent's own exhibits that provide the factual basis for our conclusion that Sanchez was suspended, not discharged, for the driving incident.

The Board argues on appeal that even if Sanchez was not discharged for the driving incident, the fact that he led a wildcat strike is a legitimate basis for the discharge. While it may well be true that Sanchez could have been discharged for leading the strike, we have found scant evidence in the record to support the conclusion that such was the case. *See* App. at 1090. Moreover, the Board itself did not rely on this explanation in its decision nor did it apply the *Wright Line* analysis to this newfound possibility for the "discharge." It is undisputed that "the courts may not accept appellate counsel's *post-hoc* rationalizations for agency action. . . . [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983) (citations omitted).

Having concluded that the Board's determination that Sanchez was legitimately discharged for the driving incident is not supported by substantial evidence, we cannot accept the Board's dismissal of that part of the claim which contends that Sanchez was fired as a result of his union activities in violation of Section 8(a)(3). The Board found that Sanchez had met his burden of proving under *Wright Line* that the discharge was the result of union animus. There is ample evidence to support his finding. The record, however, does not support the Board's conclusion that Goodie Brand met its burden of rebuttal by showing that it legitimately discharged Sanchez for the driving incident. As Justice White has noted:

> [t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Transportation Management Corp., 462 U.S. at 403, 103 S.Ct. at 2475. Thus we grant the petition for review with respect to Sanchez' claim that the Company violated Section 8(a)(3) when it fired him.

We are left with the situation of the employees who went on strike because they believed Sanchez had been wrongfully dis-

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charged as a result of the driving incident. We have held that there is insufficient evidence to support this version of Sanchez' discharge, however, it does appear that there is ample evidence to support both Sanchez' and the employees' good faith belief that he had been fired. The Board predicated its dismissal of the employees' 8(a)(3) complaint on its conclusions with respect to Sanchez' discharge. Since we have rejected these conclusions, we remand the case for further proceedings to consider the claim of the striking employees that they were dismissed in violation of Section 8(a)(3) in light of our decision with respect to Sanchez' claim.

The order of the Board is modified and those portions of the ALJ's recommended order that require the rehiring of Sanchez are reinstated. The case is remanded to the Board for a determination as to the Section 8(a)(3) claims of the other employees.

Louis J. D'Amico, Reg. Dir. v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO

630 F.Supp. 919 (D. Md.), March 14, 1986

On action for award of attorney fees under EAJA

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James R. Miller, Jr., District Judge: Pending in this action in an Application for Attorneys' Fees pursuant to the Equal Access to Justice Act (the EAJA), 28 U.S.C. § 2412(d), as amended, filed by Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (the National Union) (Paper No. 41). Louis J. D'Amico, Regional Director of Region 5 of the National Labor Relations Board (the Regional Director), has filed a Motion to Dismiss the Application and an Amended Motion to Dismiss the Application (Paper Nos. 42 and 43). The National Union has filed a Response to the motion (Paper No. 45). No hearing is necessary to decide the motion. Local Rule 6(G).

This application for attorneys' fees stems out of a petition to adjudge the National Union in civil contempt and for injunctive relief (Paper No. 35), in which the Regional Director asserted that certain acts of the National Union were motivated by a desire by the National Union to retaliate against, and to remove from office, the officials of Local 33 who negotiated and administered the local's collective bargaining agreement with Bethlehem Steel Corporation's Sparrows Point, Maryland Shipyard. The Regional Director contended that such acts of the National Union were in violation of this court's Order of May 10, 1984, as clarified on March 4, 1985. For reasons set forth in a Memorandum dated September 30, 1985 (Paper No. 40), this court on September 27, 1985, issued an Order denying the Regional Director's petition (Paper No. 39).

The Regional Director asserts that the application should be dismissed for several reasons. He contends (1) that the National Union has not sufficiently established its eligibility for an award of fees and expenses under EAJA; (2) that the Regional Director was substantially justified in initiating the contempt petition; (3) that special circumstances exist which make an award unjust; and (4) that the National Union has not submitted a proper accounting of the fees and expenses it is claiming and is claiming fees and expenses in excess of those to which it would be entitled even if it were found to be entitled to an award.[1]

Section 2412(d)(1)(A) of Title 28, United States Code, provides:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the

> United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Initially, this court finds that the National Union is a prevailing party, since the Regional Director's Petition for Contempt was denied. This issue does not appear to be in dispute. The Regional Director does dispute, however, whether the National Union is a "party," eligible to receive fees and expenses under the EAJA.

I. *Eligibility under the EAJA*

In its application, the National Union alleges that it is a prevailing party under § 2412(d) as most recently amended and that at no time relevant to the application did the National Union's net worth exceed $7,000,000.00.[2] The Regional Director asserts that the application is insufficient, because it fails to allege that the National Union has less than 500 employees, because the National Union is not the real party in interest, and because the National Union has not sufficiently demonstrated its own eligibility.

The National Union has attached to its Response to the motion the affidavit of Ernest H. Soderstrom, who performs accounting services for the National Union and who avers that at approximately July 1985, the aggregate net worth of the National Union and its local affiliates was $4,778,727.00 and that since that time the net worth has declined (Paper No. 44, Soderstrom Affidavit, ¶ 6). He further avers that during the year 1985, the maximum number of persons employed on a full-time or regular part-time basis by the National Union and its affiliated locals has not exceeded 45 (*id.*, Soderstrom Affidavit, ¶ 7). The Regional Director, however, continues to assert that the National Union has not met the threshold statutory requirements of establishing its eligibility for an award.

Section 2412(d)(1)(B) provides:

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[1] While the National Union failed to allege in its petition, as required by 28 U.S.C. § 2412(d)(1)(B), that the Regional Director's actions were not substantially justified, it does not appear that the Regional Director relies on this default in his motion.

[2] There is, apparently, no dispute that the application for attorneys' fees at issue here is governed by § 2412(d) as recently amended by Pub.L. No. 99-80, 99 Stat. 183 (1985), because the case was pending when these amendments to the EAJA were enacted. *See* Pub.L. No. 99-80, § 7(a), 99 Stat. at 186.

> "A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified."

Section 2412(d)(2)(B) defines a "party" as, *inter alia,*

> "(ii) any owner of an unincorporated business or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed. . . ."

The Regional Director's argument that the National Union's application is insufficient because it does not allege that it has less than 500 employees has been rendered moot by the statement in the Soderstrom affidavit that the National Union and its Local affiliates employed no more than 45 employees during the relevant time period. Similarly, the Regional Director's argument that the real party in interest is not the National Union, but is the National Union combined with all of its affiliated local unions throughout the United States, has been rendered moot by the averments in the Soderstrom affidavit that the National Union and its local affiliates together have insufficient net worth and employees to exceed the statutory requirements.

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Finally, the Regional Director argues that because § 2412(d)(1)(B) requires that the party "show" that it is eligible to receive an award under the section, in contrast to the requirement that it "allege" that the position of the United States was not substantially justified, the National Union must submit more than an affidavit stating that it has a net worth of less than $7,000,000.00 and employs less than 500 persons. The Regional Director asserts that the National Union, in order to meet its threshold statutory requirement of "showing" that it is eligible to receive an award, must submit a balance sheet showing its net worth. It further appears that the Regional Director argues that since the National Union has not sufficiently demonstrated its eligibility in its application, and the 30-day limit in § 2412(d)(1)(B) for submitting an application has expired, it should not be permitted to supplement its application. and, therefore, it has failed to submit within 30 days an application which establishes its eligibility for an award. Because it appears that such restrictions would conflict with the purposes of the EAJA, these arguments are without merit.

While it is clear that the statute places the burden of establishing eligibility on the applicant, it would impose unnecessarily burdensome restrictions on recovery to require an applicant to prove, to the government's satisfaction and in its initial application for fees and costs under the EAJA, that the applicant met all of the eligibility requirements. Often, when a party applies for fees under the EAJA, there is no serious question as to eligibility under § 2412(d)(1)(B). *See, e.g., Hirschey v. F.E.R.C.,* 760 F.2d 305, 309 (D.C.Cir.1985). Accordingly, there is often no argument by the government that the applicant is not eligible, and, in such cases, other courts have accepted as sufficient proof an applicant's affidavit of net worth, *see, e.g., Donahue v. Heckler,* 600 F.Supp. 153, 157 (E.D.Wis.1985); *Johnson v. Secretary of/and U.S. Department of HUD,* 594 F.Supp. 265, 267 (E.D.La.1984), and even an affiant corporation's assertion that it meets the net worth and maximum employee eligibility requirements. *See Trident Marine Construction, Inc. v. District Engineer, United States Army Corps of Engineers,* 587 F.Supp. 799, 803 (W.D.Mich.1984). *Cf. Carlisi v. Secretary of Health and Human Services,* 583 F.Supp. 135, 139 n. 7 (E.D.Mich.1984) (dismissing the application for numerous flaws, but noting that although the applicant also failed to provide the court with any basis to determine if plaintiff's net worth was less than $1 million, the error was not fatal because the court could take judicial notice that plaintiff, as a recipient of state and federal government assistance, must have a net worth of less than $1 million). In the vast majority of cases, in which such eligibility is not questioned, it would require a significant amount of effort to be expended unnecessarily to require a showing as suggested by the Regional Director. In this court's view, an applicant's affidavit which indicates eligibility should be sufficient to meet the applicant's burden, absent some at least minimally factually supported argument by the government that the applicant is not eligible.

In recently reenacting the provisions of § 2412(d), Congress noted that "[t]he primary purpose of the Act [is] to ensure that certain individuals, partnerships, corporations, businesses, associations, or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." H.R.Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.Code Cong. & Ad.News 132, 132–33. Dismissing an application because the applicant, although possibly eligible, did not submit an affidavit of net worth or number of employees until such eligibility was challenged would constitute a miserly interpretation of the language of the statute and would violate the announced legislative intent of the Act. It appears more consistent with the purposes of the Act to find that, while it is advisable that applicants for EAJA fees indicate in their application, by affidavit or allegation, that they are eligible to receive such fees, the applicant need not prove such eligibility until some objection to their eligibility is raised by the government. Therefore, these arguments are without merit.[3]

II. *Substantial Justification and Special Circumstances*

Section 2412(d)(1)(A) requires the court to award fees and other expenses to a prevailing party, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The Regional Director here argues both that its action in initiating the petition for contempt was substantially justified, and that special circumstances exist in this case which make an award unjust.

Initially, this court must determine the proper standard to apply in determining whether the Regional Director's actions were substantially justified. Under the EAJA as initially enacted, courts were divided on the meaning of the term "substantially justified." The Fourth Circuit, relying on language from the legislative history of the Act, found that the test was "essentially one of reasonableness." *Amidon v. Lehman,* 730 F.2d 949, 952 (4th Cir.) (*quoting* H.R.Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad.News 4953, 4993), *cert. denied,* ––– U.S. –––, 105 S.Ct. 507, 83 L.Ed.2d 398 (1984); *Tyler Business Services, Inc. v. NLRB,* 695 F.2d 73, 75 (4th Cir.1982) (also quoting this section of H.R. Rep. No. 1418). When the Act was reenacted, Congress, noting the division among the courts, disagreed with the position taken by the Fourth Circuit, stating:

> "Another problem which has developed in the implementation of the Act has been the fact that courts have been divided on the meaning of 'substantial justification.' Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness. . . .
>
> The Committee expects that the determination of what is 'substantially justified' will be decided on a case-by-case basis due to the wide variety of factual contexts and legal issues which make up government disputes."

H.R.Rep. No. 120, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1985 U.S. Code Cong. & Ad.News 132, 138 (footnote omitted). Thus, while it appears that the standard to be applied in determining whether the Regional Director was substantially justified in initiating the contempt petition is somewhat higher than mere reasonableness, it does not appear to be much higher. There is nothing in the legislative history to suggest, for example, that the government must prevail, as the applicant apparently suggests, or that the Fourth Circuit's analysis was incorrect in its observation that:

> "The legislative history . . . admonishes that the standard which it prescribed 'should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the

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[3] While this court finds that the applicant has met its initial burden of showing eligibility, this, of course, does not preclude the government from arguing that the applicant does not, in fact, meet the eligibility requirements, assuming it has some competent evidence to support its argument. The burden of persuasion, of course, remains with the applicant.

> standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing' "

Tyler Business Services, Inc., 695 F.2d at 75 (quoting H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad.News 4953, 4990).

In the present case, the court concludes, after a review of the record, that the Regional Director's action in initiating the contempt petition was substantially justified. The petition alleged that the National Union's actions in vacating Local 33's May 1983 election of officers and in bringing internal union charges against certain members of Local 33 were motivated by the National Union's desire to retaliate and remove from office the officials at Local 33 because they had negotiated a collective bargaining agreement with Bethlehem Steel for the Sparrows Point Shipyard. The assertion by the National Union that there were no real credibility issues and that there was never any conflict as to any relevant fact involved in the contempt petition is unfounded.

Although the National Union asserts that the Regional Director's case was based entirely on perjured testimony, this was not so found by the court. In fact, this court found that at least part of the motivation for the National Union's actions against certain officers of Local 33 was in retaliation for the negotiation of the collective bargaining agreement, but found, as a result of its resolution of credibility conflicts, that a dual motive for the National Union's actions existed, stating:

> "The court is persuaded by the evidence that the actions taken by the Respondent would have been taken under the circumstances irrespective of the antipathy between the Respondent and its president, Arthur Batson, and the top officials of Local 33 as a result of the negotiation of the aforesaid collective bargaining agreement."

(Paper No. 40 at 6). While most of the facts in the case were stipulated, the National Union is incorrect in its statement that "the decision in this case dismissing the contempt petition was not based on any credibility resolution by the Court as to disputed facts," and that based on those facts which were undisputed, the inferences drawn by the court were the only conceivable inferences which could be drawn (Paper No. 44 at 7–9). As noted above, at least some credibility resolutions were made in favor of the Regional Director in the court's conclusion that the National Union's actions were motivated, at least in part, by a desire to retaliate against the officials of Local 33. In sum, this court believes that bona fide credibility disputes did exist, and that the Regional Director was substantially justified in believing, from the evidence available to him, that the National Union's actions were in violation of this court's injunction.

In addition, this court finds that special circumstances existing in this case warrant a finding that no fees or expenses be awarded. Unlike most circumstances in which EAJA applications are made, the present controversy arose over a question of whether the applicant had violated a court order, specifically, whether the National Union had violated this court's order that it not interfere with the collective bargaining agreement at issue or retaliate against the officials of Local 33 who negotiated that contract. The Regional Director reasonably believed that certain actions taken by the National Union were being taken to retaliate against the officials of Local 33, and, therefore, believed that those actions were in violation of this court's Order. Under such circumstances, this court believes that the Regional Director had an obligation, both to the public and to this court, to present the matter to this court so that it could determine whether there had, in fact, been a violation of this court's Order. This court's denial of the petition for contempt cannot, in hindsight, negate the Regional Director's obligation, in light of his reasonable belief that a violation had occurred, to pursue the matter in court.

Accordingly, it is this 14th day of March, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That the Regional Director's Motion to Dismiss the National Union's Application for Attorneys' Fees be, and the same is hereby, GRANTED.
2. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

NLRB v. Paper Manufacturers Company, Warehouse Employees Local 169 a/w International Brotherhood of Teamsters, Chaffeurs, Warehousemen, and Helpers of America

786 F.2d 163 (3d Cir.), March 18, 1986—274 NLRB 491

On petition to enforce Board Order

Before SEITZ and GIBBONS, Circuit Judges and BARRY, District Judge *

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GIBBONS, Circuit Judge: The National Labor Relations Board petitions pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1982), to enforce its order finding that the Paper Manufacturers Company, the employer, committed an unfair labor practice in refusing to recognize and bargain with Graphic Communications International Union Local 14, AFL-CIO (Local 14). The Board found that the employer had unlawfully recognized and bargained with another union, Warehouse Employees Local 169 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 169), and that this action constituted unfair labor practices by both the employer and Local 169. *See Paper Manufacturers Co.,* No. 4-CA-13616 and No. 4-CB-4613 (March 14, 1984) (opinion by A. Pacht, A.L.J.), *aff'd as modified,* 274 N.L.R.B. No. 70 (1985). The employer and Local 169 contend that the Board erred (1) in refusing to defer to an arbitrator's decision, and (2) in making a bargaining unit determination. We enforce.

I.

Background Facts

The employer manufacturers products for the communication, office, telecommunications, and disposable medical devices industries. It has facilities in several states. Two of its major divisions are the Medical Packaging Division and the Paper Products Division. The employer's Philadelphia plant currently houses a part of the Paper Products Division as well as the Medical Packaging Division. In 1979 the employer's Philadelphia plant began to coat a product called tyvek. After coating, the product was used in the packaging of medical supplies. The employer initially shipped the coated tyvek product from the Philadelphia plant to various converters

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that processed it into pouches and other finished packaging products.

In 1971 the production and maintenance employees at the Philadelphia plant selected Local 169 as their bargaining representative. Thus the Paper Products Division employees and the employees coating tyvek were in the same bargaining unit.

Some time prior to 1976 the employer purchased LF & P, a corporation located in Peabody, Massachusetts. LF & P had been engaged in the business of converting coated tyvek into finished packaging products. Consequently, the purchase of LF & P integrated the employer into the business of converting coated tyvek into finished products. In 1978 the employer moved the pouching and printing equipment for converting tyvek from Peabody to a leased facility in Southampton, Pennsylvania, seven miles from its Philadelphia plant. Coated tyvek was thereafter transported from Philadelphia to Southampton instead of Peabody.

The employer maintained different shifts and separate seniority lists at the Philadelphia and Southampton sites. Southampton employees were paid lower wages for comparable work and received fewer benefits than did the Philadelphia employees. Each plant had a separate job classification system. The employees used different plant managers and first-line supervisors at the Southampton and Philadelphia facilities.

By January of 1982 the employer had available space in the Philadelphia plant because it had transferred the Business Products Unit of its Paper Products Division to its plant in Indianapolis, Indiana. On January 26, 1982 the employer decided that it would relocate the Southampton unit, which it referred to as its Medical Packaging Division, to the vacant space in Philadelphia. The employer had in late 1981 given several managers authority to run the operations at both the Philadelphia and Southampton facilities.

In April 1982, before the relocation of the Southampton facility took place, Local 14 asked the employer for recognition as the bargaining representative of the Southampton Medical Packaging Division employees. The employer declined to extend recognition, and Local 14 filed a representation petition. On June 10, 1982 the Board's Regional Director in the Philadelphia office determined that the Southampton Medical Packaging Division was an appropriate unit and directed that an election be held. The employer did not contest the unit determination, but asked the Regional Director to reconsider in light of the decision that the Medical Packaging Division would be moved to Philadelphia.

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* Hon. Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

The Regional Director refused to reconsider, finding no evidence that the proposed relocation would affect the composition of the unit. On July 8, 1982 a Board-supervised election was held at Southampton, in which, by a vote of twenty-six to seventeen, Local 14 was chosen as the bargaining representative. Formal certification of Local 14 by the Board was delayed until February 8, 1983 because the employer filed objections.

Meanwhile the employer proceeded with extensive physical changes in the Philadelphia plant to accommodate the move from Southampton to Philadelphia. Interior walls were constructed so that the Medical Packaging Division, which required sterile conditions, would be physically separated from those parts of the Paper Products Division still located in Philadelphia. On October 15, 1982 the employer closed its Southampton facility and moved the Medical Packaging Division to its new quarters. The employer transferred nearly all Southampton employees to Philadelphia, where they retained the same wages, benefits, and seniority as they had prior to the transfer. Three former Southampton employees—two from shipping and receiving and one truckdriver—were offered other positions in the Medical Packaging Division at Philadelphia. Several Southampton maintenance workers were merged into a larger group of maintenance employees at Philadelphia but continued to service the Medical Packaging Division equipment. Almost all job classifications in the Medical Packaging Division remained the same, not only

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for the approximately forty-five Southampton employees who were transferred but also for thirty newly hired employees. New hires in the Medical Packaging Division received identical wages and benefits, worked in the same sterile area, and dressed in similar sterile clothing as did the transferred Southampton employees.

Even before the move in October, Local 169, on September 17, 1982, told the employer that the work to be performed by the Southampton transferees or new hires in the Medical Packaging Division must be done under Local 169's contract and the employees included in the bargaining unit it represented. The company initially took no position on the bargaining unit issue but insisted that the Philadelphia contract would not apply to transferred Southampton employees. Local 169 then insisted that the Southampton employees should be treated as an accretion to the bargaining unit it represented. At that point the employer and Local 169 agreed to submit the accretion issue to arbitration pursuant to the terms of the Local 169 contract. An arbitration was held on January 12, 1983. Local 14 did not participate in it.

Before the arbitration commenced Local 14 notified the employer that it intended to file unfair labor practice charges if the employer should ignore the expected certification of its majority status. On February 8, 1983 the Board's Regional Director overruled the employer's objection to the Southampton election and certified Local 14 as the bargaining representative of the Medical Packaging Division employees. The company requested Board review of Local 14's certification. On April 14, 1983 the Board denied that request, and on April 19, 1983 Local 14 renewed a pending request to the employer that it bargain.

The Local 169employer arbitration, meanwhile, proceeded. Although noting that the employer's objections to the Southampton election were still pending before the Board, the arbitrator, on March 7, 1983, rejected the employer's contention that the Medical Packaging Division employees were not a part of Local 169's unit. At the same time, however, he decided that the Local 169 collective bargaining agreement did not cover those employees and that a separate Medical Packaging Division seniority system should be maintained. The company chose to comply with the award by bargaining with Local 169.

II.

Board Proceedings

Faced with the employer's refusal to bargain despite its certification and with the employer's recognition of Local 169, Local 14 filed unfair labor practice charges against both the employer and Local 169. Rejecting the contentions of the employer and Local 169 that the Board should defer to the arbitrator's award, an administrative law judge held a hearing and found that the employer had violated sections 8(a)(1), (2), and (5) of the Act, 29 U.S.C. § 158(a)(1), (2), (5) (1982), by recognizing Local 169 and refusing to recognize and bargain with Local 14. Local 169 was found to have violated section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1982), by demanding recognition as bargaining representative of the Medical Packaging Division employees. The Board affirmed and now seeks enforcement of its order.

III.

The Respondents' Contentions

Both the employer and Local 169 contend that the Board erred in refusing to defer to the decision of the arbitrator. Both also contend that the Board erred in concluding that the Medical Packaging Division is an appropriate bargaining unit within the Philadelphia plant.

A. *Deferral*

In *Chas. S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3d Cir.1985), this court affirmed a summary judgment declaring that an employer is not bound to arbitrate a successorship issue because successorship is a representation issue and not subject to resolution by contract. In that opinion we pointed out **167** that under section 9 of the National Labor Relations Act, 29 U.S.C. § 159 (1982), representation issues are matters relegated to the Board. *Winner*, 777 F.2d at 863. Representation issues may not be decided by contract, and thus may not be decided by an arbitrator. *Id.* The *Winner* case controls with respect to the contention that the Board should have deferred to the decision of the arbitrator. Like successorship, accretion is a representation issue. It cannot be resolved by a contract between Local 169 and the employer and thus cannot be resolved by the contractual remedy of arbitration.

Our holding that accretion, like successorship, is not a matter that can be resolved by contract arbitration is consistent with the position of the Board that it will not defer to arbitration on representation issues. *See, e.g., Martin Marietta Chemicals*, 270 N.L.R.B. 821, 822 n. 4 (1984); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984); *Marion Power Shovel Co.*, 230 N.L.R.B. 576, 577–78 (1977); *Hershey Foods Corp.*, 208 N.L.R.B. 452, 457 (1974), *enforced mem.*, 506 F.2d 1052 (3d Cir.1974); *Combustion Engineering, Inc.*, 195 N.L.R.B. 909, 910–11 (1972); *Walwick, Inc.*, 185 N.L.R.B. 783, 784 (1970).

B. *Unit Determination*

Because the Board properly refused to defer to a decision that the arbitrator had no legal authority to make, we turn to the merits of the respondents' objections to the Board's decision and order.

As noted in Part I, the Regional Director, over the employer's objection, conducted an election for the Medical Packaging Division unit on July 8, 1982. In that election a majority of the unit employees chose Local 14 as the unit's bargaining representative. Formal certification of Local 14 was made on February 8, 1983. For one year after the date of a Board certification a certified bargaining representative enjoys an irrebuttable presumption of continuing support from a majority of the employees in the bargaining unit. *See Brooks v. NLRB*, 348 U.S. 96, 102–04, 75 S.Ct. 176, 180–82, 99 L.Ed. 125 (1954); *NLRB v. J.W. Rex Co.*, 243 F.2d 356, 360–61 (3d Cir.1957). While "[a] valid certification is, of course, not intended to be a permanent relationship . . . an employer cannot rely on the changes to justify his refusal to bargain when those changes occur within the certification year. . . ." *J.W. Rex Co.*, 243 F.2d at 360. The Board's one-year-after-certification rule, approved by the Supreme Court in *Brooks*, is consistent with the policy of encouraging stability in collective bargaining relationships. Any other rule would permit employers to delay a final certification by filing objections to an election, while at the same time taking self-help steps such as moving the physical location of the bargaining unit in hopes of destroying a union's majority status.

In this case the employer argues that the relocation of the Medical Packaging Division to Philadelphia was a changed circumstance and certification should not have been granted. The *Brooks* rule is sufficient to foreclose consideration of this contention. Even if this rule were not applicable, however, the result would be no different because the Board's bargaining unit determination is supported by substantial evidence. The factors relevant to the determination of an appropriate bargaining unit include (1) integration of operations, (2) centralization of managerial and administrative control, (3) geographic proximity, (4) similarity of working conditions, skill, and functions, (5) common control over labor relations, (6) collective bargaining history, and (7) interchangeability of employees. *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir.1976). In this instance both before and after the move to Philadelphia the operations of the Medical Packaging Division were separate, with interior walls built to maintain separation. Only the upper echelons of management were consolidated. Almost all job classifications remained intact. Working conditions, skills, and functions were, with the possible exception of two maintenance employees, separate and distinct. The Medical Packaging Division employees had selected a different bargaining representative and, with the possible exception of two maintenance employees, there was no interchange of employees. The Board's conclusion that the Medical Packaging Division remained an appropriate bargaining unit after the move, therefore, is amply supported by the record.

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The employer and Local 169 rely heavily on the fact that the Philadelphia plant has an integrated maintenance workforce. That isolated fact, which resulted from the employer's unilateral decision to move the Medical Packaging Division from Southampton, does not as a matter of law compel the conclusion that an accretion to the Philadelphia plant-wide unit has occurred. Neither the Medical packaging Division nor the Paper Products Division has separate maintenance employee units. Unit clarification proceedings are available to determine to which unit the two maintenance employees transferred from Southampton should be assigned.

The employer and Local 169 also rely on the fact that following the election the number of employees in the Medical Packaging Division increased and on the employer's acquisition in January of 1983 of additional medical packaging equipment. These facts have no relevancy to the issues of accretion. The new employees were integrated into the Medical Packaging Division, and the new equipment was used by that division.

Conclusion

The Board did not err in refusing to defer to the arbitrator's decision. In addition the Board did not err in concluding that the Medical Packaging Division remained an appropriate bargaining unit following the move of that division from Southampton to Philadelphia. The Board's certification of Local 14 as the bargaining representative for employees in that division required that the employer bargain with Local 14 as the employees' representative and that Local 169 refrain from efforts to bargain for them. Thus the Board's order will be enforced in all respects.

NLRB v. Ford Brothers, Inc.

786 F.2d 232 (6th Cir.), March 19, 1986—272 NLRB 1222

On petition to enforce Board Order

Before MARTIN and KRUPANSKY, Circuit Judges, and CHURCHILL,[*] District Judge

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PER CURIAM: The National Labor Relations Board petitions for enforcement of its order issued against Ford Brothers, Inc. on November 26, 1984. The issue before us is whether substantial evidence in the record considered as a whole supports the Board's finding that Ford Brothers violated sections 8(a)(1) and 8(a)(5) of the national Labor Relations Act, 29 U.S.C. 158(a)(1) and (5).

Ford Brothers is engaged in the interstate transportation of bulk liquid products by truck. The Company operates terminals in Marietta, Columbus, Cincinnati, and Coal Grove, Ohio, and in Kenova, West Virginia. Through its multiemployer bargaining agent, the Labor Relations Advisory Association, the Company entered into successive collective bargaining agreements with several of the International Brotherhood of Teamsters Locals, the latest of which was effective from November 15, 1979 to November 15, 1982. On January 16, 1981, Company officials met with Union representatives to discuss the Company's request for modifications to the collective bargaining agreement. This discussion led to another meeting between the Company and the Union's Joint State Committee on February 17, 1981. At that time the Union stated that the Joint State Committee had no authority to approve any modifications and referred the entire matter to the Central States Joint Area Committee. On February 22, 1981, the Company posted notices informing all of its Ohio-based drivers that a majority of the drivers had accepted the Company's proposed modifications, and that the modifications would be implemented for the March 1 workweek. On April 16, 1981, Local 159 sent the Company a letter stating that the Central States Committee had decided not to approve any changes to the agreement. The agreement originally called for a cost of living in-

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[*] The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

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crease and a wage increase on May 15, 1981, but the Company did not pay it. The Company also stopped complying with the agreement's guaranteed 48-hour workweek and refused to pay a cost of living and wage increase due, under the agreement, on November 15, 1981.

On these facts, the Board found, in agreement with the administrative law judge, that the Company violated section 8(a)(1) and 8(a)(5) of the Act by failing, as of May 15 and November 15, 1981, to adhere to certain terms in the collective bargaining agreement. The Board's order should be enforced by this Court if the Board's findings are supported by substantial evidence on the record considered as whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464–65, 95 L.Ed. 456 (1951). We believe that substantial evidence is present in this case, and therefore the petition is entitled to enforcement.

It is undisputed that the collective bargaining agreement required certain wage and cost of living increases and established a guaranteed 48-hour workweek. The record demonstrates that the Company, through its membership in the Advisory Association, was bound by the contract and was required to observe its terms. The Company does not dispute that it failed to pay the increases due on May 15 and November 15, 1981, and failed to honor the 48-hour workweek guarantee, and that it did so without the Union's consent. Such unilateral modification of an existing collective bargaining agreement violates section 8(a)(1) and 8(a)(5) of the Act. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 675, 101 S.Ct. 2573, 2579, 69 L.Ed.2d 318 (1981); *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186, 92 S.Ct. 383, 401, 30 L.Ed.2d 341 (1971). This result is not altered by the fact that the Company obtained the approval of a majority of its employees for its proposed modifications, because at no time did the Company reach agreement with the various Teamster Locals on any changes, nor had it been authorized by the Central States Joint Area Committee to implement those changes without prior approval. The Company's other contentions and defenses are without merit.

The petition is to be enforced.

NLRB v. Island Film Processing Co.; Inc., d/b/a Kahala Kai Photo Service

784 F.2d 1446 (9th Cir.), March 19, 1986—274 NLRB 1525

On petition enforce Board Order

Before POOLE and BEEZER, Circuit Judges, and JAMESON, * District Judge

1447

JAMESON, Senior District Judge: The National Labor Relations Board (NLRB) has applied to this court for enforcement of its order requiring Island Film Processing Co., Inc., d/b/a Kahala Kai Photo Service (Kahala Kai), to bargain collectively with the International Longshoremen and Warehousemen's Union, Local 142 (Union). The NLRB found that Kahala Kai had committed an unfair labor practice by refusing to bargain collectively in violation of the National Labor Relations Act (NLRA) section 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1). Kahala Kai contends that because the active pro-union participation of its supervisors coerced employees in their right to vote, the NLRB improperly certified the Union. We agree with Kahala Kai and deny the application for enforcement.

I. *Background*

Kahala Kai sells souvenir photographs to tourists on the island of Oahu, Hawaii. Kahala Kai maintains its headquarters at the Hilton Hawaiian Village, and operates three satellite photolaboratories at Kewalo Basin, Paradise Cove and Tavana. Each laboratory operates independently of the other laboratories. Kahala Kai photographs tourists at various places of entertainment and dispatches runners to collect the film for processing, the laboratory processes the prints, and the runners return the finished product for sale to the tourists within the hour. Kahala Kai employs approximately 150 people.

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* The Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

The Union, on December 3, 1982, filed a representation petition seeking certification as the exclusive bargaining representative for 35 of Kahala Kai's employees. [1] Basically the bargaining unit excludes all employees except those working in the photolaboratories. Within each photolaboratory the darkroom employees operate separately from the laboratory technicians. A head printer oversees the darkroom employees, and a head checker oversees the laboratory technicians.

Following a pre-election hearing, held pursuant to section 9(c) of the NLRA, 29 U.S.C. § 159(c), the Regional Director determined the supervisory status of certain employees and filed a Decision and Direction of Election, dated January 31, 1983. The Director found that all head printers qualified as supervisors because they were able to grant time off and approve overtime, discipline darkroom staff, and effectively recommend pay increases, hiring or termination of employees. The parties stipulated that the head checkers Lenny Nichols at Paradise Cove, Vinny Zoccolante at Tavana, and Dwight Iwasa at Hilton Hawaiian Village were supervisors. The Regional Director found, however, that Clyde and Clayton Young, part-time checkers at Kewalo Basin, were not supervisors. [2] Unlike the head checkers, the Young brothers were paid an hourly rate and did not attend managerial meetings. The evening prior to Clyde Young's testimony at the administrative hearing, Dwight Iwasa informed Clyde that Clyde possessed the requisite authority to discharge personnel. However, up to that time Clyde had never recommended termination, hiring or salary increases for employees. Further, each time Clyde faced an unusual problem, he would telephone Dwight Iwasa for advice on how to proceed.

Clyde Young served as the Union's "main organizer." The head printers, William Kuencer, Joseph Flanagan, Theodore Cobeen, Dean Hewitt and Alan Nalui, also encouraged employee support for the Union. Kuencer and Flanagan initiated the Union movement. They visited the Union hall to discover the procedure for organizing. Flanagan urged employees to attend the first union meeting. Many of the head printers also attended the meeting. Kuencer, Cobeen, Hewitt and Nalui signed union authorization cards in the presence of employees. Nichols, a head checker and previously a head printer, testified that a type of "underground" was formed in order to "keep it [the union movement] quiet from the management," and to "talk it up to get support for the Union." Nichols described the pre-petition atmosphere: "[E]verybody in Kahala Kai was kind of apathetic to everything. It had been so bad, that we had to get support [for the Union] and say, well, this has got to go no matter what. You know, if we get threatened or whatever, we have got to stick with it, to get the commitment."

Prior to the election head printers often spoke to employees in favor of the Union. Flanagan and Kuencer engaged in conversations favoring the Union "almost every night." Flanagan explained to employees that he "saw good things about [the Union], . . . it would help us to have job security, better benefits. The company wouldn't be able to just take away paid vacations. . . . [W]e would have things in writing that the company would have to stick to." Kuencer indicated to employees that "The job would be rougher if [they] didn't vote," and explained that if the Union lost the election "[t]hings will be about the same, there will be no vacations, vacation pay, and . . . the job situation wouldn't be moving up for seniority people that had been working for the company. . . ." A few days before the election Kuencer stated that if he could vote, he would vote in favor of the Union. The other head printers also engaged in conversations and indicated their pro-union bent.

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[1] The bargaining unit, by stipulation, included all regular full-time and part-time employees of the Employer including printers, feeders, negative driers, soupers, runners, supply clerks, packagers and checkers employed [at all four locations]; excluding confidential employees, photographers, clerical and professional employees, guards and supervisors as defined in the Act.

[2] Clyde Young testified at the pre-election hearing; Clayton Young did not. Kahala Kai contests only Clyde Young's status since he was the Union's main organizer.

However, none of the supervisors directly threatened employees. A bargaining unit employee, Frances DeCosta, testified that although she frequently engaged in conversations with Kuencer, she never felt threatened by him. She was able to freely express her views.

In response to the Union campaign, Kahala Kai's acting president, Lee Fleishman, clearly expressed his opposition to the Union during a weekly managerial meeting. He threatened to close down the photolaboratories and lay off employees if the Union won. The head printers relayed this message to employees.

The Union held a secret ballot election on March 3, 1983. Twenty-six employees cast their ballots. Fifteen employees voted for the Union and seven voted against, with four ballots challenged. The challenged ballots were not sufficient to change the election results. Kahala Kai timely objected to the propriety of the pre-election supervisory participation. [3]

On September 12, 1983, the hearing officer recommended that all of Kahala Kai's objections be overruled. [4] The hearing officer addressed two issues: (1) whether Clyde Young's status had changed subsequent to the pre-election hearing, and (2) whether supervisory participation invalidated the election. Addressing the first issue, the hearing officer noted that on January 3, 1983, Lee Fleishman had informed Clyde that he would be converted to salary, rather than hourly pay, and that he was now a manager. Thereafter, however, Clyde attended only one managerial meeting, his working hours were reduced, and he was shifted to different work locations. Based on these facts, the hearing officer concluded that Clyde was still an employee.

Addressing the second issue, the hearing officer summarized:

> Thus, in all circumstances I conclude that the record has no evidence of any employee fear of supervisory retaliation in the event they vote in a way not supported by the supervisors. I find that in view of the supervisors in question being
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> "minor supervisors" in terms of both their actual exercise of authority and the clear authority of Fleishman [Kahala Kai's acting president], that it is unlikely employees had any real basis to have such a fear. I finally conclude that by the dissemination of the employer's clear threats to shut down in the event of a union victory, the employer's position was known to the employees.

The NLRB adopted the hearing officer's recommendation and issued a Decision and Certification of Representation.

After the Union obtained certification, Kahala Kai, beginning June 4, 1984, refused to bargain collectively with the Union. On November 1, 1984, the General Counsel issued a complaint, based on charges by the Union alleging that Kahala Kai refused to recognize, bargain, and furnish information to the Union, in violation of section 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1). In answer, Kahala Kai admitted the allegations, but asserted improper certification of the Union for the reasons urged in its election objections. The NLRB in its decision issued April 5, 1985, granted the General Counsel's motion for summary judgment because

> the points the Company raise[d] in connection with its assertion of "special circumstances" constitute[d] nothing more than a reiteration of its position with respect to its objection to the election alleging improper supervisory involvement in the Union's election campaign.

The NLRB concluded that Kahala Kai engaged in unfair labor practices violating Section 8(a)(5) and

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[3] Kahala Kai formally objected to the election on March 9, 1983. Because Kahala Kai failed to timely submit evidence in support of its objections, the Regional Director certified the Union on April 6, 1983. Kahala Kai requested review of that decision. The NLRB remanded to the Regional Director. The Regional Director on July 12, 1983, issued a second supplemental report granting a hearing to be held August 11, 1983. The hearing officer reported that the employer's objections to the election had no merit. Kahala Kai again appealed the hearing officer's report. The NLRB affirmed the decision of the hearing officer on April 3, 1984.

[4] Kahala Kai made three objections:

> 1. The Union, by and through its agents, and through parties affiliated, sponsored and embraced by the Union, engaged in, and improperly condoned impermissible supervisory sponsorship and electioneering, and through these and other violations of the Act, and conduct in violation of established NLRB election conduct precedent, coerced and restrained employees in the exercise of their rights guaranteed under the Act, which acts and misconduct irreparably destroyed the laboratory conditions requisite to, and necessary for, the occurrence of a free expression of employee sentiment.
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> 2. During the laboratory period, the Petitioner, through its agents, intimidated employees into supporting Petitioner.
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> 3. By these and other acts and conduct, Petitioner intimidated, restrained, and coerced the employees in the exercise of their rights guaranteed under Section 7 of the Act.

For the reasons noted, the hearing officer overruled objection No. 1. Because no evidence was submitted in support of objections Nos. 2 and 3, the hearing officer recommended they be summarily overruled.

(1), and ordered Kahala Kai to cooperate with the Union as required by the NLRA. Kahala Kai seeks review of this order. [5]

II. *Contentions*

Kahala Kai contends that (1) Clyde Young is a supervisor within the meaning of section 2(11) of the NLRA, 29 U.S.C. § 152(11), and (2) the supervisors' campaign activities precluded employees from exercising their right to an uncoerced vote for Union representation. For these reasons Kahala Kai urges this court to deny enforcement of the NLRB's order.

III. *Standard of Review*

This court conducts a limited review of the NLRB's underlying decision. The NLRB possesses wide discretion in determining whether an individual is a supervisor. *See George C. Foss Co. v. NLRB,* 752 F.2d 1407, 1410 (9th Cir.1985). It retains the same broad discretion in determining the propriety of the election process. *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294, 1300 (9th Cir.1985). Nevertheless, the NLRB's order will be upheld only if it correctly applies the law and if it rests upon substantial evidence. *NLRB v. Best Products Co., Inc.,* 765 F.2d 903, 906 (9th Cir.1985).

IV. *Supervisory Status of Clyde Young*

Kahala Kai contends that Young possessed the requisite "supervisory powers." [6] A "supervisor" must be able to

> hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, *or* effectively to recommend such action, *if in connection with* the fore-
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> going the exercise of such authority is not of a merely routine or clerical nature, but *requires the use of independent judgment.*

29 U.S.C. § 152(11) (emphasis added). A supervisor need only possess one of the enumerated powers, but must do so in conjunction with an exercise of independent judgment. *George C. Foss, Co.,* 752 F.2d at 1410; *Walla Walla Union-Bulletin, Inc. v. NLRB,* 631 F.2d 609, 613 (9th Cir.1980); *Global Marine Development of California, Inc. v. NLRB,* 528 F.2d 92, 94 (9th Cir.1975), *cert. denied,* 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976).

The giving of routine minor orders does not make an employee a statutory supervisor. *George C. Foss, Co.,* 752 F.2d at 1410. Before Clyde ever took action in an unusual situation he would consult Dwight Iwasa for instructions on how to proceed.

Despite Fleishman's insistence that Clyde could terminate an employee, Clyde never effectively recommended termination, hiring or pay increases. During the pre-election period, rather than continuing Clyde's steady work hours, Kahala Kai reduced his hours. Clyde testified that he became an "on call" type of employee. No evidence suggests Clyde exercised supervisory powers or exercised independent judgment. The NLRB upon substantial evidence found Clyde to be an employee. [7]

V. *Supervisory Pro-Union Conduct*

Active supervisory participation in a union organizing campaign destroys laboratory conditions and prevents employees from exercising an uncoerced vote. Such involvement requires an election to be set aside. *Wright Memorial Hospital v. NLRB,* 771 F.2d 400, 404 (8th Cir.1985); *Fall River Savings Bank v. NLRB,* 649 F.2d 50, 56 (1st Cir.1981). The courts, however, have never required actual proof of coercion. Supervisory activity need only "reasonably tend" to have a coercive effect on or "likely to impair" an employee's choice. *ITT Lighting Fixtures v. NLRB,* 658 F.2d 934, 937 (1981), *appeal on remand,* 712 F.2d 40 (2nd Cir.1983), *cert. denied,* —— U.S. ——, 104 S.Ct. 2361, 80 L.Ed.2d 833 (1984). Implied threats of retaliation suffice to taint an election. *See Wright Memorial Hospital,* 771

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[5] Because an election certification does not constitute a final order, but an order to bargain following an unfair labor practice proceeding does, Kahala Kai refused to bargain in order to obtain review of these issues by this court. Kahala Kai properly preserved its objection in both the certification and unfair labor practice proceedings. *See NLRB v. Belcor, Inc.,* 652 F.2d 856, 858 (9th Cir.1981).

[6] The NLRB urges that Kahala Kai failed to raise its objection to Young's status below, and, thus, did not preserve its objection for review by this court. *See NLRB v. Best Products Co., Inc.,* 765 F.2d at 909. However, the NLRB granted summary judgment against Kahala Kai, because it simply "reiterated" its objections. In its prior decision, the NLRB discussed Young's supervisory status even though Kahala Kai merely objected to supervisory involvement. Thus, it appears Kahala Kai adequately preserved its objection to Young's status.

[7] We note also that Clyde Young voted in the election unchallenged.

F.2d at 404; *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 365 (10th Cir.1982); *Fall River Savings Bank*, 649 F.2d at 57.

The NLRB rested its decision on a distinction between "major" and "minor" supervisors. The hearing officer found that since head printers possessed only "minor" supervisory powers, their pre-election involvement could not have created a coercive atmosphere. Kahala Kai contends that such distinction is inapplicable. The Court of Appeals for the Fourth Circuit has held:

> The Board's designation of . . . "minor supervisors" is not supported by the evidence or the law. The Act does not grade supervisors as major or minor. An individual is either a supervisor or an employee.

Turner's Express, Inc. v. NLRB, 456 F.2d 289, 291 (4th Cir.1972) (Footnote omitted). Section 2(11) of the NLRA, 29 U.S.C. § 152(11), makes no mention of "minor" supervisors.

In *ITT Lighting Fixtures*, the court, in denying enforcement of the Board's order, held that "the criteria developed by the Board for determining whether a supervisor [is] 'major' or 'minor,' and whether the exercise of a supervisor's authority could have an impact on the laboratory condition for voting," cannot be made "simply by labeling a supervisor as 'minor'; instead there must be consideration of both the extent of the supervisor's authority and the extent of his pro-union activity." 712 F.2d at 43–44. The court held further:

> It seems clear that in addition to the Board's criteria which are based solely on the power to retaliate, there should be included the power to reward. This power consists of giving one employee an advantage over another. The authority
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> **1452**
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> to grant rewards in the form of transfer, or favorable work assignments, or selection to work overtime to make more money, or excuse from overtime, can be just as coercive in the election process as the authority to issue written warnings.

Id. at 44.

We need not decide in this case whether a distinction between "major" and "minor" supervisors can ever be a permissible element in an analysis of the coercive impact of pre-election involvement by supervisors. In other contexts, it may prove appropriate to consider whether the potential for coercion was reduced where a supervisor possessed little actual power over employees, although the lack of substantial authority may instead be evidence that the individual was not in fact a statutory supervisor.

In this case, however, the hearing officer did not adequately support his finding that the supervisors possessed only "minor" authority. He did not give careful consideration to the extent of the supervisors' authority to "reward" employees by approving over-time and granting time-off. Moreover, the Regional Director, in the pre-election hearing, had found the supervisors to have authority to discipline workers, and effectively recommend termination and raises in the pay of employees. These individuals, who had been identified by official NLRB action as supervisors with the power to discipline employees, continued to campaign for the union right up until the election. Consequently, the hearing officer's classification of these individuals as "minor" supervisors appears to be a conclusory appellation adopted after the decision had already been made to uphold the election.

In reaching its decision, the NLRB applied a two-prong test. An affirmative answer to either prong would have required the election to be set aside. First, the NLRB asked whether the supervisors' conduct created an impression that the employer favored the union, and second, whether the supervisors' conduct created a fear of future retaliation. Kahala Kai does not argue that the employees were unaware of its anti-union position. It only contends that the supervisors created a fear of future retaliation.

Reviewing the second prong, this court has applied the following standard:

> The type of solicitation which invalidates a union selection process is one that must "contain the seeds of potential reprisal, punishment, or intimidation [or] the involvement of the supervisors does not rise to the level of supervisory 'solicitation.' "

Global Marine, 528 F.2d at 95 (quoting *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1316 (5th Cir.1973)). We review the record as a whole to determine whether the head printers' conduct laid the foundation for potential coercion of the employees.

The head printers initiated the union organizing campaign and overcame employee apathy pervading Kahala Kai. Nichols testified that the supervisors established a type of "underground." Most of the head printers organized and attended the initial union meeting. They also signed authorization cards in the presence of other employees. These actions were highly visible among employees. [8]

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Further, the head printers engaged in almost continuous conversations at the work place. They enumerated the many benefits a union would provide, and warned, among other things, that without a union employees would not receive vacations or seniority. Kuencer cautioned that "the job would be rougher" without union support. Two nights prior to the election, he told an employee that if he could, he would vote for the Union. These pervasive conversations clearly expressed the head printers' Union preference.

Each of the five head printers vocalized their Union support among the twenty-six employees who voted. Thus, the head printers exerted significant influence over a small group of employees. A switch of only four votes, not counting challenged ballots, would have resulted in a tie vote. [9] *See ITT Lighting,* 712 F.2d at 45; *N.L.R.B. v. Klinger Electric,* 656 F.2d 76, 86 (5th Cir.1981). The head printers' constant vocal support among such a small group of employees, combined with the supervisors' ability to effectively recommend pay increases, reprimand employees, and approve overtime, together with their assurance of benefits if the Union prevailed and unfavorable consequences if the Union lost the election, sowed the seeds of reprisal. [10] The NLRB, thus, improperly certified the Union as Kahala Kai employees' exclusive bargaining representative.

VI. Conclusion

We conclude that (1) there was substantial evidence to support the Board's finding that Clyde Young was not a supervisor; but (2) the head printers' pro-union supervisory conduct tainted the election. The NLRB's application for enforcement of its order is denied.

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[8] The NLRB, adopting the *Ideal Electric* rule, contends that pre-petition involvement must not be considered in determining whether supervisory involvement tainted the election. (*See Ideal Electric and Manufacturing Co.,* 134 NLRB 1275, 1277–78 (1961)). This court, however, has taken into consideration such pre-petition activity. It has refused to mechanically apply such a rule.

> Ideal Electric makes clear that the rule is simply an evidentiary device calculated to render irrelevant upon a post election contest, conduct "too remote" to have interfered with the employees' exercise of free choice. . . . *NLRB v. R. Dakin and Co.,* 477 F.2d 492, 494 (9th Cir.1973). *See also Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB,* 589 F.2d 1166, 1173 (1978), *appeal on remand,* 620 F.2d 20 (2nd Cir.1980). *Cf. Global Marine,* 528 F.2d at 94–95 (reviewed whether signing of authorization cards and attendance at union meeting invalidated union selection process). In the instant case the head printers' conduct began prior to the filing of the petition and lasted up until the election. Continuous involvement, such as here, is not "too remote" to be considered.

[9] In *ITT Lighting,* the court noted that "51 employees could possibly have been influenced by the pro-union activity of five of the group-leaders" and that a switch of only 12 votes could have changed the result of the election. The court continued:

> Thus, we cannot say that the election was held in an atmosphere " 'free not only from interference, restraint or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.' " *ITT Lighting Fixtures,* 658 F.2d at 936, quoting *Sewell Manufacturing Company,* 138 N.L.R.B. 66, 70 (1962).

712 F.2d at 45. The same is true here. Twenty-six ballots were cast, and five supervisors engaged in extensive pro-union activities.

[10] We find this case factually distinguishable from most of the cases cited by the NLRB. In those cases the ratio of supervisors to employees was much lower and the supervisors' "pro-union" activity less pervasive, consisting of attending union meetings, passing out authorization cards, and expressing personal support for the union. *See, e.g., Wright Memorial Hospital,* 771 F.2d at 405–6 (three charge nurses and 147 employees); *Worley Mills, Inc.,* 685 F.2d at 364 (three supervisors and 51 employees); *Klingler Electric Corp.,* 656 F.2d at 86 (Union won by a margin of 32 to 15, excluding votes of nine "headpersons"). The head printers here went beyond the conduct of the supervisors in these cases. In addition to other conduct, the head printers engaged in continuous conversations with employees up until the time of the election and predicted unfavorable consequences if the employees failed to vote for the Union. The five head printers exerted considerable influence over the 26 potential bargaining unit employees, thus destroying the necessary "laboratory" conditions.

Dominic Garcia v. NLRB

785 F.2d 807 (9th Cir.), March 25, 1986

On petition to review Board Order

Before BROWNING and TANG, Circuit Judges, and D. WILLIAMS, [*] District Judge

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TANG, Circuit Judge: Dominic Garcia, a United Parcel Service (UPS) employee, refused to obey a supervisor's order to tap his horn when he stopped to make residential deliveries because state law forbids horn honking unless necessary for safety. UPS discharged him for gross insubordination but after he filed a grievance the joint labor-management arbitration committee changed his discipline to a 10-

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[*] Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

day suspension. Garcia filed an unfair labor practice (ULP) charge under Section 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) (1982) ("NLRA" or "the Act"). The National Labor Relations Board ("NLRB" or "the Board") dismissed his complaint because of its decision to defer to the arbitration award and Garcia has petitioned this court for review of the NLRB deferral. We refuse to enforce the Board's order because its deferral decision was an abuse of discretion.

FACTS

Garcia had worked as a package delivery driver for UPS in Stockton, California for one and one-half years when on January 24, 1983 a supervisor scheduled a ride-check to assist in improving his productivity on the job. When Garcia began his deliveries in a residential area, his supervisor instructed him to tap his horn when he stopped to make a delivery, as part of UPS's "Four-Way Attract Attention Method." Garcia refused, explaining that he thought it was against the law to honk his horn in those circumstances. [1] In a meeting later that day, the Division Manager told Garcia if horn tapping were illegal UPS would take responsibility and pay any fines if drivers were cited, and that Garcia should obey the order to tap his horn and file a grievance through his Union business representative. Garcia indicated he would not tap his horn. UPS discharged Garcia for gross insubordination on January 24, 1983.

Garcia's Union, the Teamsters Union, Local 439, filed a grievance on his behalf. The collective bargaining agreement between the Union and UPS provided for a Joint Committee comprised of three Union and three UPS representatives which was to meet regularly and whose majority decisions were to be binding and final. The Joint Arbitration Committee held a hearing on February 8, 1983 and reduced Garcia's

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discharge to a 10-day suspension. The Union then grieved UPS's horn tapping policy as violative of the collective bargaining agreement, article 11, section 3, which provided no employee could be required to violate traffic laws. In July 1983 the Joint Committee denied the grievance because UPS agreed to assume full responsibility for any citations issued for horn tapping.

Garcia filed an ULP based on his January 24 discharge, alleging that UPS discharged him for engaging in protected concerted activity in violation of § 8(a)(1) of the NLRA. A hearing on September 29, 1983 resulted in the Administrative Law Judge (ALJ) issuing a decision on March 14, 1984 in which he dismissed the complaint in its entirety based on his conclusion that Garcia's refusal to tap his horn was not protected concerted activity. On February 28, 1985 the Board affirmed the ALJ's dismissal but on the ground that it deferred to the grievance award made by the Joint Committee, and thus the Board did not reach the merits of the alleged unfair labor practice. On May 9, 1985 Garcia filed a petition for review of the Board's decision.

DISCUSSION

A. *Standard of Review*

This court's review of the Board's deferral decision is limited to determining whether the Board has abused its discretion. *Servair, Inc. v. NLRB,* 726 F.2d 1435, 1439 (9th Cir.1984) (citing *Hawaiian Hauling Service, Ltd. v. NLRB,* 545 F.2d 674, 676 (9th Cir.1976), *cert. denied,* 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1061 (1977)). This court will not deny enforcement of a deferral decision unless the Board clearly departs from its own standards or the standards themselves are invalid. *Servair,* 726 F.2d at 1439.

B. *The Board's Deferral Standards*

The Board has authority under section 10(a) of the NLRA, 29 U.S.C. § 160(a) (1982) to adjudicate unfair labor practices. It also has broad discretion to respect an arbitration award if to do so serves the fundamental purposes of the Act. *Carey v. Westinghouse Corp.,* 375 U.S. 261, 270–72, 84 S.Ct. 401, 408–09, 11 L.Ed.2d 320 (1964). One purpose of the Act is to promote industrial stability by encouraging private dispute resolution through a mutually agreeable arbitration process. *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 377–79, 94 S.Ct. 629, 636–37, 38 L.Ed.2d 583 (1974). Another equally important objective is to prevent unfair labor practices and thus protect employees in the exercise of their protected Section 7 rights. *Ad Art. Inc. v. NLRB,* 645 F.2d 669, 675–76 (9th Cir.1980).

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[1] The California Vehicle Code restricts the use of a horn to occasions when it is necessary for safe operation or as a theft alarm system. Cal.Veh.Code § 27001 (West 1985).

The Board's deferral standards favor deferral to an existing arbitration award if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not "clearly repugnant to the purposes and policies of the Act," *Spielberg Manufacturing Company,* 112 N.L.R.B. 1080, 1082 (1955); (4) the contractual issue was factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented generally with the facts relevant to resolving the ULP, *Olin Corporation,* 268 N.L.R.B. 573, 574 (1984). The *Olin* Board said the burden is on the party arguing against deferral to demonstrate defects in the arbitral process or award. *Id.* The *Olin* Board also explained that the *Spielberg* standard of repugnancy to the Act means that "[u]nless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, [the Board] will defer." *Olin,* 268 N.L.R.B. at 574 (footnote omitted).

C. *Application of the Deferral Standards*

In this case, the ALJ had dismissed Garcia's ULP charge because he did not find Garcia's individual refusal to honk his horn to be concerted activity protected by the Act. The Board found this conclusion to be erroneous because Garcia's conduct was concerted activity under the Board's view first announced in *Interboro*

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Contractors, 157 N.L.R.B. 1295 (1966), *enf'd* 388 F.2d 495 (2d Cir.1967), and recently endorsed by the Supreme Court in *NLRB v. City Disposal Systems,* 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984), that an invocation of a right rooted in a collective bargaining agreement is concerted activity even if an individual acts alone. *City Disposal,* 104 S.Ct. at 1511. Even though the Board found Garcia's action to be concerted activity, it dismissed his complaint without reaching the merits of the ULP charge because it held Garcia had failed to meet his burden of showing the arbitration award was "clearly repugnant" to the Act. Garcia concedes that the other four deferral standards were met because (1) the committee proceedings were fair and regular; (2) the parties agreed to be bound; (3) the contractual and ULP issues were factually parallel; and (4) the arbitration panel heard the facts relevant to resolving the ULP.

The Board reasoned that the Committee considered all the facts relating to the ULP and that it reached an award consistent with the Act when it disciplined Garcia for his concerted activity because the refusal to honk his horn was not necessarily protected activity. The arbitration committee did not reach any conclusions about whether its discipline comported with the Act, but the Board found that the Committee's discipline of Garcia meant it thought he had a more reasonable means of enforcing his contractual rights. The Board read *City Disposal* to say concerted activity might not be protected if an employee has alternative means to secure his rights, 104 S.Ct. at 1514, and concluded the Committee "undoubtedly" had the "facts necessary to resolve whether the grievance procedure presented a reasonable alternative to Garcia's refusal to tap his horn as instructed and whether Garcia's refusal to work as directed properly subjected him to some form of discipline." The Board thought the Committee's award could be interpreted as meaning Garcia's conduct was unprotected and it found that decision to be "susceptible to an interpretation consistent with the Act" and therefore not "palpably wrong." We disagree.

Deferral was inappropriate because: (1) to permit discipline of an employee who refuses to violate a state law violates § 8(a)(1) of the NLRA in that it punishes him for engaging in protected concerted activity; and (2) to permit such discipline violates public policy. For both reasons the arbitration decision is repugnant to the Act, and the Board clearly departed from its own standards when it decided to defer to the award.

A number of Board decisions have upheld employee refusals to operate vehicles in violation of state law as protected concerted activity. In *Varied Enterprises, Inc.,* 240 N.L.R.B. 126, 132 (1979), the Board said an employee had a right to refuse to carry out an order which would result in a violation of law unless his refusal was based upon a malicious motive to frustrate the employer's business operations. The statute at issue in that case regulated vehicle length but the Board said an employee's effort to have his employer comply with any "legal standards (*safety, economic or otherwise*)" was protected. *Id.* (emphasis added). The Board also said employees have the right "to refuse to violate state laws and guarantee to themselves legal working conditions" because to hold otherwise would put "the Board in a position of an aider and abettor o[f] such violations." *Id.* Similarly, in *Ogden & Moffett Co.*, 254 N.L.R.B. 1349 (1981) and *Transport Service Co.*, 263 N.L.R.B. 910 (1982), the Board held that refusing to operate vehicles which exceeded state statutory weight limits was protected activity. Furthermore, at least one other Circuit Court has refused to defer to an arbitration award in a case in which an employee was discharged for refusing to operate an overweight vehicle, saying "[n]o contract provision or arbitration award can permit an employer to require his employees to violate state laws. . . . [Such an] award below grants the Company a license to violate state law and as such is void as against public policy and repugnant to the purposes of the National Labor Relations Act."

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Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir.1974).

The Board would have us believe that *City Disposal* somehow altered the Board's longstanding policy of viewing compliance with the law as protected activity. In *City Disposal*, the Court upheld a Board decision holding that an employee's refusal to drive a truck he knew had malfunctioning brakes was concerted Section 7 activity. 104 S.Ct. at 1516. The Sixth Circuit Court of Appeals had denied enforcement of the Board's order because it did not believe the employee's actions were concerted activity. *City Disposal Systems, Inc. v. NLRB*, 683 F.2d 1005, 1008 (6th Cir.1982). Thus, the Supreme Court directed its attention primarily to analyzing the concept of concerted activity in the context of an individual's efforts to enforce contract rights unilaterally. The Court noted that the "principal tool" an employee uses to invoke his contract rights is the processing of a grievance. *City Disposal*, 104 S.Ct. at 1513. It went on to say:

> In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial *refusal to perform a certain job that he believes he has no duty to perform.* It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer.

Id. at 1513–14 (emphasis added).

Only then, in dicta, did the Court point out that such concerted activity might not necessarily be protected under the Act because "[a]n employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7." *Id.* at 1514. The only indication the Court gives of what it means by such abusive means of enforcing contractual rights is its citation to two cases in which employee conduct was presumably abusive. *See, e.g., Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir.1970) (an employee's insubordinate acts were accompanied by abusive and profane language directed at his employers in a meeting involving his co-workers); *Yellow Freight System, Inc.*, 247 N.L.R.B. 177, 181 (1980) (employee refusal to complete a freight haul constituted work stoppage or slow down expressly prohibited in a no-strike clause). The Court also says an employer may limit the availability of certain methods of invoking contract rights through a provision in the collective bargaining agreement, such as a no-strike provision. If an employee then used such a proscribed method his activity would not be protected. *City Disposal*, 104 S.Ct. at 1514.

None of these strictures is applicable to Garcia's refusal to tap his horn. In arguing that *City Disposal* means that when there is a reasonable alternative to refusing to follow an order, an employee must follow the order, the Board is making a completely unwarranted extension and distorting the rule of that case. Garcia's behavior was neither abusive nor disruptive of company discipline. Rather, it was, as the *City Disposal* Court described, "both a natural prelude to, and an efficient substitute for, the filing of a formal grievance." *Id.* We do not believe a refusal to break a law can be categorized as an abusive manner of enforcing contract rights. Thus, we hold that Garcia's refusal was protected concerted activity.

We also hold that punishing an employee for refusing to break the law is contrary to public policy. The Board argues that a desire to obey traffic laws is not protected by the NLRA because the Act is not designed to encourage compliance with traffic laws and the Board is not empowered to correct all illegality. General policy objections to making the NLRB another agency for enforcement of state traffic laws only cloud the issue of whether the Board should defer to an arbitration decision which punishes an employee for invoking his contractually guaranteed right not to be asked to violate any state laws. The Board may not be charged with enforcing all laws, but it surely is not empowered to condone law violation.

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We believe that even though UPS and other employers may think they have legitimate business reasons for placing themselves above the law, we as a court of law must not reinforce such a view. Despite the current popularity of cost-benefit analysis, we must insist that the rule of law requires, at an irreducible minimum, that all citizens obey the law regardless of economic cost. We note that the parties in this case informed the court that the Union and UPS have agreed that UPS employees will disobey ordinances prohibiting double parking and horn tapping in exchange for UPS's agreeing to pay any fines imposed for these violations. We expressly disapprove any such accommodation which serves only to breed or reinforce a cynical view of the operation of law in this society—that those with enough sophistication, money, and influence are exempt from its requirements and may be specially licensed or privileged to ignore and disobey the law and that obedience to the law is reserved for the unsophisticated, the poor, and the powerless.

There is no principled basis for distinguishing between laws that employees are within their rights to choose to obey and those they choose to disobey. Apparently the Board believes that an employee given an unlawful order is sometimes obliged to "obey and grieve." We prefer the alternative view that a citizen's first obligation is to obey the law, not the unlawful commands of an employer. Particularly in this case, where we know that the outcome of grieving the policy was a decision that the company would assume liability for the consequences of the violation, rather than an end to law violation, we do not see obeying and grieving as a responsible course of action. To adopt the Board's reasoning would put us in the position the District of Columbia Circuit Court of Appeals described, of aiding and abetting law violation. *Banyard*, 505 F.2d at 347. This position is repugnant to public policy and to the NLRA, and the Board erred in deferring to the arbitration award.

CONCLUSION

The Board concluded the arbitration award was not repugnant to the Act because Garcia's conduct was not protected activity. It reached that conclusion only through a strained reading of *City Disposal* and by ignoring all of its prior decisions upholding employee refusals to break laws as protected activity. Thus, we hold the Board departed from its own standards and abused its discretion in deciding to defer to the arbitration award. For these reasons we grant Garcia's petition and refuse to enforce the order of the Board.

ENFORCEMENT DENIED.

Hotel, Motel and Restaurant Employees and Bartenders Union Local No. 19, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO v. NLRB

785 F.2d 796 (9th Cir.), March 25, 1986

On petition to review Board Order

Before SNEED, KENNEDY and BOOCHEVER, Circuit Judges

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BOOCHEVER, Circuit Judge: We review the NLRB decision that Burger Pits, Inc., did not violate sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5) (1982), by withdrawing recognition from and refusing to bargain with the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 19 (Union). The Union asks us to review (1) whether the NLRB correctly applied the law regarding the presumption of continuing majority support for a union and an employer's good faith doubt of that support and (2) whether the NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing support is sustained by substantial evidence in the record. We find that the NLRB correctly applied the law and that the record supports its findings of fact.

I. FACTS

Hotel, Motel, Restaurant Employees and Bartenders Union, Local 19 (Union) represented Burger Pits employees. Burger Pits entered into successive collective bargaining agreements with the Union, the most recent of which was effective through May 31, 1980. On May 29, 1980, Burger

Pits and the Union agreed to extend the contract through June 30, 1980.

Under the contract, Union representatives had the right to enter the kitchen areas of Burger Pits facilities to investigate employee status and work conditions. After May 31, however, Burger Pits refused to grant Union representatives access to the kitchen areas. No evidence was submitted, however, that any Union representatives sought access.

As of June 1, 1980, Burger Pits employed 276 employees in the bargaining unit. Between June 1 and June 3, relief cook Turrick Robbins collected 180 signatures on an employee petition which stated that the signers "no longer wish[ed] to be represented by the [Union]." Robbins presented

the petition to Burger Pits Vice President Albert Berger on June 3, 1980. When he presented the petition, Robbins told Berger that he had collected the signatures on his own initiative and that the employees "willingly signed the petition" at "almost every location."

Berger contacted his attorney who, on June 6, sent to the Union written notice that Burger Pits no longer recognized the Union as the employees' bargaining representative. After June 6, but before the expiration of the contract on June 30, Burger Pits unilaterally instituted new health and welfare coverage and ceased making the contractually required contributions to the existing health and welfare fund and pension plan.

On June 16, 1980, the Union filed an unfair labor practice charge, alleging that Burger Pits had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1982). The Union alleged Burger Pits had locked out Union representatives, unilaterally changed terms and conditions of employment during the term of the contract extension, and refused to recognize and bargain with the Union.

The Administrative Law Judge decided that Burger Pits had engaged in unfair labor practices and ordered a broad "make-whole" relief and a bargaining order. Burger Pits sent its Exceptions to the ALJ's decision to the NLRB.

On December 14, 1984, the NLRB upheld the ALJ's Conclusion of Law that Burger Pits had violated sections 8(a)(1) and 8(a)(5) but found that Burger Pits had a good faith reasonable doubt of the Union's majority status. The NLRB refused to enforce the order to bargain. It further held that because Burger Pits had failed to recognize the Union for purposes of its contract obligations a make-whole remedy was appropriate for the contract period but not beyond.

The Union appealed, alleging that the NLRB failed to apply correctly the presumption of a union's continuing majority support, and that the record failed to provide substantial evidence sufficient to justify a finding that Burger Pits had a good faith doubt of the Union's majority support.

II. STANDARD OF REVIEW

A court reviewing an NLRB decision looks to see "if the Board correctly applied the law" and determines "if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole." *Whisper Soft Mills, Inc. v. NLRB,* 754 F.2d 1381, 1384 (9th Cir.1985). Although a reviewing court reviews questions of law de novo it should give considerable deference to the Board's expertise in construing and applying the labor laws. *United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); *Mingtree Restaurant, Inc. v. NLRB,* 736 F.2d 1295, 1297 (9th Cir.1984). Thus, with some deference to the NLRB, we review de novo whether the NLRB correctly applied the presumption of a union's majority status.

With respect to questions of fact, however, the NLRB's findings are conclusive if supported by substantial evidence in the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 484–88, 71 S.Ct. 456, 462–64, 95 L.Ed. 456 (1951). Thus, in reviewing whether the NLRB's finding that Burger Pits had a good faith doubt of the Union's continuing majority support, we look to the record for substantial evidence.

III. ANALYSIS

A. The NLRB correctly applied the law regarding a union's presumption of continuing majority support and an employer's good faith doubt of that support.

As long as a union is certified or voluntarily recognized, the employer has a duty to bargain. A refusal to bargain is a violation of sections 8(a)(1) and 8(a)(5). Once a union is certified or recognized it enjoys a presumption of continued majority

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status which is irrebuttable for a reasonable time, usually one year, and is rebuttable thereafter. An employer may rebut the presumption of continued majority status if it shows by clear, cogent, and convincing evidence that the union was in the minority or that the employer had a good faith reasonable doubt of majority status. *See Brooks v. NLRB,* 348 U.S. 96, 104, 75 S.Ct. 176, 181, 99 L.Ed. 125 (1954); *Mingtree Restaurant,* 736 F.2d at 1296-97. The reasonable doubt must be asserted in good faith and may not be raised in the context of any employer activities aimed at causing disaffection with the union. *NLRB v. Carilli,* 648 F.2d 1206, 1216 (9th Cir.1981); *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 730 (9th Cir.1980), *cert. denied,* 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981).

Once the employer has presented sufficient evidence to rebut the presumed majority status, "the General Counsel must come forward with the evidence that on the refusal to bargain date the union in fact did represent a majority of employees . . . or that the refusal to bargain was not predicated upon a good faith and reasonably grounded doubt of the union's continued majority status." *National Cash Register v. NLRB,* 494 F.2d 189, 194 (8th Cir.1974); accord *NLRB v. Sacramento Clinical Laboratory, Inc.,* 623 F.2d 110, 114 (9th Cir.1980); *NLRB v. Silver Spur Casino,* 623 F.2d 571, 577 (9th Cir.1980), *cert. denied,* 451 U.S. 906, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981). If the General Counsel presents evidence showing that the union's decline in support was attributable to the employer's misconduct, the employer's claim of a good faith reasonable doubt fails. Absent such evidence, the employer prevails. *See NLRB v. Sacramento Clinical Laboratory,* 623 F.2d at 114; *Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77, 80 (9th Cir.1977).

Thus, a good faith defense to a refusal to bargain charge requires the employer to present clear, cogent, and convincing evidence of (1) a reasonable good faith doubt of majority status (2) in a context free of employer activities aimed at causing disaffection. If the General Counsel then fails to come forward with a rebuttal, the NLRB must find that the employer has a good faith defense.

With regard to Burger Pits, the NLRB correctly applied the presumption of continuing majority support. The Union, however, alleges that the NLRB failed to recognize that Burger Pits had violated the second requirement of the good faith defense and, with regard to that issue, the NLRB improperly shifted the burden of proof to the Union. The Union maintains that the employer's defense is tainted and without merit because Burger Pits locked out union representatives at the time signatures were obtained on Robbins' petition.

The existence of an unfair labor practice prior to the withdrawal of recognition, however, "does not necessarily mean that an employer's action is in bad faith." *NLRB v. Nu-Southern Dyeing & Finishing, Inc.,* 444 F.2d 11, 15-16 (4th Cir.1971). Rather, the activity must be of such a character "as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Guerdon Industries, Inc.,* 218 NLRB 658, 661 (1975). *See also Nu-Southern Dyeing & Finishing,* 444 F.2d at 16 (the unfair labor practice must "significantly contribute to [the] loss of majority or to the factors upon which a doubt of such a majority is based").

Consistent with these principles, the NLRB found that lack of access to the kitchen areas after May 31 did not "taint" the employee petition which was the grounds for Burger Pits' good faith doubt of continuing majority support. The NLRB concluded:

> The [ALJ] found that after 31 May the Respondent unlawfully refused to grant union representatives access to its kitchen areas. We note that this misconduct began prior to the submission of the petition on 3 June, and prior to employee Robbins' collection of the signatures between 1 and 3 June. However, we think it clear that this misconduct was un-
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> related to the massive disaffection with the Union which the petition reflects. We conclude that this unfair labor practice "was not of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." (Footnote omitted)

The company's vice president's testimony supports the NLRB's conclusion; it reveals a brewing discontent with the Union which was neither connected with nor caused by the company's lockout. As early as March, 1980, most of the employees were not paying dues and "just weren't in favor of the Union." Further, during the year or two prior to the withdrawal of recognition, Union representatives had not visited most of the company's facilities. No evidence was submitted that any union representative sought access during the period of the lock-out. Thus, the record supports a finding that the lock-out on May 31 did not taint the employee petition.

The NLRB therefore recognized and correctly applied the presumption of a continuing majority status. The Union's argument that the Board improperly applied the presumption because it shifted the burden to the Union fails to recognize that under the proper application, the burden does shift once the employer rebuts the presumption. Because Burger Pits presented sufficient evidence to rebut the presumed majority status in a context free of activities aimed at causing disaffection and the General Counsel failed to present evidence establishing that the employees' petition was tainted by Burger Pits' unfair labor practice, the NLRB properly found that Burger Pits had a good faith defense to charges of refusal to bargain.

B. The NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing majority support is sustained by substantial evidence in the record.

Evidence presented to establish an employer's good faith doubt of continuing majority support must unequivocally indicate that a union's support has declined to a minority. *Mingtree Restaurant*, 736 F.2d at 1297. Evidence presenting only an ambiguous inference of a lack of majority support is not enough. *N.T. Enloe Memorial Hospital v. NLRB*, 682 F.2d 790, 795 (9th Cir.1982). A petition signed by half of the members of a bargaining unit and urging employers to withdraw recognition of the union, however, is sufficient evidence that the union has lost its majority support. *Sacramento Clinical Laboratory*, 623 F.2d at 114 (petition established loss of majority); *Industrial Waste Service, Inc.*, 268 NLRB 1180, 1186 (1984) (petition gave employer good faith doubt); *Master Slack Corp.*, 271 NLRB 78, 85 (1984) (petition established actual loss of majority).

Thus, the employee petition presented to Vice President Berger by employee Robbins constituted clear and convincing evidence on which the employer could base a reasonable good faith belief that the Union had in fact lost majority support. The petition stated that the signers "no longer wish to be represented by [the Union]". The petition alone is sufficient support for a finding that Burger Pits had a good faith doubt in the Union's continuing majority support.

The Union, however, alleges that the petition is not clear, cogent, and convincing evidence because Burger Pits offered no evidence (1) that the signatures were actually those of employees in the bargaining unit; (2) regarding the number of employees in the unit; and (3) concerning the circumstances surrounding the circulation of the petition.

The Union's allegations are without merit. Although the Union received the opportunity to challenge the petition's authenticity when it was put into evidence, the Union failed to raise the issue. Further, Berger testified that employee Robbins told him that he had personally collected the signatures on his own initiative and that the employees willingly signed the petition. Berger testified that 276 employees were in the bargaining unit and that testimony was unchallenged. No evidence was presented to show that management was involved with, or even aware of, the petition prior to June 3 when Robbins presented it to Berger. Under these circumstances, the could find that the petition constituted clear and convincing evidence.

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Even if an employee petition alone were not sufficient, the record discloses that Burger Pits' good faith doubt in the Union's majority support was based on other factors as well: (1) Robbins' statement that the petition was signed willingly at almost every location he visited; (2) reports that "most of the busboys and dishwashers would not join the Union" for "at least a year, or maybe two"; (3) no union business agent had visited ten of the Burger Pits' fifteen restaurants for a long period; (4) of sixteen employees at one location, only one was a Union member; and (5) of seventeen employees at another location, only two were Union members.

Thus, because an employee petition constitutes evidence sufficient to support a finding of good faith belief that a union has lost majority support and because other factors indicate the Union had lost majority support, the NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing majority support is supported by substantial evidence in the record.

IV. CONCLUSION

The NLRB correctly applied the burden of proof regarding the presumption of a union's continuing majority support. Burger Pits' good faith doubt of the Union's majority status is supported by substantial evidence in the record. Therefore, the order of the NLRB is AFFIRMED.

Local Union 1392, International Brotherhood of Electric Workers, AFL-CIO v. NLRB

786 F.2d 733 (6th Cir.), March 26, 1986—273 NLRB 1540

On petition to review Board Order

Before KEITH and MARTIN, Circuit Judges, and WEBER, * District Judge

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BOYCE F. MARTIN, JR., Circuit Judge: Local 1392 of the International Brotherhood of Electrical Workers petitions this Court for review of a decision of the National Labor Relations Board in favor of the employer, Indiana & Michigan Electric Company. 273 N.L.R.B. No. 193 (1985).

In November, 1978, Local 1392 filed unfair labor practice charges against Indiana & Michigan alleging that the employer had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by imposing harsher discipline on two union officers than on ten other employees, all of whom had participated in the same unauthorized work stoppage. After an investigation, the Board's General Counsel issued a complaint against the employer. The administrative law judge upheld the unfair labor practice charges, finding that the employer had violated the Act. On review, the NLRB reversed the administrative law judge's decision and dismissed the complaint. The Union appeals this dismissal.

The facts of this case are straightforward and undisputed. On August 21, 1978, fifteen employees in the line department at Indiana & Michigan's Muncie, Indiana plant staged an unauthorized work stoppage. The employer issued three-day suspensions to the ten rank-and-file members who participated in the work stoppage, and five-day suspensions to the two instigators of the incident and two union stewards.[1] The employer based its harsher discipline of stewards Ridley and Maxwell on their "greater responsibility to end the unauthorized work stoppage"; the company did not contend that the stewards led or actively promoted the misconduct.

The issue presented by these facts is whether an employer's selective discipline of a union official, based on his union status, violates section 8(a)(3) of the NLRA. The Board's inconsistency on this issue[2]

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was resolved by the Supreme Court's decision in *Metropolitan Edison v. NLRB*, 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983), which held that an employer may impose selective discipline in this situation if the union has made a "clear and unmistakable" waiver of its officials' statutory right to be free from such disparate treatment. *Id.* at 707, 103 S.Ct. at 1476. The parties agree on the applicability of the legal principles of *Metropolitan Edison* to this case; they disagree as to whether their particular contractual language constitutes the requisite "clear and unmistakable" waiver.

The *Metropolitan Edison* court, in reaffirming union officials' statutory right to be free from selective discipline based on their union status, held that a general no-strike clause was insufficient to establish waiver of such a protected right. *Id.* at 707-08, 103 S.Ct. at 1476-77. The court recognized, however, that "a union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages." *Id.* at 707, 103 S.Ct. at 1477. Specifically, the court ruled that "a union may waive this protection by clearly imposing contractual duties on its officials to ensure the integrity of no-strike clauses." *Id.* at 710, 103 S.Ct. at 1478.

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* Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

[1] The Union's highest official at the plant was not suspended because the employer's investigation revealed he attempted to persuade the employees to return to work.

[2] The Board's most definitive holding on this issue prior to *Metropolitan Edison* was in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), in which it held that selective dismissal of a shop steward who participated in and made no effort to terminate an illegal strike constituted discrimination based solely on the holding of union office and thus was violative of sections 8(a)(1) and 8(a)(3). Before *Precision Castings*, the Board, on several occasions, had found no unfair labor practice in the dismissal of union stewards based on their participation in illegal strikes. *See, e.g., Chrysler Corp.*, 232 N.L.R.B. 466 (1977); *Super Valu Xenia*, 228 N.L.R.B. 1254 (1977).

We agree with the Board that Indiana & Michigan's contract with Local 1392 imposed affirmative duties on union officials sufficient to establish a waiver of those officials' section 8(a)(3) right to be free from disparate discipline. The relevant contractual language provides:

> The Union agrees that, in the event of any violation (other than lockout) of the provisions of the foregoing paragraph, it will in good faith and without delay publicly disavow such violation, exert itself to bring about a quick termination of such violation and insist that the employee or employees involved cease such violation. To that end the Union will promptly take whatever affirmative action is necessary. If the Union has not authorized, participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation.

Art III, § 2.

The Union argues that because the language of the contract refers to the union as an entity, and not to its individual officers, the union officers owe no duty to the employer. It correctly notes that the contractual assumption of these duties imposes damage liability on the union under *Carbon Fuel v. Mine Workers*, 444 U.S. 212, 216–18, 100 S.Ct. 410, 413–15, 62 L.Ed.2d 394 (1979), and contends that this liability is the extent of the employer's remedy for breach of the provision. The Union bases its argument on the well-established principle of agency that an agent is liable only to the principal for a breach of a duty owed to a third party.

The Union's reliance on agency principles in this context is misplaced. A valid waiver of an employee's statutory right renders the right unprotected under the National Labor Relations Act. Clearly, rank-and-file employees may be discharged for disobeying a contractual no-strike clause. A valid waiver of union officials' protected rights should have the same effect. The District of Columbia Circuit assessed a similar argument advanced by the Board as "wholly unconvincing." *Fournelle v. NLRB*, 670 F.2d 331, 339 & n. 16 (D.C.Cir.1982), and we agree.

In a case decided before *Metropolitan Edison*, the Third Circuit found the language of a collective bargaining agreement imposed specific enforceable duties on union officials. *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir.1979), *cert. denied*, 449 U.S. 890, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980). The contractual obligations assumed by the union in that case were very similar to those agreed to by Local 1392. The language of the *Gould* contract, however, imposed these duties specifically upon

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"the Union, *its officers and representatives*" (emphasis added) rather than on the Union alone. *Id.* at 730, n. 3.

This difference in language cannot hold the legal significance attributed to it by the Union in this case. Obviously, unions act only through their officers. A union's assumption of the duty to end an unauthorized work stoppage necessarily imposes a concomitant duty upon its officials to implement that obligation. We believe that the contractual language in this case illustrates the intent of the Union for its officials to attempt to prevent unauthorized work stoppages, and that this language constitutes a "clear and unmistakable waiver" of those officials' right to be free from selective discipline.[3] This waiver is the result of the specific additional duties assumed by the union under the contract, and is not necessarily inherent in an employee's position as a union official. *NLRB v. Babcock & Wilcox Co.*, 697 F.2d 724, 732–33 & n. 9 (6th Cir.1983). *Compare Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 230 (7th Cir.1979).

The Board's interpretation of a collective bargaining agreement is entitled to deference if it is reasonable and consistent with the policies of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822, 829–30, 104 S.Ct. 1505, 1510–11, 79 L.Ed.2d 839 (1984); *NLRB v. Local 534, Construction & General*

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[3] In its amicus brief, the Chamber of Commerce notes that imposing these obligations on union stewards is the logical corollary to the award of superseniority against layoff permitted the officials because of the importance of their function. *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656 (1975). This interesting argument is not persuasive here, both because we have no evidence before us concerning the parties' agreement on the contractual issue of superseniority, and because this Court has already rejected the notion of a higher responsibility imposed on union representatives by virtue of their office. *NLRB v. Babcock & Wilcox*, 697 F.2d at 732 (6th Cir.1983).

Laborers' Union, 778 F.2d 284, 287 (6th Cir.1985). The Board's interpretation of the language of this contract was reasonable, consistent with the policies of the Act, and in accord with the Supreme Court's pronouncements in *Metropolitan Edison.* The petition of the Union is therefore denied, and the order of the Board is enforced.

Glaziers Local Union 558 v. NLRB

787 F.2d 1406 (10th Cir.). March 31, 1986—271 NLRB 583

On petition to enforce Board Order

Before McKAY and MOORE, Circuit Judges, and WEST, District Judge *

JOHN P. MOORE, Circuit Judge: Kenneth Orr filed a complaint with the National Labor Relations Board (the Board) charging Glaziers Local Union 558 (the Union) with unfair labor practices in violation of § 8(b)(2) and, derivatively, § 8(b)(1)(A) of the National Labor Relations Act (the Act). The complaint alleged that the Union caused PPG Industries (PPG) to discriminate against Orr and another nonunion employee, William Gooch, Jr., by forcing PPG to fire them. Orr contended their firing was precipitated by a walkout of union members designed to bring about the termination of nonunion employees. The case was brought before an administrative law judge (ALJ) who found there was no persuasive evidence to support the allegation that the Union caused the walkout. The ALJ further concluded that even if the Union were responsible for the jobsite walkout, the evidence failed to establish that the actual motive of the Union was to cause PPG to discriminate against employees on the basis of nonunion status. Accordingly, he dismissed the complaint. After consideration of the ALJ's findings, supplemented by testimony on which he did not explicitly rely, the Board reversed the dismissal of the complaint, concluding that the Union illegally caused PPG to fire Orr and Gooch. The case is before this court on the Union's petition for review and the Board's cross-application for enforcement of its order. Because we conclude that the Board's decision is not supported by substantial evidence on the record as a whole, we reverse its order.

I.

PPG manufacturers, sells, and installs glass products in Kansas and Missouri, as well as in other areas of the country. Through Mo-Kan, a multiemployer bargaining association, PPG and the Union were parties to a series of labor agreements, including one in effect during the events underlying this controversy. That agreement made general references to two classes of glaziers, "journeymen" and "apprentices," while setting forth one wage rate. Glaziers were employed by Mo-Kan employers pursuant to a formal industry apprenticeship training program, which was established by a separate agreement incorporated by reference into the Mo-Kan agreement. [1] The Mo-Kan agreement also contained a lawful union security clause requiring employees to become members of the Union after a grace period. It further included a "no-strike" clause, a commitment by the Union not to strike over disputes arising under the contract.

While the Mo-Kan agreement did not specify procedures or priorities for the hiring and referral of employees on construction jobs, the long-standing practice among Mo-Kan employers was to use the Union as the primary source for referral of glaziers. When the Union was unable to locate glaziers to satisfy employer requests, Mo-Kan employers directly hired employees to work as glaziers. According to custom on Mo-Kan jobs, direct hires were referred to the Union to obtain a "permit," a certificate which established that the holder had been hired with the knowledge and acquiescence of the Union. The permit system was designed to prevent potential jobsite harassment by employees in other trades or from union representatives policing compliance with union security agreements. The union security clause in the Mo-Kan agreement was not customarily enforced against permit holders, apparently due to the fact that permits were issued only for the dura-

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* Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

[1] The terms of the agreement covering the apprenticeship training program were not included in the record in this case, though the existence of an established formal program was undisputed.

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tion of a job or thirty days, whichever period was shorter. Therefore, according to the traditional practice followed by the Union and Mo-Kan employers, permit men enjoyed only a temporary status and were replaced with journeymen when journeymen became available for referral by the Union.[2] Deviation from this traditional practice is at the heart of this dispute.

From approximately June 1981 through March 1982, PPG was engaged in the installation of window glass on a project known as the "North Supply job" in Gardner, Kansas. In August 1981, regular glass installation work commenced at the jobsite. To fulfill its requirements for glaziers, PPG, through construction manager William Gooch, Sr., requested referrals of journeymen glaziers from the Union. At some point in August, Jack Zander, the Union's business representative, informed Gooch that the Union was unable to locate additional journeymen in the area. PPG then resorted to direct hiring, eventually employing seven or eight persons, including Kenneth Orr and William Gooch, Jr., construction manager Gooch's son.[3] All of the direct hires were referred to the Union for temporary work permits, which were issued without incident.

On several occasions in October 1981, Zander or Charles Foland, assistant business representative for the Union, notified PPG through construction manager Gooch that there were journeymen available for referral to the North Supply job. The Union repeatedly requested that permit men on the job be replaced with the available journeymen. On each occasion, Gooch refused, stating that he was satisfied with the permit employees and that he was not interested in additional employees at that time.[4] Zander complained to Gooch that the company's refusal to replace permit men with available journeymen glaziers was not "the way that this thing has been operated"; that it would "destroy the apprenticeship program"; and that it "was not fair to the apprentices and the way that the apprenticeship program has been run in the past." Gooch remained steadfast in his refusal, and no further discussions on the subject transpired between Gooch and Union representatives until January.

Between the end of October and early January, dissatisfaction with PPG's refusal to replace the permit men increased among union glaziers on the North Supply job. While visiting the jobsite on an unrelated matter, Zander spoke with James Davis, a journeyman member of the Union, who stated that he and other workers "didn't want to put up with it and they were going to walk off." Zander testified that he advised Davis that a walkout would be in violation of the contract and that "it just couldn't happen." Employee concern over the situation was raised during at least two union meetings between October and January. On each occasion, Zander informed

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members that the Union had done all it could to accomplish the replacement of the permit men with journeymen. He informed the members that they would have to quit their jobs and seek employment elsewhere if they were dissatisfied with working conditions at the jobsite. Zander reiterated that the Union could not instigate a walkout or strike.[5] In response to specific questions from members, Zander stated that union bylaws provided for fines against members who continued to work alongside permit men. However, he also maintained that neither he nor any union officer would prefer charges for that reason, but other members could not be prevented from filing charges. Zander also stressed that he would personally prefer charges against any member who attempted to instigate a walkout.

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[2] The record in this case fails to reveal precisely how an employee becomes qualified as a journeyman. From the usage of the term "journeyman" by witnesses and attorneys during the hearing, the ALJ concluded that journeyman implies the "possession of substantial qualifying experience" and the "satisfaction of a rather specific set of criteria which distinguish apprentices from journeymen and which results in some sort of formal certification of journeyman status." The ALJ found that journeymen were generally more qualified than permitmen; in fact, several permit holders at the jobsite involved in this controversy were awaiting entry into the formal apprenticeship program to eventually be certified as journeymen, an opportunity available to permit holders on a limited basis.

[3] According to information available in the record, neither Orr nor Gooch was an experienced glazier. Orr previously worked for PPG in an unspecified capacity and was employed as a sign hanger by another company when he accepted work on the North Supply job. Gooch, Jr., was employed by another firm in an unrelated construction trade at the time PPG offered him employment.

[4] In response to Union requests that the permit men be replaced with available journeymen, Gooch stated that he could not legally bump the permit employees to give jobs to other people. The ALJ, noting that Gooch failed to explain the basis for this assertion, found that Gooch's concern that the proffered journeymen were striking auto glass workers who might not remain on the North Supply job after the strike ended was a more important consideration in Gooch's decision than concern over potential illegalities.

[5] Union officials apparently believed that a walkout over the replacement of permit men would violate the no-strike clause in the Mo-Kan agreement. The ALJ was unable to conclude that a strike would have been contractually proscribed. The no-strike clause in the Mo-Kan agreement prohibited stoppages of work as a result of "any controversy or dispute as to the meaning, or application of the provisions of the agreement." Because the contract was silent on the subject of hiring priorities as between journeymen and permit men, the ALJ noted, without deciding, the no-strike clause might have been inapplicable to a dispute over those priorities.

On December 31, 1981, assistant business representative Foland contacted Gooch to inform him of the availability of qualified journeymen as a result of a strike at Atlas Glass in Kansas City. Once again, Gooch responded that he was not interested in additional employees. Several days thereafter, a union job steward, Paul Serna, approached Ernie Kraner, PPG's North Supply project manager, to express his dissatisfaction with the fact that journeymen glaziers were out of work while permit men remained on the job. A similar conversation was repeated a few days later.

The dispute came to a head on January 7, 1982. At that time, the crew at the North Supply job had been reduced through layoffs leaving a group of journeymen, a group formally involved in the apprenticeship program, a group of "waiting" apprentices, and Orr and Gooch, Jr. In at least one conversation with Kraner during the day, Serna stated his intention to "finish out the day" and "quit" and requested that his final paycheck be mailed to him. Serna indicated that other men on the job would not be content to work "under those conditions" with permit men while journeymen were without work. Later in the day, two apprentices left the North Supply job without explanation. That evening, Jack Griffin, the general foreman, notified Kraner of his intention to take "a day of vacation" the next day. Arthur Jackson, the working foreman, stated that he would quit or be sick if the situation with the permit men was not straightened out. At the beginning of the workday the following morning, only three employees, Orr, Gooch, Jr., and a waiting apprentice reported for work. By 9 a.m., the waiting apprentice had disappeared from the work site.

On January 8, 1982, after discussing the situation at the North Supply job, Kraner and Gooch decided to discharge Gooch, Jr., and Orr and to attempt to recall the other employees, concluding that was the only way PPG could complete the job. Kraner then telephoned foremen Griffin and Jackson and asked them to return to work. Kraner also requested that Griffin and Jackson attempt to persuade other workers to return to work on the North Supply job. Gooch telephoned Zander to inquire about ways to get glaziers back on the job. Zander replied that most of the former North Supply job employees had found work on other jobs but that Gooch was "free to call" them if he wished. Apparently, Zander's only active role in the recall was to inform members who called that "things were being straightened out" and to instruct them to await a call from Griffin or the company before returning to work.

During the following week, glaziers gradually trickled back to the North Supply job. The record does not indicate that any of the journeymen the Union previously sought to

put on the job were hired to replace Gooch, Jr., or Orr. The dispute apparently ended with the discharge of the two permit men.

After reviewing the harmonious testimony of witnesses and weighing the credibility of those witnesses, the ALJ found that the Board's General Counsel had not adequately demonstrated that the Union caused the firing of Orr and Gooch, Jr., by bringing about a strike or other impermissible concerted activity. The ALJ first concluded there was insufficient evidence to establish that the employees who left the North Supply job engaged in a "strike," noting that a strike contemplates continuation of an employment relationship, while at least some of the employees intended to completely sever their employment ties with PPG. Even if the employees' actions could be deemed a strike, the ALJ found that the Union had not caused the strike. He determined that any references on the part of union officials to quitting the North Supply job because of dissatisfaction or to the possibility of fines for working alongside permit men were merely explanations of the members' rights and liabilities. Despite the General Counsel's urging to the contrary, the ALJ found no duty on the part of the Union to reprimand its members for leaving the job or to take affirmative action to replace those employees with journeymen until requested to do so by PPG. In finding no causation, the ALJ emphasized the continued opposition of the Union's business representative, Zander, to a walkout or a strike. While recognizing the possibility that any formal union opposition to a strike or other connected activity might be accompanied by a figurative "wink," the ALJ found no clear evidence that the Union covertly evaded responsibility for concerted activity that it was actually encouraging.

Because the complaint tied allegations of a § 8(b)(2) violation to a claim that the Union sought the termination of Orr and Gooch, Jr., due to their nonunion status, the ALJ examined the evidence pertaining to the Union's motivation. He found the testimony of Zander, Foland, and Gooch, Sr., supported the inference that the Union sought to protect the reputation of an established apprenticeship program, which he characterized as a long-standing, traditional practice guaranteeing qualified glaziers for work on employers' projects and establishing employment priorities which ensured for the Union a fair distribution of work opportunities among qualified job-seekers.[6] Furthermore, if the Union's actual objection to retention of the permit men was their nonunion status, the ALJ reasoned that the Union could have corrected the problem through enforcement of the valid union security clause in the contract. After determining that the Supreme Court in *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961), set the "true purpose" or "real motive" in hiring or firing as the test of a § 8(b)(2) violation, the ALJ concluded that the Union was not guilty of violating the Act because union membership was not the basis on which its officials sought the replacement of permit men with journeymen. Accordingly, the ALJ dismissed the complaint in its entirety.

After a review of the record, the Board, contrary to the ALJ's findings, determined there was ample evidence that the Union caused or attempted to cause PPG to terminate Orr and Gooch, Jr. As support for its conclusion, the Board emphasized the repeated requests by union agents Zander and Foland to replace permit employees with available journeymen. It interpreted Zander's advice to union members that they would have to quit if dissatisfied with conditions at the North Supply job and his

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reference to the possibility of the imposition of fines on members for working alongside permit men as threats which encouraged members to quit the North Supply job. The Board further concluded that the Union's conduct following the walkout from the North Supply job demonstrated that the Union "ratified" the employees' actions, specifically noting that the Union made no effort to fill the vacated positions with available journeymen.

Once it determined that causation was established, the Board applied a presumption that a union acts illegally anytime it prevents an employee from being hired or causes an employee to be discharged to reach its ultimate conclusion that the Union violated § 8(b)(2). According to prior cases decided by the Board,[7] a union may rebut this presumption by providing "evidence of a compelling and overriding character" establishing that its conduct "was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or other matters with which the Act is concerned." While the Board did not specifically dispute the ALJ's finding that the Union's actions were motivated by its desire to protect the traditional apprenticeship system, it determined that the motivation was insufficient justification to overcome the presumption of illegality. The Board ordered the Union to cease and desist from violations of § 8(b)(2) and (1)(A) of the Act and to compensate Orr and Gooch, Jr., for any loss of earnings or benefits suffered as a result of the discrimination against them. The Union was further required to contact PPG in writing requesting reinstatement of Orr and Gooch, Jr.

In this appeal, the Union contends the Board erred as a matter of law in finding that the Union violated § 8(b)(2) because the Union's intent to unlawfully discriminate against nonmembers, an element of a § 8(b)(2) violation, had not been established. It argues that the presumption imposed by the Board disregards the controlling principle, announced in *Teamsters*, that it is the true purpose or motive for hiring or firing an employee which determines a § 8(b)(2) violation. In addition, the Union contends the operation of the presumption in connection with the requirement that rebuttal be accomplished by presentation of evidence of a compelling and overriding character that it was lawfully motivated places an impermissible burden on the Union. Even if the presumption were valid, the Union asserts that its application was unwarranted in this case because the Board erred in concluding that the Union caused PPG to terminate Orr and Gooch, Jr.

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[6] In this context the ALJ pointed out that the traditional practice, while not contractually sanctioned, was not challenged by the General Counsel on the basis that it was *per se* invalid. The ALJ regarded this as "an apparent concession that such general practices do not, *per se*, violate the Act." The ALJ further noted that the Board also appears to have implicitly assumed that there was nothing unlawful, *per se*, about construction industry practices which give qualified individuals the right to displace ("bump") less qualified employees hired when the Union was unable to refer qualified help.

[7] The presumption, which the Board characterizes in its brief as "long-standing," appeared in *Local 1332, United Brotherhood of Carpenters and Joiners (Planet Corporation)*, 166 N.L.R.B. 700 (1967). The Board elaborated on the presumption in *International Union of Operating Engineers, Local 18 (Ohio Contractors)*, 204 N.L.R.B. 681 (1973), *enf. denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974).

II.

A reviewing court may reverse a decision of the Board "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). Enforcement of an order should be granted if the Board correctly applied the law and if its findings are supported by substantial evidence in the record as a whole. *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, 723 F.2d 1468, 1471 (10th Cir.1983); *N.L.R.B. v. Carbonex Coal Co.*, 679 F.2d 200, 203 (10th Cir.1982). The standard of review is not altered in cases in which the ALJ and the Board reached contrary conclusions. *Pennypower Shipping News, Inc. v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir.1984); *U.S. Soil Conditioning v. N.L.R.B.*, 606 F.2d 940, 945 (10th Cir.1979). However, the findings of the ALJ, whether contrary or supportive of the Board's determination, are part of

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the record to be fully considered by a reviewing court. *Universal Camera*, 340 U.S. at 492-96, 71 S.Ct. at 466-68.

In the context of these constraints and guidelines, we turn to a consideration of the Board's decision in this case. The Union appears to challenge both the validity of the presumption of illegality adopted by the Board and its application to the facts of this case.[*] The Board argues that the presumption is "a reasonable application of the Suprene Court's decisions in *Radio Officers' Union as N.L.R.B.*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954), and *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 US. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), concerning the Board's authority to apply general presumptions to the facts of particular cases." In *Radio Officers'*, the Court upheld as reasonable the Board's finding that an employer violated § 8(a)(3) of the Act where the employer granted retroactive benefits to union members while denying the benefits to employees who were not union members, despite the absence of specific evidence of the employer's intent to encourage or discourage union membership. The Court concluded that intent to encourage or discourage union membership by discrimination, an element of a § 8(a)(3) violation, may be presumed where the employer's action "inherently encourages or discourages union membership," for it is a common law rule that a man is held to intend the foreseeable consequences of his conduct. *Radio Officers'*, 347 U.S. at 45, 74 S.Ct. at 338. The Court also held that a union violated § 8(b)(2) when it caused an employer to reduce an employee's seniority or to fail to hire an employee because of the employee's violation of internal union rules. In *Great Dane Trailers*, an employer who paid accrued vacation benefits to nonstriking employees while withholding similar benefits from striking employees was found to have violated § 8(a)(3), despite the absence of specific evidence that the employee's conduct was motivated by a desire to discourage employees' exercise of their rights under the Act. The Board concludes that in these cases, the Supreme Court upheld as reasonable the presumption that an employee discharge caused by union conduct encourages union membership and the presumption that an employer's conduct that is inherently destructive of employees' rights is motivated by a desire to discourage union membership. The Board contends the presumption applied in this case is similarly reasonable. We disagree that the cited cases provide such a blanket endorsement of the Board's presumption.

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[*] The Board contends this court is without jurisdiction to consider the Union's challenge to the validity and application of the presumption because the Union failed to raise its objections before the Board. The Board's argument is clearly specious. The operation of the presumption did not become an issue until the Board relied on it in determining that the Union violated the Act. Contrary to the Board representations, the ALJ did not specifically find that the presumption was properly applicable to this case. After finding that the Union did not cause Orr's and Gooch, Jr.'s termination and that it was motivated with their replacement by a desire to preserve the operation of a traditional referral system, the ALJ noted that the General Counsel failed to establish that nonmembership in the Union was a factor in the discharge of the persons. Rather than dismiss the complaint on this basis, the ALJ bolstered his finding of no violation by determining that the Union successfully rebutted any inference of illegality. After harmonizing Board precedent with relevant Supreme Court cases, the ALJ concluded that the Union rebuts any presumption of a § 8(b)(2) violation when it is "shown to have acted in good faith to further hiring and referral practices which are of general benefit to its constituency as a whole and which only incidentally work to the employment disadvantage of particular individuals." The ALJ then found that the referral system relied on by the Union had not been challenged as invalid and that there was no showing of an actual intent to discriminate against nonmembers or other indication of bad faith on the part of the Union. The Union had no need to object to this rather collateral reference to the presumption. Further, we conclude the matter is properly before this court.

III.

We recognize the Board's authority to apply general presumptions as a part of its responsibility to formulate rules to fill the interstices of the broad statutory provisions of the Act. *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 500–01, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); *N.L.R.B. v. American Can Co.*, 658 F.2d 746, 752 (10th Cir.1981). However, only if the presumption is rational and consistent with the Act and its application is supported by substantial evidence on the record as a whole will an order of the Board based on the presumption be enforced. *American Can*, 658 F.2d at 752–53. While *Great Dane* and *Radio Officers'* are instructive on the issue of presumed intent to encourage or discourage union membership by discrimination, the validity of the Board's presumption must be considered in light of other guidelines and criteria set out by the Court, as well as its pronouncements in those cases.*

We begin by noting although *Radio Officers'* approved a finding of a § 8(a)(3) violation without proof of specific intent to encourage or discourage union membership by discrimination, it also emphasized that the employer's "real motive" or "true purpose" is controlling of the determination of a § 8 violation. *Radio Officers'*, 347 U.S. at 43, 74 S.Ct. at 337. *See also Teamsters*, 365 U.S. at 675, 81 S.Ct. at 839. An inquiry into the motivation for challenged conduct is critical because § 8 "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited." *Radio Officers'*, 347 U.S. at 42–43, 74 S.Ct. at 336–37. *See also Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 700, 103 S.Ct. 1467, 1473, 75 L.Ed.2d 387 (1983); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311, 85 S.Ct. 955, 963, 13 L.Ed.2d 855 (1965). In cases of alleged violations of § 8(b)(2), the real purpose behind a union's actions is crucial because "*all* union-procured employment action demonstrates the union's power and thus encourages membership; and . . . *all* union action is motivated by a desire, proximate or ultimate, to encourage membership." *Road Sprinkler Fitters, Local No. 669 v. N.L.R.B.*, 778 F.2d 8 (D.C.Cir.1985). The Supreme Court long ago recognized that a "union is a service agency that probably encourages membership whenever it does its job well." *Teamsters*, 365 U.S. at 675–76, 81 S.Ct. at 839–40.

While the real motive or true purpose underlying challenged conduct is controlling, we recognize that proof of specific intent to encourage or discourage union membership by discrimination is not always necessary to sustain a violation of § 8 of the Act. *Radio Officers'*, 347 U.S. at 44, 74 S.Ct. at 337. *See also N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227, 83 S.Ct. 1139, 1144, 10 L.Ed.2d 308 (1963). In certain circumstances, the existence of discrimination arising from illegal motives may be inferred by the Board. In other words, "[s]ome conduct may by its very nature contain the implications of the required intent: the natural foreseeable consequences of certain actions may warrant the inference." *Teamsters*, 365 U.S. at 675, 81 S.Ct. at 839. *See also Radio Officers'*, 347 U.S. at 45, 74 S.Ct. at 338; *Erie Resistor*, 373 U.S. at 227, 83 S.Ct. at 1144.

However, where intent is to be inferred from conduct, it may be difficult to identify a true motive due to the presentation of a possible complex of motives. In such cases, the Court has divided an employer's conduct into two categories:

> Some conduct is so "'inherently destructive of employee interests'" that it carries with it a strong inference of impermissible motive. *See id.* [*Great Dane*, 388 U.S.] at 33, 87 S.Ct., at 1797 (quoting *NLRB v. Brown*, *supra*, 380 U.S., at 287,

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* At this juncture, we note that most of the applicable case law derives from alleged employer violations of § 8(a)(3) of the Act. However, the enunciated principles are equally applicable to determinations of § 8(b)(2) violations. Indeed, by the terms of § 8(b)(2), the discrimination which the Union seeks must be violative of § 8(a)(3). *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 317 F.2d 746, 749 (2d Cir. 1963).

> 85 S.Ct., at 986). In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board "may nevertheless draw an inference of improper motive from the conduct itself

> and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S., at 33–34, 87 S.Ct., at 1797. On the other hand, if the adverse effect on employee rights is " 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.*, at 34, 87 S.Ct., at 1798 (emphasis in original).

Metropolitan Edison, 103 S.Ct. at 701. In the former category, the Board may essentially truncate its inquiry into the motivation underlying challenged conduct. *American Ship Building*, 380 U.S. at 312, 85 S.Ct. at 964. The foregoing categories are equally applicable to union conduct challenged under § 8(b)(2) in view of the fact that a violation of that subsection rests on the establishment of a violation of § 8(a)(3). Therefore, the parameters prescribed by the Court in *Metropolitan Edison* and *Great Dane* establish the framework for a determination that a presumption of illegality of union conduct is rationally conceived and applied.

Without expressly stating its intention to do so, the Board apparently relegated the Union's conduct in this case to the former category, conduct which "carries a strong inference of impermissible motive." This conclusion flows from the fact that the Board cut off its inquiry into the Union's motivation by summarily rejecting the Union's assertion that it acted out of a desire to protect the apprenticeship program when it requested the replacement of permit employees, even though there was no direct proof that the Union sought to illegally encourage membership or to promote its standing among employees in violation of the Act. After reviewing the record, we conclude that the Board's application of the presumption in this manner lacks rationality and is not supported by substantial evidence.

It was the undisputed, long-standing practice among Mo-Kan employers to seek referrals of journeymen from the Union to fill their needs for experienced glaziers. According to the traditional operation of the referral system, permit men were considered temporary employees subject to replacement by journeymen when they became available. The temporary nature of the tenure of permit holders was evidenced by the fact that the permits were issued for a limited period of time, the shorter of the duration of the job or thirty days. There was no indication anywhere in the record of any expectation on the part of permit workers, members of the Union, or other employees that permit men enjoyed anything other than a temporary status. Under the facts presented in the record, union efforts to replace permit men could not have so dramatically demonstrated its power over employees and their livelihood that the effect was to encourage union membership among employees witnessing the exercise of power. *See International Union of Operating Engineers, Local 18 (Ohio Contractors)*, 204 N.L.R.B. 681 (1973), *enf. denied on other grounds*, 496 F.2d 1308 (6th Cir.1974). Encouragement of union membership is not a consequence which "inescapably flows" from the Union's actions such that the Union can be presumed to have intended it. *Erie Resistor*, 373 U.S. at 228, 83 S.Ct. at 1145. Therefore, the inference of improper motive drawn by the Board in the absence of proof of discriminatory purpose and despite the presentation by the Union of a business justification is not supported by substantial evidence.

IV.

Even if the facts presented a situation of union conduct "inherently destructive of employee rights," we conclude that the balance struck by the Board in rejecting the Union's asserted justification for its actions is not consistent with the policies served by the Act as required by *Great Dane* and *Metropolitan Edison*. While considerable deference is due the Board's expertise in weighing employee interests against legitimate business justifications, the balance

struck between competing interests is not immune from judicial review and reversal. *N.L.R.B. v. Brown*, 380 U.S. at 290–92, 85 S.Ct. at 987–88. A reviewing court must set aside a determination of unlawful intent which rests on an "erroneous legal foundation." *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–13, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956). Here, the Board's summary rejection of the Union's business justification does not comport with the Act. The Board concluded that even if the Union was motivated by a desire to preserve the traditional practice of displacing permit men with journeymen, its justification was insufficient to overcome the presumption of illegality because "[t]he practice consists of nothing more than demanding that employers replace nonmember employees with other individuals." This rationale could be applied to dismiss a union's explanation for effecting the hiring or dismissal of any nonunion employee, regardless of an underlying basis for taking its action. It could invalidate as violative of the Act the union's enforcement of any traditional practice, contractually prescribed or not, undertaken by a union in the course of representing its constituency. The Act was not intended to outlaw all such actions; it only proscribes encouragement or discouragement of union membership accomplished by discrimination. *Radio Officers'*, 347 U.S. at 42–43, 74 S.Ct. at 336–37. The Supreme Court has consistently construed the Act to permit actions taken to serve legitimate business interests even though the conduct may tend to encourage or discourage union membership. *American Ship Building*, 380 U.S. at 311, 85 S.Ct. at 963.

The Board's determination that there was "no evidence of an objective basis supporting the decisions to refer or displace particular employees" does not save the balance it struck in rejecting the Union's asserted justification. In the first place, its conclusion is not supported by substantial evidence. The existence of the referral practice, upon which PPG relied for many years to obtain glaziers, was undisputed. The operation of the referral system, which included the replacement of permit men with journeymen, was the basis of the Union's requests that PPG replace Orr and Gooch, Jr., with available journeymen. Secondly, there is no indication in the record that such practices, even though they are not contractually prescribed, are *per se* illegal or illegitimate. The validity or legality of the referral system was not challenged by the General Counsel. Thus there is no legal objection to the Union's assertion of the practice as the basis for its efforts to replace Orr and Gooch, Jr.

V.

The fact that the referral system was not contractually prescribed does not compel the conclusion that the Union's assertion of its desire to preserve the system constitutes insufficient justification to overcome the presumption. The ALJ found it insignificant that the industry practice of permitting journeymen to bump permit men was not contractually sanctioned. The Board's rejection of the Union's justification did not turn on the absence of contractual authority for the referral system. Board decisions addressing a union's rebuttal burden have not specifically mandated that a union's justification for seeking the hiring or firing of an employee be based on practices spelled out in its contract with the employer.

When the presumption of illegal action was first announced and applied by the Board in *Local 1102, United Brotherhood of Carpenters and Joiners (Planet Corp.)*, 144 N.L.R.B. 798, 800 (1963), a union's rebuttal burden was described as the production of "evidence of a compelling and over-riding character showing that the conduct complained of was referrable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned." As we noted above, the long-standing referral practice was not challenged as unlawful. In *Ohio Contractors*, 204 N.L.R.B. at 681, the Board elaborated that a union's rationale overcomes the presumption "where the

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facts show that the union action was necessary to the effective performance of its function representing its constituency." The Board later noted that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *United Brotherhood of Painters, Local 487 (American Coatings)*, 226 N.L.R.B. 299, 302 (1976), (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953)). The record established that the Union's requests to replace Orr and Gooch, Jr., included its expressed desire to protect the apprenticeship system and the manner in which it operated in the past. Any references on the part of union officials to quitting the North Supply job or to the imposition of fines for working with permit workers remaining on the job were made in response to requests for information from its members. There was no indication that this conduct was beyond the scope of reasonable actions taken to achieve the effective representation of the Union's constituency. Furthermore there was no evidence that the Union acted in bad faith in seeking to replace Orr and Gooch, Jr. The Union repeatedly informed members that it could not instigate a walkout, nor would it impose fines on members for working with permit men. The ALJ found no evidence that the Union covertly evaded responsibility for illegal concerted activity it actually encouraged. Finally, as the ALJ found, if it had been the Union's motivation to encourage union membership, it could have invoked the valid union security clause provided in the Mo-Kan agreement. Therefore, the Board's rejection of the Union's justification for its actions did not comport with its own case law regarding a union's rebuttal burden, nor was it supported by substantial evidence.

VI.

Because we conclude that the Board's application of the presumption of illegality to the facts of this case, specifically that the Union's conduct was inherently destructive of employee rights, is not supported by substantial evidence on the record, we do not reach the question whether the Union caused an illegal walkout from the North Supply job. Even assuming that the General Counsel established causation and that the illegality of the Union's action was properly presumed by the Board, we conclude that the Union met its burden in rebutting the presumption. Accordingly, we deny enforcement of the Board's order.

NLRB v. Del Rey Tortilleria, Inc.

787 F.2d 1118 (7th Cir.), April 2, 1986—272 NLRB 1106

On petition to enforce Board Order

Before Wood and Ripple, Circuit Judges, and Eschbach, Senior Circuit Judge

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Ripple, Circuit Judge: The National Labor Relations Board (NLRB or the Board) petitions this court to enforce an order[1] requiring respondent, Del Rey Tortilleria, Inc. (the Company), to cease and desist from interfering with its employees' exercise of their rights under section 7 of the National Labor Relations Act[2] (the Act) and to offer reinstatement to former employees discharged in violation of the Act. We enforce the order.

I

The following statement of the facts is derived from the findings of fact contained in the Decision of the Administrative Law Judge (ALJ's Decision):[3] The Company is a family-owned corporation which operates retail and wholesale facilities on 18th and 27th Streets in the Pilsen or Little Village area of southwest Chicago. During the relevant period, the Company, which produces tortillas and related Mexican food products, employed some seventy unskilled workers at the 27th Street facility and approximately forty unskilled employees at its 18th Street factory. Nearly all of the employees are of Mexican descent. Some are undocumented aliens. Most are poorly-educated immigrants with little working knowledge of English who work for minimum wage.

In the summer of 1982, Refugio Martinez, the Company's vice-president and chief operating officer, was away in Mexico on business. In his absence, his stepdaughters were left in charge: Dorothy de la Torre managed the 27th Street facility with the assistance of supervisor Pilar Ramirez. Yolanda Carreon managed the 18th Street operation. In late September, Luis Maldonado and several other employees asked Mrs. de la torre to establish a regularly-scheduled break time to replace the arbitrary system then in operation. She replied that the employees were a "bunch of pigs" and that, because they made a "mess of the lunchroom," she would not give them a regular break. These employees were then sent home prior to the end of their shifts. Thereafter, Mr. Maldonado contacted Local 76 of the International Ladies' Garment Workers Union (Union).

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[1] The Board's order, which was issued November 16, 1984, is reported at 272 N.L.R.B. No. 179.

[2] Section 7 of the National Labor Relations Act provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

29 U.S.C. § 157 (1982).

[3] The Decision of the Administrative Law Judge (ALJ's Decision) is found in the Record at Volume I, "Pleadings," Item 2, pp. 1-19.

On or about October 1, 1982, one of the Union's organizing directors, Rudolfo Lozano, began an organizational drive at both of the Company's facilities. Mr. Lozano stood on the sidewalk outside of the plants and spoke to employees entering and leaving the plants. He also held organizational meetings at a local community center. At these meetings, blank authorization cards were given to employees for distribution and signed cards were collected. After a meeting at the community center on October 6, the organizational drive began in earnest. On October 13, two days before the Union filed its representation petition, Mr. Lozano sent a telegram to Mrs. de la Torre. The telegram informed her that the Union was involved in an organizing drive and told her that "our organizing committee consists of the following employees—Luis Maldonado, Enelida Diaz, and Jose Luis Arriaga."

Certain subsequent actions of the Company, which are detailed *infra,* were alleged by the Union to be unfair labor practices designed to thwart the organizational effort. Charges were filed by the Union on October 14. The Board, adopting the findings of the ALJ, decided that the Company had violated both sections 8(a)(1) and (3) of the Act. 29 U.S.C. §§ 158(a)(1), (3) (1984).

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The Board issued an order requiring the Company to cease and desist from engaging in the activities underlying the unfair labor practices, to reinstate the three employees discharged in violation of the Act, and to post remedial notices.

II

A

Our review of Board orders is limited. "Factual findings supported by substantial evidence in the record as a whole are conclusive." *NLRB v. Aero Enterprises, Inc.,* 787 F.2d 195, 199 (7th Cir.1986) (quoting *International Union of Operating Engineers v. NLRB,* 755 F.2d 78, 81 (7th Cir.1985)); *see* 29 U.S.C. § 160(e) (1984); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). Substantial evidence has been described as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed.2d 126 (1938). In determining whether there is substantial evidence in support of the Board's position, we must be satisfied—based on our independent review of the record—that the result is "justified by a fair estimate of the worth of the testimony of witnesses or [the Board's] informed judgment on matters within its special competence. . . ." *Universal Camera,* 340 U.S. at 489-90, 71 S.Ct. at 465.

The determinations of the Board in this case are based on the findings of the ALJ. These findings are all based on his resolution of conflicting testimonial evidence. The Company argues that the ALJ was biased in favor of the Union. This argument is founded on the fact that the ALJ credited the testimony of the Board's witnesses more often than he credited the testimony of the Company's witnesses. However, we agree with the Board's position that, "[t]here is no basis for finding that bias and partiality existed merely because an administrative law judge resolved important factual conflicts in favor of the General Counsel's witnesses." *Penn Color, Inc.,* 261 N.L.R.B. 395, 395 (1982). Further, "[t]here is nothing inherently arbitrary . . . in believing one side's witnesses and not the other's." *Conair Corp. v. NLRB,* 721 F.2d 1355, 1367-68 (D.C.Cir.1983). Moreover, it has long been the law in this circuit that a reviewing court "must accept the Board's credibility findings unless the party challenging the credibility determinations establishes 'exceptional circumstances.'" *NLRB v. Harrison Steel Castings Co.,* 728 F.2d 831, 836 n. 9 (7th Cir.1984); *see Medline Industries, Inc. v. NLRB,* 593 F.2d 788, 795 (7th Cir.1979); *Electri-Flex Co. v. NLRB,* 570 F.2d 1327, 1331-32 (7th Cir.), *cert. denied,* 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256 (1978).

The Company appears to argue that exceptional circumstances exist in this case. It seemingly contends that, since many of the General Counsel's witnesses were former Company employees whose terminations had been challenged as unfair labor practices, the testimony of these witnesses is too untrustworthy to constitute the substantial evidence necessary to support the Board's findings. *See Midwest Stock Exchange, Inc. v. NLRB,* 635 F.2d 1255, 1263 (7th Cir.1980). According to the *Midwest* court, a reviewing court may "disregard [the ALJ's] credibility determinations where we find them to be unreasonable, self-contradictory or based on inadequate reasoning." *Id.* However, that is not the situation in this case. The ALJ's task here was not an easy one. Apart from the Company's witnesses, most of the witnesses spoke only Spanish. Therefore, their testimony was taken through an interpreter, and it is clear that the language barrier complicated the hearing process. As the ALJ himself noted, "the interpreters who were called upon to render translations to and from the colloquial Mexican Spanish were not well suited to their tasks." ALJ's Decision at 3 n. 6. In this case, the ALJ very competently monitored the translation process. He tried to ensure not only that the witnesses understood the

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questions they were asked but also that the translators understood the nuances of the questions and that the witnesses' answers were accurately interpreted. The ALJ alone had the opportunity to hear the testimony and observe the witnesses' demeanor; thus, he was best suited to assess credibility and to resolve conflicts in testimony. *Portable Electric Tools, Inc. v. NLRB,* 309 F.2d 423, 426–27 (7th Cir.1962). There are minor conflicts between testimony at the hearing and the affidavits. However, these minor discrepancies are substantially overcome by the balance of the testimony and consideration of the language problem.

B

It is against this backdrop that we must evaluate the Board's findings. Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1984). In this case, the Board found that fifteen discrete acts of the Company interfered with the organizational rights of the employees. The Company does not argue that any challenged conduct, if it actually occurred, would be permissible under the Act. Rather, it argues that the ALJ improperly credited the testimony of the Union and that the ALJ's findings are not supported by substantial evidence on the record viewed as a whole. In essence, the Company argues that the alleged acts never occurred.

The ALJ credited the testimony of several employees that the Company, on three separate occasions, promised them raises if they would abandon the Union.[4] Additionally, on October 17, Luis Maldonado had two conversations with Mrs. Ramirez, the 27th Street plant supervisor, regarding the Union. In the first, Mrs. Ramirez promised that, if the employees would renounce the Union, Mrs. de la Torre would pay them for any time they had lost. In the second, Mr. Maldonado was told that, if he would get rid of the Union, the Company would give him a check in any amount.[5]

The ALJ also found the Company guilty of conducting several coercive interrogations. It was found that, at the October 13 meeting, employee Enelida Diaz was subjected to coercive interrogation by Mrs. Ramirez. Specifically, Ms. Diaz was asked which employees were in the Union and why they needed a union at all. On October 11, another employee, Guillermo Ruiz, was called into Mrs. de la Torre's office. Mrs. de la Torre asked Mr. Ruiz if he was involved in the Union. When Mr. Ruiz denied involvement, Mrs. de la Torre told him that, if he were involved in the Union, she would suspend him for three days just as she had suspended Luis Maldonado. In a separate incident, Mr. Maldonado was questioned regarding the need for a union. Other instances of coercive interrogation were found in the termination interviews of employees Chavez and Paniagua. Both were asked about their status with respect to the Union. When they admitted to membership, they were each told that they no longer had jobs. Mr. Paniagua was also threatened with a visit from the police if he failed to cooperate.[6]

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[4] The workers at both facilities, generally, were paid only minimum wage. Thus, the promise of a twenty-five cent per hour raise represented nearly a seven and a half percent salary increase. NLRB Br. at 6 n. 4.

The wage increase promises were made on three separate days. First, on October 7, the day after the first organizational meeting, Ramirez called a meeting of the night shift employees at the 27th Street plant. She told them that Refugio Martinez had authorized her to promise the employees a twenty-five cent per hour raise *if* they abandoned the Union. One week later, on October 13, a similar meeting was called by Ramirez and similar promises were made. The following day, another meeting of some thirty employees was called. At this meeting, Santiago Torres, a Company supervisor, repeated Ramirez' promise that a raise would be paid if the employees abandoned the Union. ALJ's Decision at 4–6.

[5] ALJ's Decision at 7.

[6] ALJ's Decision at 4–7.

Other acts of interference with the employees' section 7 rights were found by the ALJ. First, on October 15, two days after the Union notified the Company of the organizational effort, the employees were scheduled to be paid. The Company posted a notice which required employees to present two forms of identification in order to obtain their paychecks. Employees requesting their checks were told to present their social security cards and their green cards or "micas" which are issued by the Immigration and Naturalization Service to indicate lawful presence in the United States. Such requests had never been made before; they were never repeated after this date. Further, on several occasions, discharged employees were informed that they were fired, at least in part, because of their union activities. Several employees were informed that they could be reinstated if they would renounce the Union.

This case presents a classic case of anti-union behavior by a company. The day after the first union meeting, the violations began with a promise of wage benefits in return for rejection of the Union. As the Union's organizing drive intensified, so did the Company's retaliatory measures. Indeed, the Company's threatening and hostile posture with respect to employees in the Union carried over to the hearing before the ALJ. In fact, at two separate junctures in his decision, the ALJ noted that Mrs. de la Torre "was making audible comments from the counsel table" thereby affecting the responses of the witnesses. ALJ's Decision at 11 n. 18, 4 n. 7. The Board's findings of section 8(a)(1) violations are supported by substantial evidence.

We must also review the Board's findings with respect to the discharges of several employees. Discharges of employees for union activities are violative of both sections 8(a)(1) and (3) of the Act. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. § 158(a)(3) (1984). In section 8(a)(3) cases, motive is a critical factor in determining whether a violation has occurred. *NLRB v. Brown Food Store,* 380 U.S. 278, 286–87, 85 S.Ct. 980, 985–86, 13 L.Ed.2d 839 (1965). When more than one motive is suggested by the evidence, the Board employs the test articulated in *Wright Line,* 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), and sanctioned by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). According to these decisions, the General Counsel must make a prima facie showing by demonstrating that "the employee's conduct protected by § 7 was a substantial or motivating factor in the discharge." *Id.* at 400, 103 S.Ct. at 2473. If this showing is made, the burden shifts to the employer to prove that the discharge was not solely based on the employee's protected conduct and that the employee still would have been terminated absent the protected conduct. *Id.* In essence, the employer has an affirmative defense which he must prove by a preponderance of the evidence. *Id.* (citing *Wright Line,* 251 N.L.R.B. at 1088 n. 11).

We note again that our task is not to reweigh the evidence. We must enforce the Board's order with respect to section 8(a)(3) violations if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 464. In this case, the Board decided that the discharge of three employees—Enelida Diaz, Evarardo Chavez and Antonio Paniagua [7]—violated sections 8(a)(3) and 8(a)(1).

We will first discuss the discharges of Messrs. Chavez and Paniagua. The ALJ found that: On October 11, Chavez signed a Union authorization card. On October 14, immediately preceding the meeting called by Mrs. Ramirez to discourage union membership, Mr. Paniagua stepped outside the plant to speak with Mr. Lozano, the Union's organizer. Mr. Paniagua was observed signing a Union card by Mrs. Ramirez, who was standing only eight to ten feet away. Immediately afterward, Mrs. Ramirez assigned Chavez, Paniagua and others to carry large bags of chili from the second to the third floor of the 27th Street facility. After one trip had been completed, Mrs. Ramirez observed Chavez with an open quart bottle of beer in a paper bag. At the time, Paniagua was in an adjacent room. Mrs. Ramirez asked Chavez if he was

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[7] Paniagua is referred to in the hearing transcript as Antonio Parriagua Martinez.

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drinking. He stated that he was not, that he had found the bottle and intended to throw it away. Mrs. Ramirez confiscated the bottle and told Chavez and Paniagua to change their clothes and punch out. When they were about to leave, Mrs. Ramirez told them that they were laid off for three days. When Mr. Chavez asked for an explanation, Mrs. Ramirez told both men to report to her office.

The ALJ credited the testimony of Messrs. Paniagua and Chavez with respect to what transpired in Mrs. Ramirez' office. He found that Mrs. Ramirez telephoned Mrs. de la Torre and reported her observations. Both employees were asked to speak to Mrs. de la Torre. The ALJ credited Mr. Chavez' testimony that he told Mrs. de la Torre he had not been drinking. Mrs. de la Torre then asked him who belonged to the Union and, specifically, whether Mr. Paniagua was a member. Mr. Chavez answered that he did not know about Mr. Paniagua but admitted that he was in the Union. Mrs. de la Torre then told him that, if he remained in the Union, he was fired; if he withdrew, he could continue working.

Next, Mr. Paniagua took the phone and informed Mrs. de la Torre that he had not been drinking. The ALJ also credited Mr. Paniagua's testimony with respect to the contents of the conversation: Mrs. de la Torre then asked him who was in the Union, and Mr. Paniagua replied that he did not know. Mrs. de la Torre then advised him that, if he knew anything, he should admit it and that she had friends on the police force who she could send to his house. She then told him that, if he was in the Union, he was fired, but if he would renounce the Union, he could continue to work. When Mr. Paniagua admitted that he was in the Union, Mrs. de la Torre told him that he was fired. She then told him to wait, that she was going to call her lawyer. She called back several minutes later to say that Chavez and Paniagua were both fired. The ALJ also credited the testimony of the two men that they saw the confiscated bag containing the beer bottle in the office bearing the inscription, "Union of the wetbacks."

The Board found that these discharges were motivated by anti-union animus. We believe that there is substantial evidence on the record to support this finding. The Company argues that the employees were fired pursuant to an established "no drinking" rule. It notes that Paniagua and Chavez had been warned about their drinking on September 22. The record clearly indicates that other employees were fired for violating the rule. However, the record also indicates that other employees found drinking on the job (including Chavez and Paniagua, as evidenced by the fact that they were warned but retained in September) were not discharged. Further, Mrs. Ramirez initially told Messrs. Chavez and Paniagua that they would be suspended for three days. Only after their conversations with Mrs. de la Torre—during which each admitted to Union involvement—were they actually fired.

Moreover, the actions were proximate in time to the beginning of the organizing drive. In fact, the discharges occurred one day after Mrs. de la Torre received the Union's telegram indicating the commencement of the organizing drive. That very day, Mr. Paniagua was observed signing a union authorization card. Also on that day, Mrs. Ramirez called a meeting to promise a raise if the employees would forget about the Union. Additionally, both men testified that Mrs. de la Torre told them that they would be fired if they were pro-Union but that they could keep their jobs if they were not. It is clear that the

Board's findings comprise a prima facie showing of discriminatory motive by the Company in discharging Mr. Chavez and Mr. Paniagua. It is equally clear that the Company's proffered legitimate reason—enforcement of the "no drinking rule"—was not proven before the ALJ by a preponderance of the evidence. We find that there is substantial evidence to support the Board's conclusion that the discharges of Paniagua and Chavez violated sections 8(a)(3) and 8(a)(1).

The Board's finding that employee Enelida Diaz was discriminatorily discharged is also supported by substantial evidence. Ms. Diaz was fired on October 18. The record shows that, on that day, she went to the lunchroom for her break. When she pushed some boxes of tostadas to make room to sit down, one fell to the floor and broke. Two male employees immediately began to clear the breakage. Supervisor Ramirez criticized Ms. Diaz for not helping, and Ms. Diaz replied that her help was unnecessary because the men had already taken care of the breakage. Later that day, Ms. Diaz offered to pay for the tostadas, but Mrs. Ramirez refused the offer. Mrs. Ramirez asked Ms. Diaz to remain after her shift to speak to Mrs. de la Torre. Ms. Diaz' shift ended at 4:00 a.m., and Mrs. de la Torre usually arrived between 6:00 and 6:30 a.m. Ms. Diaz told Mrs. Ramirez that she could not wait and left at her regular time. At about 9:00 or 10:00 a.m., Mrs. Carreon telephoned Ms. Diaz and informed her that she was fired. At first, Mrs. Carreon told Ms. Diaz that she was discharged for breaking the merchandise. Later in the conversation, however, she admitted that the dismissal was because of the Union.

As in the cases of Messrs. Chavez and Paniagua, we find substantial evidence to support the Board's finding that Ms. Diaz was discharged because of her Union activities. Ms. Diaz was an active union supporter; she attended several meetings and distributed cards to her fellow employees. She was mentioned as a member of the Union's organizing committee in Mr. Lozano's October 13 telegram to Mrs. de la Torre. These factors substantially support a finding that Ms. Diaz was a discriminatee.

The ALJ had ample grounds for rejecting the Company's position that it fired Ms. Diaz for insubordination or for breaking the tostados. The Company had never before nor after fired someone for breaking tostadas. Moreover, Ms. Diaz volunteered to pay for the damage. Thus, the breakage argument is clearly pretextual. The Board's finding that Ms. Diaz' discharge violated section 8(a)(3) is supported by substantial evidence on the record.

CONCLUSION

Because we find that the Board's determinations that the Company was guilty of various violations of sections 8(a)(3) and 8(a)(1) are supported by substantial evidence on the record taken as a whole, we enforce the Board's order.

ENFORCED.

Daniel Silverman, Reg Dir. v. Local 3, International Brotherhood of Electrical Workers, AFL–CIO

634 F.Supp. 671 (S.D. N.Y.), April 3, 1986

On action for preliminary injunction under Section 10(*l*)

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KRAM, District Judge: Petitioner, the National Labor Relations Board ("Board"), has moved for a preliminary injunction pursuant to Section 10(*l*) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(*l*). For the reasons discussed below, this petition is denied and dismissed.

The Board seeks to have the respondent ("Local 3") enjoined from violations Sections 8(b)(4)(i), 8(b)(4)(ii)(B) and 8(e) of the Act. 29 U.S.C. §§ 158(b)(4)(i), 158(b)(4)(ii)(B) and 158(e). The thrust of the Board's contentions is that respondent has engaged in illegal secondary boycott activity. The underlying facts are essentially undisputed, and are summarized below. [1]

On November 13, 1985, Central Financial Systems, Inc. ("CFS"), filed a charge against Local 3 with the Board. CFS filed a second charge against Local 3 with the Board on January 6, 1986. In its charges, CFS alleged that on October 21, 1985 Local 3 informed its members who were employed by CFS not to perform any work for CFS at a job site where they would be required to work with employees of British Telecom ("BT"), a foreign corporation.

CFS installs and maintains a telephone-computer switching system for trading securities. This system is known as the ITS 8300 and was manufactured and sold to CFS by BT. CFS installed this system at the Bank of New York's Wall Street facility. On October 21, 1985, Gerry Meisel, a CFS employee and Local 3 member, performed work on the ITS 8300 at the Bank of New York's Wall Street facility. Meisel apparently performed this work along with a BT employee. The Board alleges that because of this, Local 3 caused CFS to discharge Meisel on October 22 or October 23, 1985. The Board further alleges that this was accomplished pursuant to an unlawful provision of the collective bargaining agreement between CFS and Local 3.

Although CFS filed its charge with the Board on November 13, 1985, the Board has not yet issued a complaint against Local 3. Moreover, the Board delayed in seeking relief from this Court until February 24, 1986—a delay in excess of three months. In addition, no administrative record has been put before the Court at this juncture.

Local 3, in answering the Board's petition for an injunction, contends that its members do not object to taking instructions from BT employees or to having BT employees perform work for CFS without Local 3 members present. Local 3 also contends that it is not attempting to prevent CFS from working with or doing business with BT. Rather, Local 3 simply objects to having its members work side by side with BT employees at any particular job site. Local 3 has pursued this policy at the request of the National Communications Union in London, England.

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[1] The Court held a hearing at which only one witness was presented.

The foregoing facts are not vigorously disputed. The legal conclusions to be drawn from them, however, are vigorously contested by the parties. In passing upon an application for preliminary injunctive re-

lief under Section 10(*l*) the Court must consider:

> (1) whether the temporary injunctive relief would be "just and proper" in terms of general equitable principles and (2) whether there is "reasonable cause" for the Regional Director "to believe such [unfair labor practice] charge is true and that a complaint should issue,". . .

McLeod v. Local 25, Int'l Brotherhood of Electrical Workers, 344 F.2d 634, 638 (2d Cir.1965). The issuance of an injunction is an extraordinary remedy, however. *McLeod v. General Electric Company,* 366 F.2d 847, 849 (2d Cir.1966), vacated as moot, 385 U.S. 533, 87 S.Ct. 637, 17 L.Ed.2d 588 (1967).

Under the foregoing standard, the Court concludes that the injunctive relief sought here is not "just and proper." In view of this, the Court does not reach the issue of whether the Board has reasonable cause to believe an unfair labor practice has occurred.

In determining whether the injunctive relief sought is just and proper, general equitable principles apply. *Danielson v. Local 275, Laborers Int'l Union of North America,* 479 F.2d 1033, 1036 (2d Cir.1973). *See also Danielson v. Int'l Brotherhood of Electrical Workers,* 509 F.2d 1371, 1375 (2d Cir.1975); *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U.,* 494 F.2d 1230, 1242 (2d Cir.1974).

In the instant case, the Board first learned of the conduct which it now seeks to have enjoined on November 13, 1985. Yet, the Board did not seek the extraordinary relief of a preliminary injunction until February 24, 1986: a delay in excess of three months. Such delay seriously, indeed fatally, undermines the Board's position that an injunction is necessary to protect against harm to the public.

It is a fundamental equitable principle that delay in seeking equitable relief presents grounds to deny such an application. *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 276 (2d Cir.1985); *Danielson v. Int'l Brotherhood of Electrical Workers,* 509 F.2d 1371, 1375 (2d Cir.1975). In *Citibank,* the Second Circuit explained:

> Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.

Citibank at 276. Indeed, in *Citibank* the plaintiff had delayed in seeking injunctive relief for ten weeks. *Id.* at 274. In the instant case, the Board delayed for over three months in seeking injunctive relief. The Second Circuit's comment in an earlier case applies with equal vigor to the instant case:

> We feel justified, then, in taking appellant's failure to seek expedited review as a recognition that there is no real danger of irreparable harm to the public interest in the limited period until the Board rules in the pending unfair labor practice proceeding.

Danielson v. Int'l Brotherhood of Electrical Workers, 509 F.2d 1371, 1375 (2d Cir.1975).

The Court also notes that in considering the need for injunctive relief, it is harm to the public generally, and not to CFS, which controls. The Second Circuit has explained:

> the purpose of 10(1) was *not* to prevent irreparable damage to the Employer but to protect the public interest in maintaining the free flow of commerce and to encourage collective bargaining.

Id. at 1375 (emphasis added and citation omitted.) The Board failed to produce any evidence which demonstrated potential harm to the public in the instant case.

In conclusion, a preliminary injunction would not be "just and proper" in the instant case. The Board's lengthy and unexplained delay in seeking such relief demonstrates that it is unnecessary. Accordingly, the Board's petition is denied and dismissed.

SO ORDERED.

Louis V. Baldovin, Jr., Reg Dir. v. International Longshoremen's Association Local Union No. 20, AFL-CIO

640 F.Supp. 76 (S.D. Tex.), April 15, 1986

On action to enjoin informational picketing under Section 10 (1)

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HUGH GIBSON, District Judge: Petitioner, Regional Director of the National Labor Relations Board (Board), has asked this Court to enjoin picketing activities conducted by the respondent, International Longshoremen's Association Local Union No. 20 (Union). The Court heard the evidence on the Board's petition on April 14, 1986. Having considered counsel's arguments and all evidence presented at the show-cause hearing, the Court concludes that the Board's petition must be DENIED. In accordance with F.R.Civ.P. 52, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. Sullivan Enterprises, Inc., a Texas corporation, is engaged in the business of loading and unloading vessels at the Port of Galveston.

2. Respondent Union is the official collective bargaining representative dealing with several employers providing longshore work in the vicinity.

3. On or about March 13, 1986, Sullivan assigned the work of unloading barite from the ocean-going vessel ARGUS to some twenty employees at Sullivan's West Port Galveston facilities. These employees performed like work from the vessel RADNICK when this vessel arrived on or about April 7, 1986.

4. These twenty employees are not Union members. At no time has the Board certified the Union as the official collective bargaining representative for Sullivan's employees. Nor has the Board directed Sullivan to bargain with the Union.

5. Sullivan pays its employees lower wages than area employers bound by Union collective bargaining contracts.

6. On or about February 3, 1986, the Union posted a picket sign near the entrance of Sullivan's West Port Galveston facility, 4800 Old Port Industrial Boulevard, Galveston, Texas. The picket sign contained the following message:

> INFORMATIONAL PICKET
>
> NEWPORT MARINE TERMINAL AND/OR SULLIVAN ENTERPRISES INTENDS TO PAY SUBSTANDARD WAGES AND BENEFITS TO EMPLOYEES ENGAGED IN LONGSHORE WORK AT THIS FACILITY. WE DO NOT HAVE A CURRENT LABOR DISPUTE WITH ANY OTHER EMPLOYER AT THIS FACILITY.
>
> LOCAL 20 & 1665 INTERNATIONAL LONGSHOREMEN'S ASS'N. AFL-CIO

7. On March 24, 1986, Sullivan filed a charge with the Board, alleging that the Union had committed unfair labor practices. Sullivan charged that the Union's purpose was to pressure Sullivan into assigning its work to members of the Union.

8. On or about March 28, 1986, the Union suspended the picketing to clarify its purpose. The Union then issued a press release, assuring that it did not seek a contract with Sullivan. According to the press release, the purpose of the picketing was to protest Sullivan's intent to pay a lower wage than that prevailing on the Galveston waterfront.

9. On or about March 31, 1986, the picket sign was changed as follows:

> INFORMATIONAL PICKET
>
> SULLIVAN BROTHERS AND/OR NEWPORT MARINE IS PAYING AREA SUBSTANDARD WAGES AND BENEFITS TO LONGSHOREMEN. WE DO NOT HAVE A LABOR DISPUTE WITH ANY OTHER EMPLOYER AT THIS FACILITY *and We Do Not Seek the Jobs or a Contract with the Sullivan Brothers.* WE ASK YOUR SUPPORT. IT COULD HAPPEN TO YOU.
>
> ILA LOCAL # 20

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(Emphasis added.)

10. The picketing was conducted peacefully at all times in accordance with a state court injunction prohibiting violent and disruptive conduct.

11. On April 8, 1986, the NLRB asked this Court to enter a preliminary injunction against the Union pending the Board's final adjudication of the controversy.

Conclusions of Law

1. This Court has subject matter jurisdiction and is empowered to grant injunctive relief pursuant to 29 U.S.C. § 160(*l*).

2. The Board relies on Section 8(b)(4)(i)(ii) of the National Labor Relations Act, 29 U.S.C. § 158. This section prohibits a labor organization from threatening a business affecting commerce where the object thereof is to force or require the employer to assign a particular work to Union members rather than to employees of any other class.

3. The Union, on the other hand, relies on Section 8(b)(7) of the National Labor Relations Act. This section prohibits a labor organization from picketing any employer, where an object thereof is to force or require the employer to recognize or bargain with a labor organization as the representative of his employees.

4. The two principal issues before a district court in a proceeding for injunctive relief under 29 U.S.C. § 160 are 1) whether there exists reasonable cause to believe that unfair labor practices have been committed; and 2) whether the requested relief is just and proper. *Kaynard v. Palby Lingerie, Inc.*, 1980, 625 F.2d 1047 (2d Cir.1980). *See also Lewis v. New Orleans Clerks & Checkers, ILA*, 724 F.2d 1109, 1114–1115 (5th Cir.1984). Thus, in granting an injunction against an alleged unfair labor practice, the district court must first find that the Board had reasonable cause to believe the charges filed were true. *Compton v. National Maritime Union of America, AFL–CIO*, 533 F.2d 1270 (1st Cir.1976). A "reasonable cause" means a reasonable basis upon which the Board could sustain the employer's charge, or a finding that the Board's theory is not insubstantial or frivolous. Thus, this Court must inquire into the substantiality of the Board's position. *Lewis, supra*, at 1115.

5. The Court finds insufficient evidence in the record to justify the Board's belief that the Union has violated Section 8(b)(4)(i)(ii). In judging "reasonable cause", the Court will discern the Union's motive as manifested by the nature of its conduct and activities. The Board has failed to persuade this Court that such conduct and activities were tainted by impropriety.

It is evident that the Union wished to advise the public of Sullivan's wage scales compared to the prevailing local standard. This legitimate purpose was made clear in the Union's various public communications. It is also evident that at the time the Union became engaged in informational picketing, it did not wish to enter a collective bargaining agreement with Sullivan. Thus, the vice guarded by Section 8(b)(7) has not been committed. To avoid the adverse publicity, Sullivan may choose to revise its pay scales without necessarily having to reassign the work. Hence, it is not reasonable to conclude that a possible statutory violation exists any time a labor union publicizes an employer's pay policy in light of union standards.

6. The record did not sufficiently raise a reasonable belief as to the Union's improper motive. Accordingly, the Court concludes that injunctive relief is improper.

7. It is, therefore, ORDERED, ADJUDGED and DECREED that petitioner's application for a preliminary injunction be, and is hereby, DENIED.

8. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

Teamsters Local Union No. 175, affiliated with the International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers of America v. NLRB

788 F.2d 27 (D.C. Cir.), April 15, 1986

On petition to review Board Order

Before WRIGHT and EDWARDS, Circuit Judges and DAVIS,[*] Circuit Judge, United States Court of Appeals for the Federal Circuit

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS

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HARRY T. EDWARDS, Circuit Judge: The instant case involves an unfair labor practice charge filed by Teamsters Local Union No. 175 ("Local 175" or the "Union") with the National Labor Relations Board ("NLRB" or the "Board"), alleging that Bell Transit Company ("Bell Transit" or the "Company") violated section 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act") when Company officials unilaterally reduced the wage rate of bargaining unit employees prior to reaching a new agreement or a bargaining impasse with the Union. An Administrative Law Judge ("ALJ") found that representatives of Bell Transit thought an agreement with the Union was imminent at the time when wages were reduced. Therefore, the ALJ concluded that bargaining had not reached an impasse and that Bell Transit's wage reduction had been an unfair labor practice in violation of the Act. Although it did not overturn any of the ALJ's findings of fact, the Board reached an extraordinary and concededly unprecedented conclusion that the negotiating parties were at an impasse while they simultaneously had reached a tentative contract agreement. Accordingly, the Board dismissed the Union's complaint.

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[*] Sitting by designation pursuant to 28 U.S.C. § 291(a).

We find the Board's decision to be completely unsupportable. It is undisputed that the employer's negotiator believed that he had reached a tentative agreement with the Union. Furthermore, the findings do not support a conclusion that the Union thought bargaining was deadlocked. Moreover, neither bargaining party took any action indicating that further bargaining would have been fruitless. Thus, on this record, there was no legal justification for the employer's unilateral action in reducing wages. The Board's conclusion that an impasse and tentative agreement can exist simultaneously is both inconsistent with prevailing law and, additionally, incomprehensible. We therefore reverse and remand to the Board.

I. BACKGROUND

Bell Transit hires and supervises truck drivers for its sole customer, Union Carbide. From 1956 to 1982 the Company employed members of Local 175 for work at Union Carbide's Institute, West Virginia plant under National Master Freight Agreements negotiated between a multi-employer association and affiliated local unions. When Bell came under pressure from Union Carbide to lower labor costs, it withdrew from the association. Local 175 was then authorized by the Teamsters to negotiate a separate agreement with Bell, subject to the approval of the Eastern Conference Rider and Contract Review Committee ("Eastern Conference").

Bell and the Union first met to negotiate on March 5, 1982, but Bell did not offer a contract proposal at that meeting. With the National Motor Freight Agreement about to expire on March 31, 1982, Bell Transit sent a letter to Local 175 on March 26, agreeing to continue to pay the wage rate of $12.68 per hour that had been in effect under the expiring agreement. In exchange, it expected the drivers to continue working during negotiations on a new contract. Bell also agreed to increase its fringe benefit contributions on April 1 as scheduled under the national agreement, but did not offer to implement scheduled cost-of-living increases that would raise wages to $13.15 per hour. The Company **29** stated that it would pay the wage rates agreed on in the upcoming negotiations retroactively to April 1.

The negotiating parties met again April 5, 6 and 7. On April 7, the Company made its first wage offer at $9.71 per hour with an annual reopener. The Union requested the $13.15 per hour it would have received under the national agreement. On May 4, the parties returned to the bargaining table and Bell Transit made a so-called "final offer" of two alternative wage proposals: $10.50 per hour with an annual reopener or $11.00 per hour without a reopener. The Union maintained its original demand. At the next negotiating session on May 7, Bell again raised its offer. It proposed a wage rate of $11.25 per hour with a reopener in the third year.

After bargaining with Bell on May 7, the Union held a meeting of the drivers and took a straw pool to assess sentiment on the Company's latest proposal. The vote was split evenly. On May 11, one of the Union negotiators telephoned Max Rein, Bell's president and negotiator, and told him of the split vote. The Union agent informed Rein that the vote meant the drivers had *not* rejected the proposal and reminded him that the contract would have to be approved by the Eastern Conference. When asked at the hearing what his response had been to this news, Mr. Rein testified, "Well, I felt as long as the men didn't reject it, we had a good chance." Joint Appendix ("J.A.") 301.

On May 14, Rein notified the Union that Bell would implement its May 7 contract proposal, reducing wages to $11.25 per hour. On May 16, without agreement from the Union, the company unilaterally reduced the wage rate to $11.25 per hour. Local 175's negotiators submitted Bell's wage proposal to the Eastern Conference on June 11 with a recommendation that they reject it. The parties continued to negotiate a variety of other issues on May 17 and July 9. On July 25, the Union and Company representatives met with the employees and Bell offered to make several changes in work rules if the Union would sign the proposal Bell had implemented.

By letter of August 10, the Eastern Conference rejected Bell's contract proposal. The parties continued to negotiate on August 20 and agreed to seek help from a mediator. On September 9, they met with a mediator and Bell raised its offer to $11.75 per hour. The employees rejected this proposal and voted to strike.

On November 8, 1982, Local 175 filed charges with the Board alleging that Bell Transit had committed an unfair labor practice by unilaterally lowering the wage rate on May 16. The NLRB General Counsel investigated the charge and filed a complaint against Bell. An ALJ held a two-day hearing and issued an opinion concluding that Bell had violated the NLRA as charged. He determined that the Union had not agreed to, nor acquiesced in, the wage increase.[1] He also found no bargaining impasse that would justify Bell's unilateral action. Specifically, the ALJ concluded that "[n]othing about the prior negotiations suggested they were exhaustive" and that Rein had believed there was "a good chance" the Eastern Conference would accept the Company's offer.[2] Thus, he stated that although subsequent events revealed that the Union's position on wages was firmer than Rein had thought, there had been no impasse on May 16 when the Company unilaterally reduced wages.

The Board, over a dissent,[3] disagreed with the ALJ and dismissed the Union's complaint. In its view, the parties had bargained in good faith to an impasse and,

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therefore, Bell Transit's unilateral wage reduction was permissible. The Board did not disagree with the ALJ's finding that Rein believed he had reached an agreement subject to Eastern Conference approval. Instead, it concluded that the impasse in negotiations had existed *concurrently* with a tentative agreement between Bell Transit and the Union.

II. Discussion

Under section 8(a)(5) of the NLRA, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . " 29 U.S.C. § 158(a)(5) (1982). It is well settled that an employer is required to maintain the status quo established by an expired collective bargaining agreement until the parties reach a new agreement or bargain to an impasse. An employer violates the duty to bargain if, prior to either a final agreement or an impasse, it institutes a unilateral change in wages, hours or working conditions over which bargaining is required.[4]

Impasse is defined as the deadlock reached by bargaining parties "after good-faith negotiations have exhausted the prospects of concluding an agreement."[5] This court has described the situation as one in which "there was no realistic prospect that continuation of discussion at that time would have been fruitful."[6] The Board's determination of impasse involves judgments on factual issues[7] that are peculiarly within the Board's expertise and a reviewing court may not disturb the Board's evaluation unless the finding is irrational or unsupported by substantial evidence.[8] In this case the Board's decision is entitled to no deference because it is based on an irrational premise without even the slightest support in the evidence.

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[1] The Board did not doubt this conclusion and it is not an issue before us on appeal.

[2] *Bell Transit Co.*, 271 N.L.R.B. 1272, 1276 (1984).

[3] The dissenting Board member stressed that the existence of an impasse must be determined from the stance of the negotiations at the time unilateral action was taken, not from subsequent events. He concluded that the majority's analysis was at odds with this principle and would have found that there had been no impasse on May 16. 271 N.L.R.B. at 1274.

[4] *See NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C.Cir.1982).

[5] *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C.Cir.1968).

[6] *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d at 628.

[7] The Board typically looks to a variety of factors to determine if the parties have reached an impasse in negotiations:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 N.L.R.B. at 478.

[8] *See District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1164 (D.C.Cir.1978); *Dallas General Drivers, Local No. 745 v. NLRB*, 355 F.2d 842, 844–45 (D.C.Cir.1966).

There is no evidence to suggest that either the Union or Rein, Bell's president and negotiator, viewed the negotiations as deadlocked. The ALJ found, and the Board accepted, that Rein thought he had a tentative understanding with the Union, subject only to ratification by the Eastern Conference. This finding is supported by Rein's own testimony. On the Union's side, there were no findings that Local 175 regarded further negotiations as hopeless. Indeed, the Union's actions support the opposite conclusion. Just prior to Bell's reduction in wages on May 16, the Union negotiators had taken Bell's offer to the employees, who had split evenly on the proposal. The negotiators had reported the split vote to Rein and explained that this meant the drivers had *not* rejected the proposal; they had indicated they would submit it to the Eastern Conference for approval; and they had not voiced any opposition to ratification of the proposed agreement. This undisputed evidence supports a conclusion that in the contemporaneous view of *both* bargaining parties, negotiations were not at a standstill.[9]

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Moreover, the objective evidence is clear that when Bell lowered wages, neither side had taken any action to indicate that further bargaining would be fruitless. In support of its finding of impasse, the Board stressed that the parties were still far apart on wages, which it regarded as the key bargaining issue. Wages were undoubtedly an important issue, and it is true that deadlock on an issue central to negotiations may make it impossible to negotiate productively on other issues.[10] Yet, the distance between the bargaining positions on wages taken by Bell and Local 175 did not, by itself, indicate a deadlock. The employer never gave any signal that it had reached the point where, without concessions on pay from the Union, it would have to act unilaterally. The bargaining progressed at a leisurely pace with no expression of any urgency on the wage issue, and the employer had even agreed at the outset to keep the old rates in effect until a new agreement was concluded. In fact, Bell did not even present a wage proposal at the early negotiating sessions. Wage offers were discussed at only three meetings with the Union and on each occasion Bell *raised* its offer. Such continuous negotiating progress is strong evidence against an impasse.[11] The Company called its May 7 offer a "final" proposal, but this is a common bargaining tactic and Bell had applied the same label to its earlier offer on May 4. Under similar circumstances, the Board has refused to regard this designation as dispositive.[12]

Because the Board did not dispute the finding that Rein understood the parties to have reached a tentative agreement, the only way in which it could find impasse was to conclude that an impasse can exist *simultaneously* with a tentative agreement.[13] This conclusion of law is counterintuitive, incomprehensible and, as both counsel conceded, completely without support in precedent.

The Board attempted to justify its conclusion by means of a hypothetical. It stated that an impasse exists simultaneously with a tentative agreement "when a union's negotiators accept the employer's final offer subject to ratification by the union's members. If the tentative agreement is accepted, then the impasse breaks. If the tentative agreement is rejected, then the impasse endures."[14] This generalized hypothetical is not only a non sequitor, but it draws a conclusion simply not applicable in this case. It is perhaps arguable that an impasse and tentative agreement could coexist under certain circumstances. For example, an employer might make it plain that if the union wants an agreement it has no choice but to accept a particular offer, while the union negotiators simultaneously articulate their disapproval of the proposal but nonetheless submit it for approval.

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[9] The Board has on occasion concluded that negotiations have *not* reached an impasse in spite of the bargaining parties' contemporaneous assertions that they were deadlocked. *See, e.g., Louisville Plate Glass Co.*, 243 N.L.R.B. 1175, 1181 (1979), *enf'd*, 657 F.2d 106 (6th Cir.1981). However, none of the parties have cited any cases that stand for the converse proposition—that negotiations *were* at an impasse in spite of both parties' belief that they *were not*.

[10] *See Financial Institution Employees of America, Local No. 1182 v. NLRB*, 738 F.2d 1038, 1042 (9th Cir.1984); *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d at 627 n. 13.

[11] *See, e.g., Harding Glass Indus.*, 248 N.L.R.B. 902, 906 (1980) ("[T]he fact that each session produced forward movement tends to negate a conclusion of deadlock."), *enf'd*, 672 F.2d 1330 (10th Cir.1982).

In its brief, the NLRB makes much of the fact that the Union did not change its demand for $13.15 per hour during the negotiations. This does not, however, dictate that bargaining was deadlocked. *See Local 13, Detroit Newspaper Printing and Graphics Communications Union v. NLRB*, 598 F.2d 267, 273 (D.C.Cir.1979) ("Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset."); *Harding Glass Indus.*, 248 N.L.R.B. at 906 ("That the parties may have expressed intrasigent [sic] attitudes is not controlling. In negotiations those may be no more than tactical declarations.").

[12] *See Louisville Plate Glass Co.*, 243 N.L.R.B. at 1181 & n. 23.

[13] At oral argument, counsel for intervenor Bell Transit argued that this statement by the Board was merely dicta. We disagree. Given the Board's acceptance of the finding of tentative agreement, the conclusion that impasse could coexist with a tentative agreement was *crucial* to the NLRB's holding and could not be dicta.

[14] *Bell Transit Co.*, 271 N.L.R.B. at 1273 n. 9.

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But that is not this case. Bell did not create a situation in which the Union had no choice other than to accept its May 7 offer. In addition, at the time of Bell's wage reduction, all indications were that, rather than disapproving the proposal, the Local 175 membership had failed to reject it.

Apart from finding no support in the law, the Board's view that tentative-agreement-subject-to-ratification-equals-impasse would produce absurd situations in labor negotiations, wholly at odds with the notion of *good faith* bargaining under the NLRA. It is very commonplace in the United States for bargaining parties to reach tentative agreements subject to ratification. Often, this tradition facilitates bargaining because it ensures some meaningful employee participation in the bargaining process; it allows parties to settle and "save face" even in situations where they have previously maintained rigid bargaining positions; and it also gives both sides an opportunity to double-check against any flaws in their "final offers." However, if such a tentative agreement is seen as reflecting an impasse, thus allowing the employer preemptively to institute unilateral changes, the process leading to such an arrangement and the arrangement itself become pointless. Obviously this makes no sense when it is recognized that the device of a "tentative agreement" is usually intended to be *mutually beneficial* to the parties in helping to resolve difficult bargaining disputes.

It is also clear that failure to ratify a contract proposal cannot automatically result in impasse when the parties' bargaining history does not even hint that a failure to ratify will cause a breakdown in negotiations. Indeed, this very case is testimony to the artificiality of finding impasse during submission of a tentative agreement for approval. The Eastern Conference's rejection of the proposal did *not* result in a breakdown of negotiations; the parties continued to bargain on the issue of wages and eventually entered into mediation in a further effort to iron out their differences.

Finally, the intervenor, Bell Transit, argues that the Board's interpretation is necessary for policy reasons when an employer proposes a wage reduction. Otherwise, it argues, a union would be inclined to delay ratification procedures to forestall a new agreement or an impasse that would result in lower pay. Again, that is not this case. There are no allegations that the Union delayed unduly in submitting the proposal to the Eastern Conference or otherwise failed to engage in good-faith bargaining. The Company made its unilateral change in wages only one week after it received notification that the employees had not rejected it. Bell was clearly *not* responding to foot-dragging on the part of the Union. Moreover, the parties had already agreed that the new wage would be retroactive, making delay on the Union's part completely pointless.

III. Conclusion

In sum, we perceive no basis for the Board's decision. It rests on an irrational hypothetical regarding impasse, which has no relation to the facts of this case and therefore lacks support in substantial evidence. Furthermore, neither the Board nor the parties have been able to cite any legal authority to support the Board's strained new view on the meaning of a bargaining impasse. For the reasons heretofore indicated, we reverse and remand to the NLRB for a determination of back pay and any other appropriate remedies for the employer's unlawful refusal to bargain.

So ordered.

Gerald Kobell, Reg. Dir. v. United Food and Commercial Workers International Union, Local 23, AFL-CIO-CLC

788 F.2d 189 (3d Cir.), April 16, 1986

On appeal from district court's order granting injunctive relief

Before GARTH and STAPLETON, Circuit Judges, and FULLAM, District Judge *

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* Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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STAPLETON, Circuit Judge: This is an appeal from a district court's order granting a preliminary injunction requested by a Regional Director of the National Labor Relations Board (NLRB) against the appellant union's recognition picketing. We affirm.

I

Appellant is a labor organization, seeking to represent the employees of Vic's Markets, Inc. ("Vic's"). Vic's sells grocery products at its retail store in Mars, Pennsylvania. Appellant is not the certified or recognized representative of the Vic's employees at its Mars store.

In May of 1984, appellant began a campaign to organize the employees of Charley Brothers Company, Inc., the previous operator of Vic's Mars store. Soon after embarking on this campaign, appellant learned that Charley Brothers had extended recognition to and entered into a collective bargaining agreement with the United Steelworkers of America and its Local 14744 (the "Steelworkers").

In August of 1984, appellant filed unfair labor practice charges against Charley Brothers, alleging violations of National Labor Relations Act (NLRA) Sections 8(a)(1)-(3), 29 U.S.C. §§ 158(a)(1)-(3) (1982).[1]

On September 14, 1984, Gerald Kobell, a Regional Director of the NLRB, filed unfair labor practice charges against Charley Brothers. On September 24, 1984, Charley Brothers sold its Mars store to Vic's. Prior to this sale, Vic's was put on notice of the pending unfair labor practice charges. Following the sale, Vic's extended recognition to the Steelworkers. In October of 1984, appellant filed unfair labor practice charges with the NLRB alleging that Vic's had recognized the Steelworkers as the exclusive bargaining agent of Vic's employees in violation of NLRA Sections 8(a)(1)-(3). On November 14, 1984, the Regional

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Director of the NLRB issued an unfair labor practice complaint against Vic's.

The complaint alleged that Vic's had continued the unfair labor practices of Charley Brothers. Specifically, the Regional Director alleged that Vic's was on notice of and failed to remedy the following unfair labor practices of Charley Brothers: the interrogation of employees about their activities on behalf of appellant; the destruction of authorization cards given to employees by appellant; the participation in the solicitation of signatures on the Steelworkers' authorization cards; the denial of appellant's access to the workplace for organization purposes while permitting the Steelworkers access; the making of statements that collective representation was possible only through the Steelworkers and that Charley Brothers had already selected a Steelworkers steward; the fraudulent utilization of a meeting attendance list as a collective bargaining agreement employee ratification list; the recognition of the Steelworkers as the exclusive employee collective bargaining agent when the Steelworkers did not represent an uncoerced majority of the employees; and the deduction of Steelworkers' dues from employee pay, regardless of whether the employees had authorized such a deduction. The complaint further alleged that Vic's recognized the Steelworkers, adopted the Steelworkers' collective bargaining agreement, and deducted Steelworkers' dues from employees' pay.

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[1] Section 158. *Unfair labor practices*

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

A hearing was scheduled for December 4, 1984. However, at the end of November, 1984, a Settlement Agreement was announced under which Vic's agreed to post a notice for sixty days informing employees that it would no longer continue in Charley Brothers' unfair labor practices, that it would no longer give effect to the collective bargaining agreement with the Steelworkers, that it would not recognize the Steelworkers as exclusive collective bargaining representatives unless and until lawfully elected by the employees and certified by the NLRB, and that it would repay all previously deducted Steelworkers dues. Following Vic's full compliance with the Settlement Agreement, the NLRB Regional Director, on December 26, 1984, withdrew his complaint, over appellant's objection. Appellant appealed this decision to the NLRB General Counsel, who approved it on January 22, 1985.

From September, 1984, until the preliminary injunction was issued, appellant picketed Vic's Mars store. On April 4, 1985, Vic's filed an unfair labor practice charge with the NLRB claiming that appellant was picketing in violation of NLRA Section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (1982). [2]

The NLRB Regional Director investigated the charge and filed a complaint with the NLRB. He then petitioned the district court for the Western District of Pennsylvania for injunctive relief under NLRA Section 10(*l*), 29 U.S.C. § 160(*l*) (1982). [3] After an evidentiary hearing, the district court found that the NLRB had proffered sufficient evidence to indicate that the Regional Director had reasonable grounds to believe that appellant was picketing Vic's in violation of NLRA Section 8(b)(7)(C). The court further found that injunctive relief was just, proper, and necessary to prevent further picketing. This timely appeal followed.

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II

The district court found reasonable cause to believe that, since September 24, 1984, appellant had picketed the Mars store in order to force Vic's to recognize and bargain with it as the representative of the store's employees. Since the court also found that appellant was not currently certified or recognized as the bargaining representative of those employees and had not petitioned for a representation election, it further concluded that there was reasonable cause to believe the appellant's picketing violated Section 8(b)(7)(C) of the NLRA.

Appellant does not challenge these findings. Rather it argues that injunctive relief should have been denied because the Regional Director invoked

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[2] Section 158(b)(7)(C) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * * * *

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*. That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof. *Provided further*. That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employer by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

[3] Section 160(*l*) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: . . . *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony.

NLRA Section 10(*l*) in violation of the second "proviso" of that section which reads as follows:

> *Provided further.* That . . . [a Regional Director] shall not apply for a restraining order under [this section based on NLRA Section 8(b)(7)] . . . if a charge against the employer under [NLRA Section 8(a)(2)] . . . has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

In support of this contention, appellant argued before the district court that the settlement of its Section 8(a)(2) charges against Vic's was legally invalid and the Regional Director's withdrawal of his complaint a legal nullity because the NLRB had failed to provide appellant with an evidentiary hearing on its objections to the settlement as required by the Administrative Procedure Act and *Leeds & Northrup Co. v. NLRB,* 357 F.2d 527 (3d Cir.1966). For these reasons, appellant insisted that its Section 8(a)(2) charge had not been remedied and that the proceedings resulting from that charge were still pending before the NLRB.

The Regional Director responded that all of appellant's Section 8(a)(2) charges had been addressed and fully remedied by the settlement and that no presettlement hearing was legally required, and that, in any event, relief was available under Section 10(*l*) when a previously pending Section 8(a)(2) charge had been resolved in this manner, whether or not procedural errors

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had occurred in the proceedings before the Board.

In response to appellant's argument based on the second proviso of Section 10(*l*), the district court found, as a matter of fact, (1) that the Section 8(a)(2) "charge . . . [had] been fully remedied by the terms of a Settlement Agreement entered into by Vic's Markets", and (2) that "no charge [was] . . . currently pending before the Board under Section 8(a)(2). . . ." It then concluded, as a matter of law, that Section 10(*l*) was applicable and authorized injunctive relief on the facts before it. Since the district court did not address *Leeds & Northrup Co. v. NLRB* or the issue of whether a presettlement hearing was required, we read the district court's conclusions of law to accept the view that Section 10(*l*) relief is available on the facts of this case whether or not there was procedural error before the Board.

III

We cannot say that the factual findings of the district court are clearly erroneous. Indeed, appellant does not maintain that there is any evidentiary deficiency in the record before the district court.[4] Rather, it contends that, as a matter of law, (1) a settlement arrived at without a presettlement hearing cannot "fully remedy" a Section 8(a)(2) charge, and (2) the Section 8(a)(2) complaint remained pending before the Board despite the Regional Director's purported withdrawal.

Because the district court's factual findings are not clearly erroneous, we accept as historical fact that, as of the time of the application for an injunction, the employer's Section 8(a)(2) violation had been fully remedied and no further proceedings were expected before the NLRB on the Section 8(a)(2) complaint absent a successful appeal and a return of the case for an evidentiary hearing on the settlement. Given these facts, we conclude that the district court's interpretation of Section 10(*l*)'s second proviso was not legally erroneous. In reaching this conclusion, we, like the district court, find it unnecessary to address the *Leeds* issue.

We believe the appellant's formalistic argument ignores the interrelationship among NLRA Sections 8(a)(2), 8(b)(7), and 10(*l*) and the Congressional intention behind their enactment. Section 8(b)(7)(C) prohibits organizational or recognitional picketing by an uncertified union unless an election petition is filed under NLRA Section 9(c) within a reasonable period of time, not to exceed thirty days. If no such petition is filed, continuation of the picketing beyond the reasonable period becomes an unfair labor practice. *See, e.g., NLRB v. Suffolk County District Council,* 387 F.2d 170, 173 (2d Cir.1967), citing with approval *International Hod Carriers, Local 840 (Blinne Construction Co.),* 135 NLRB 1153, 1167 (1962); *Dayton Typographical Union v. NLRB,* 326 F.2d 634, 636 (D.C.Cir.1963); Meltzer, *Organizational Picketing and the NLRB,* 30 U.CHI.L.REV. 78, 79–83 (1962). Section 8(b)(7)(C) thereby removes the threat to employees' free choice by encouraging prompt resort to the Board's election machinery, rather than the economic pressure of picketing, as the method for resolving questions of representation.

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[4] This is not to say that appellant is content with the Settlement Agreement. It objects to the settlement (1) because it was informal and thus not enforceable on pain of contempt, (2) because it contained no admission by Vic's that it had violated the NLRA, and (3) because the notice required to be posted under the settlement contained ambiguous and confusing language. Appellant's Brief p. 26. However, appellant expressly disavows any argument that the court's findings of fact are clearly erroneous. Appellant's Reply Brief p. 18.

Congress's concern with the effects of proscribed recognitional and organizational picketing is further reflected by its amendment to Section 10(*l*) to include this unlawful conduct within the "mandatory" injunction provisions of Section 10(*l*). When taking this action, Congress recognized only one, limited situation in which it would be inappropriate to preliminary enjoin under Section 10(*l*) picketing allegedly violative of NLRA Section 8(b)(7)—namely, where **195** the picketed employer is unlawfully recognizing or otherwise giving illegal assistance to another labor organization.

The legislative history of the second proviso of Section 10(*l*) makes it clear that this narrow exception to the otherwise mandatory Section 10(*l*) injunction was intended to apply in situations where the picketed employer has already sought to entrench a "sweetheart" union in violation of the employees' right to free choice. The legislative history is replete with discussions of the need to safeguard picketing unions against any possible injustice that might flow from a rule that would preclude their picketing while the employer has unlawfully recognized another union. *See* comments of Sen. Prouty, 105 CONG.REC. S5961–62, reprinted in II LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (II "LEG. HIST. LMRDA") at 1184–85 (1959); comments of Sen. Morse, 105 CONG.REC. S5966, II LEG. HIST. LMRDA at 1189; comments of Mr. Previant, Special Counsel for the International Brotherhood of Teamsters, 105 CONG.REC. H9693-9694, II LEG. HIST. LMRDA at 1493–94; comments of Sen. Barry Goldwater, 105 CONG.REC. A8357–58, II LEG. HIST. LMRDA at 1828–29. Thus, Congress was concerned that absent a restriction to Section 10(*l*), a "sweetheart" union would enjoy a superior position over any competing union in obtaining the employees' support. Accordingly, the proviso was intended to prevent an unlawfully assisted union from enjoying the benefits and advantages of its illegal assistance while, at the same time, an unassisted, competing union is being enjoined from organizational or recognitional picketing.

As earlier noted, the second proviso of Section 10(*l*) bars a Regional Director from seeking to enjoin union picketing if a Section 8(a)(2) charge has been filed against the employer and if he "has reasonable cause to believe that such charge is true and that a complaint should issue." Appellant acknowledges, as it must, that the existence of these three prerequisites of the proviso at one point in time does not *permanently* bar Section 10(*l*) relief. The dispute in this case is when the Regional Director's disability terminates. Given the rationale for this narrow exception to Section 10(*l*) and the wording of the text, we believe the disability should terminate when the Regional Attorney no longer has reason to believe that the Section 8(a)(2) charge is "true" and is no longer pursuing the complaint before the Board. When, as here, the Section 8(a)(2) violations have been fully remedied and there are no ongoing proceedings before the Board, it seems highly unlikely that Congress intended union conduct in violation of Section 8(b)(7) to be immune from judicial intervention.

Shortly before the Regional Director instituted his Section 10(*l*) proceeding in the district court, appellant filed with this Court a petition to review the approval of the informal settlement and the purported withdrawal of the complaint. In that proceeding, we have today reaffirmed that, under *Leeds*, appellant was entitled to a presettlement evidentiary hearing and the Regional Attorney's withdrawal of the complaint was not authorized by the Act. *United Food & Commercial Workers Union, Local No. 23 v. N.L.R.B.*, 788 F.2d 178 (3d Cir.1986). This conclusion does not, however, control the disposition of the issue posed in this case. We believe Section 10(*l*) must be given a practical construction which reflects its purpose and that applications under that section must be disposed of based upon the facts as they appear at the time the district court is required to make a ruling. From this perspective, the possibility that the Section 8(a)(2) proceeding against Vic's, because of *Leeds*, might be returned to the Board at some time in the future, did not require the district court to countenance union conduct violative of Section 8(b)(7) when the offending conduct of the employer was found to have ceased and been fully remedied. [5]

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IV

The judgment of the district court will be affirmed.

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[5] We hold only that the circumstances as of the time of the Regional Attorney's application under Section 10(*l*) warranted injunctive relief under that Section. Once the Section 8(a)(2) complaint is returned to the Board, this holding neither precludes an application for modification or vacation of the injunction nor dictates the appropriate disposition thereof.

United Food and Commercial Workers Union, Local No. 23, AFL-CIO-CLC v. NLRB

788 F.2d 178 (3d Cir.), April 16, 1986

On petition to enforce Board Order

Before GARTH and STAPLETON, Circuit Judges, and FULLAM, District Judge *

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GARTH, Circuit Judge: In this case, this court is faced with the question of whether a charging party alleging unfair labor practices is entitled to an evidentiary hearing on its objections to proposed informal settlement agreements entered into by representatives of the National Labor Relations Board (Board) and the charged parties after the Board has issued a formal complaint. In *Leeds & Northrup Co. v. NLRB,* 357 F.2d 527 (3d Cir.1966), this court held that "once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal." 357 F.2d at 533. Local 23 has petitioned to review the General Counsel's refusal to entertain its objections to an informal settlement at an evidentiary hearing. We grant the petition and remand for an evidentiary hearing pursuant to *Leeds & Northrup.*

I.

On August 9, 1984, the United Food and Commercial Workers Union, Local 23, AFL-CIO-CLC (Local 23), filed unfair labor practice charges with the Board against Charley Brothers, Co., Inc., (Charley Bros.) owner and operator of Mars Shop 'N Save, a grocery store located in the Cranberry Mall in Mars, Pennsylvania. In its complaint, Local 23 alleged that Charley Bros. had violated §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), [1] by executing a collective-bargaining agreement containing union security and dues check-off provisions with the United Steelworkers of America, Local 14744, (Steelworkers) at a time when the Steelworkers did not represent an uncoerced majority of the employees. [2] In a separate charge filed that same

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day, Local 23 alleged that the Steelworkers violated §§ 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. §§ 158(b)(1)(A) and (2), [3] by executing the collective-bargaining agreement and accepting recognition by Charley Brothers. On September 14, 1984, Gerald Kobell, the Regional Director of the NLRB, consolidated the two complaints and issued formal unfair labor practice charges against Charley Brothers and the Steelworkers.

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* Honorable John P. Fullam, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title: . . . In relevant part, section 8(a)(3) of the NLRA,

29 U.S.C. § 158(a)(3), provides:

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

[2] On August 31, 1984, Local 23 amended its complaint against Charley Brothers to add charges that Charley Brothers unlawfully contributed financial and other support to the Steelworkers in violation of section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2).

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), in relevant part, provides that:

(a) It shall be an unfair labor practice for an employer—

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

[3] Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

Section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2), provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section. . . .

Specifically, Charley Brothers was charged with:

(1) interrogating employees concerning their activity on behalf of Local 23;

(2) destroying authorization cards given to employees by Local 23 in the presence of employees;

(3) granting recognition to the Steelworkers as the exclusive collective-bargaining representative of its bargaining unit employees at a time when the Steelworkers did not represent an uncoerced majority of the employees;

(4) participating in the solicitation of employee signatures on Steelworkers' authorization cards;

(5) denying Local 23 access to its facility for organizational purposes while granting access to the Steelworkers for the same purpose;

(6) informing employees that Charley Brothers had selected the steward for the Steelworkers;

(7) informing employees that they could only receive union representation by selecting the Steelworkers;

(8) soliciting employee signatures for a petition in support of the Steelworkers on several occasions; and

(9) withholding and deducting dues for the Steelworkers from all bargaining unit employees' pay regardless of whether the employees had authorized such deductions.

App. 23–25; 49.

The Steelworkers were charged with receiving assistance from Charley Bros. and unlawfully bargaining for and executing a collective-bargaining agreement including a union security and dues check-off provision.

To remedy the unfair labor practices allegedly committed by Charley Brothers, the Regional Director sought an order requiring the company to

> withdraw and withhold recognition from the Steelworkers as the exclusive bargaining representative of the employees employed at its Mars facility, and to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees . . . unless and until the Steelworkers are certified by the Board as the collective-bargaining representative of the employees at that store.

App. 25–26.

As to the Steelworkers, the Regional Director sought an order requiring the Union

> to cease accepting recognition as the exclusive bargaining representative of employees employed by the Employer at its Mars facility, to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees, . . . unless and until the [Union] is certified by the Board as the collective-bargaining representative of the employees at that store and to reim-
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> burse all present and former employees for any dues, initiation fees and other monies, paid directly to [the Steelworkers] or withheld for [the Steelworkers'] benefit pursuant to the union checkoff authorization provision set forth in the collective-bargaining agreement with appropriate interest.

App. 33.

On September 24, 1984, Vic's Markets acquired the Mars Shop 'N Save Store from Charley Brothers with notice of the unfair labor practice charges pending against Charley Brothers. Vic's Markets extended recognition and assistance to the Steelworkers as the exclusive bargaining representative of the Mars Shop 'N Save employees. Accordingly, on October 11, 1984, Local 23 filed charges against Vic's Markets and the Steelworkers similar to those previously filed against Charley Brothers and the Steelworkers. On November 14, 1984, the Regional Director issued formal unfair labor practice complaints against Vic's Markets and the Steelworkers.[4]

The complaint against Vic's Markets charged that Vic's, as a "successor employer" to Charley Bros., was liable for any unfair labor practices allegedly committed by its predecessor. Further, the complaint alleged that Vic's Markets unlawfully recognized the Steelworkers, enforced the collective-bargaining agreement, and withheld dues on behalf of the Steelworkers in violation of Sections 8(a)(1), (2) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1), (2) and (3). App. 50–59. The Steelworkers were charged with unlawfully accepting recognition from Vic's Markets, adopting the collective-bargaining agreement and accepting dues from Mars Shop 'N Save employees.

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[4] On November 14, 1984 the Regional Director also amended the September 14, 1984 consolidated complaints against Charley Brothers and the Steelworkers to allege their fraudulent use of an attendance list as a list of employees ratifying the collective-bargaining agreement between the parties.

On November 15, 1984, the Regional Director consolidated the four cases against Charley Brothers, Vic's Markets and the Steelworkers and scheduled an unfair labor practice hearing for December 4, 1984. Prior to that date the Board's regional office and the charged parties entered into settlement negotiations, allegedly without notice to Local 23. On November 22, 1984, the scheduled hearing was indefinitely postponed, and, by letter dated November 28, 1984, the Regional Director informed Local 23 of the proposed informal settlement agreements in the consolidated cases. In that letter, the Regional Director indicated his intention to approve the agreements "inasmuch as . . . [they] fully remedy any violative conduct alleged in [Local 23's] charges." App. 85.

On December 6, 1984, Local 23 submitted to the Regional Director six objections to the proposed informal settlement. Specifically, Local 23 argued that:

> (1) The proposed settlement agreements were entered into without the Charging Party being afforded full opportunity to dispose of the cases by amicable adjustment, as required by the Board's rules. Therefore, the agreements are invalid;
>
> (2) The proposed settlement agreements inadequately remedy the unfair labor practices alleged in the consolidated complaints because the sixty (60) day notice posting periods provided therein are of insufficient duration to dissipate the effect of the unfair labor practices and to permit a free representation election. It is necessary to hold an administrative hearing to fully remedy the alleged violations of law;
>
> (3) Since they do not specifically prohibit employees of the Respondent Vic's Markets who are representatives or agents of the Respondent Steelworkers from utilizing the Mars Shop 'N Save facility for organizational purposes during the notice posting period, the proposed settlement agreements inadequately remedy the alleged unfair labor practices because they do not provide Local 23 with any countervailing special access remedies;
>
> (4) The proposed settlement agreements inadequately remedy the alleged unfair labor practices because they are not formal settlements providing for Board approval, a Board order and the consent entry of a court judgment enforcing the order;
>
> (5) The proposed settlement agreements inadequately remedy the alleged unfair labor practices because they contain nonadmission clauses whereby the Respondent Vic's Markets and the Respondent Steelworkers do not admit to any violation of the National Labor Relations Act; and
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> (6) The proposed Notices to Members contain ambiguous language which, if posted, will confuse employees concerning the factual background of the settlements and the exercise of their Section 7 rights.

App. 101–102.

Further, Local 23 requested that the Regional Director "afford Local 23 an evidentiary hearing on its objections to the proposed settlement agreements." App. 101.

By letter of December 12, 1984, the Regional Director informed Local 23 of his approval of the settlement agreements and the corresponding withdrawal of the Board's pending unfair labor practice complaints against Vic's Markets, Charley Bros. and the Steelworkers. Responding to Local 23's objections, the Director substantially rejected Local 23's contentions, although he did modify some of the language in the proposed notices to employees to remedy alleged ambiguities noted in Local 23's objections. App. 109–110.

Local 23 thereupon appealed to the General Counsel of the Board the Regional Director's approval of the settlement agreements and his refusal to hold an evidentiary hearing. App. 127. [5] On January 22, 1985, the General Counsel denied Local 23's appeal. Referring to Local 23's argument that the Board's failure to hold an evidentiary hearing on its objections invalidated the informal settlement agreements, the General Counsel stated:

> It is the policy of this office, however, that a Charging Party's right to contest a proposed informal settlement agreement is properly and exclusively governed [sic] Sections 101.9(c)(1), (2), and 102.19 of the Board's rules and regulations. Inasmuch as the evidence indicates that these procedures were properly followed, insufficient basis exists to invalidate the settlement agreements on those grounds.

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[5] Local 23 withdrew objections two and three noted above as grounds for overturning the proposed settlement agreements. App. 128.

App. 132.

Following the General Counsel's denial of its administrative appeal, Local 23 filed a timely petition for review in this Court. For the reasons expressed below, we will grant Local 23's petition, vacate enforcement of the settlement agreements, and remand the proceedings to the Board for the purpose of holding an evidentiary hearing on Local 23's objections to the informal settlement agreements.

II.

In *Leeds & Northrup Co. v. NLRB,* 357 F.2d 527 (3d Cir.1966), this court specifically addressed the issue presented by this appeal. There, we held that once a formal unfair labor practice complaint had been issued by the Board, a "charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal." 357 F.2d at 533. On this appeal, it cannot be disputed that *Leeds & Northrup* is controlling. [6]

Nevertheless, the Board vigorously argues that *Leeds & Northrup* "was wrongly decided and should now be overturned." NLRB Br. at 9. However, the Internal Operating Procedures of this Court, Chapter 8.C., flatly prohibit a panel of this court from overruling a published opinion of a previous panel. [7] *See, e.g., C. Hommel Co.*

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v. Ferro Corp., 659 F.2d 340, 354 (3d Cir.1981), *cert denied* 455 U.S. 1017, 102 S.Ct. 1711, 72 L.Ed.2d134 (1982); *Byrnes v. Debolt Transfer, Inc.,* 741 F.2d 620, 625 (3d Cir.1984). Thus, his panel has no authority to depart from *Leeds'* holding, and unless the instant appeal may be distinguished from *Leeds,* we are obliged to remand for an evidentiary hearing.

III.

In *Leeds & Northrup,* the company claimed that the Union had coerced its employees during a plant strike by, among other things, threatening company employees with violence, loss of employment and union fines if they crossed the picket lines or refused to participate in strike activities. A formal complaint was filed by the Board against the Union for having violated 8(b)(1)(A) of the Act and a hearing before a trial examiner was scheduled. Prior to the hearing, the Regional Director and the Union entered into an informal settlement agreement without informing the company of the settlement.

The company, as a charging employer, filed a motion with the Regional Director seeking a hearing on the Board's complaint and also filed formal objections to the settlement agreement. The Regional Director nevertheless approved the settlement agreement, withdrew the Board's complaint, rejected Leeds' objections and denied Leeds' request for a hearing.

Leeds sought review with the General Counsel, who approved the Regional Director's action, observing that the unfair labor practices had ceased. Leeds thereupon appealed to this court, claiming the denial of an evidentiary hearing was a final action of the Board and sought to have the General Counsel's action set aside. The Board claimed that no final order had been entered and therefore this court had no jurisdiction to review the decisions of the Regional Director and the General Counsel. It also contended that no hearing was necessary because the unfair labor practices had been discontinued and the issue was therefore moot.

Rejecting the Board's position, this court held that there was no distinction between disposition of complaints by formal or informal settlements. The court held that no lack of jurisdiction precluded consideration of Leeds' appeal by the court. We went on to hold that once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal. We noted that only where the General Counsel had, after investigation, elected *not* to issue a complaint, was his action to be deemed discretionary and within the exclusive power of the General Counsel to resolve. In *Leeds,* because a formal complaint had issued, but no hearing had been allowed, the action of the Board was vacated and remanded for an evidentiary hearing.

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[6] The Board and General Counsel "acknowledge that the Court's opinion in *Leeds & Northrup* is controlling in this case." NLRB Br. at 9.

[7] IOP 8.C. provides.

C. Policy of Avoiding Intra-Circuit Conflict of Precedent.

It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.

Recognizing that *Leeds & Northrup* governed this appeal, on July 31, 1985 the Board sought initial in banc hearing prior to a panel's consideration of the instant appeal. That petition was denied by this court on September 5, 1985.

Here, too, a formal complaint had issued, but the requested evidentiary hearing was denied. We can discern no principled distinction between *Leeds* and the instant case. Indeed, as we have noted, the Board apparently cannot either. *See* n. 6 *supra.*

It may be argued that a distinction should be drawn between objections which raise material disputes of fact, and objections which involve merely procedural matters or discretionary determinations concerning the remedy, and that hearings should be required only where factfinding is essential. We have employed that type of analysis in analogous situations where we have required evidentiary hearings only in instances where the Regional Director's investigation has disclosed material dis-

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putes of fact. *See, e.g., Vitek Electronics, Inc. v. NLRB,* 653 F.3d 785 (3d Cir.1981); *Anchor Inn, Inc. v. NLRB,* 644 F.2d 292 (3d Cir.1981).

Such a distinction, however, while it may prove attractive to those who disagree with *Leeds* or to courts which encounter this problem as a matter of first impression, cannot control the disposition of this appeal. *Leeds,* as we have pointed out, is on virtually all fours with the instant case and, while the opportunity for such a distinction was available in *Leeds,* it was not seized. *Leeds'* holding leaves no room for such a distinction to be drawn here.

Thus, while Local 23's objections in this case do not bear on the substantive provisions of the informal settlement agreements, and a *Leeds* evidentiary hearing might therefore result in mere adherence to an empty formality, nevertheless we, as a panel, even if we were so disposed, are not free to change or modify *Leeds* despite arguments and ostensible precedents to the contrary.[8] *See International Ladies' Garment Workers Union v. NLRB,* 501 F.2d 823, 832–33 (D.C.Cir.1974) (evidentiary hearing on objections to proposed informal settlement agreement not required where there are no genuine issues of material fact as to substantive relief provided); *see also Cuyahoga Valley Railway Co. v. United Transportation Union,* — U.S. —, —, 106 S.Ct. 286, 287, 88 L.Ed.2d 2 (1985) (Secretary of Labor's decision to withdraw complaint charging an employer with violation of the Occupational Health and Safety Act, 29 U.S.C. § 651, *et seq,* upon reaching informal settlement agreement not reviewable by the Occupational Safety and Health Review Commission).

IV.

Any attempt to modify the *Leeds* jurisprudence in this circuit necessarily must be accomplished by the full court and cannot be effected by a panel which is bound to follow prior precedent. Because, as we have observed, *Leeds* is controlling, we will grant Local 23's petition for review and thus remand to the Board. We will also vacate the informal settlement agreements, and direct that the unfair labor practice complaints be reinstated so that the evidentiary hearing on Local 23's objections may be held, all as required by *Leeds.*

Melvin D. Taylor v. NLRB

786 F.2d 1516 (11th Cir.), April 21, 1986; rehearing and rehearing en banc denied June 16, 1986—273 NLRB 713

On petition to review Board Order

Before VANCE, Circuit Judge, HENDERSON, Senior Circuit Judge, and LYNNE *, Senior District Judge

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LYNNE, Senior District Judge: Melvin D. Taylor challenges the National Labor Relations Board's deferral to the decision of a grievance committee to dismiss his unfair labor practice claim. We hold that deferral was not warranted and remand for further consideration by the Board.

FACTS

On December 2, 1982, Melvin D. Taylor was terminated from his job as a truck driver by Ryder Truck Lines, Inc., when he refused to drive a 1979

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[8] Subsequent to argument in his case, we have become aware of a recent decision of the Sixth Circuit holding that an informal settlement agreement reached after issuance of a formal complaint by the Regional Director of the NLRB is not a final order for purposes of review by a Court of Appeals. *Jackman v. NLRB,* 784 F.2d 759 (6th Cir.1986). Referring to *Leeds & Northrup,* the *Jackman* court stated that our decision "misconstrue[d] the purposes and policy of the [National Labor Relations] Act." At 764, n. 13. Despite the conflict among the Circuits which today's affirmance of *Leeds* perpetuates, we are nevertheless constrained to adhere to *Leeds.*

* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Ford tractor assigned to him by Ryder from its pool of vehicles. Taylor complained of several safety problems with the tractor but primarily objected to the Ford's telescoping steering column, which had frozen and could not be adjusted to accommodate his 240-pound frame.

Ryder's truckdrivers are parties to a collective bargaining agreement [1] and are represented by the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America (the Union). The Agreement states that Ryder may not require employees to operate an unsafe vehicle and further provides that disputes shall be resolved through final and binding grievance and arbitration procedures.

After his termination, Taylor filed a grievance protesting his discharge. The grievance was submitted to a Southern Multi-State Grievance Committee (the Multi-State Committee) comprised of Union and Ryder representatives. This Committee held a hearing on January 25, 1983, and heard testimony from Ryder and from Taylor but was unable to reach a decision. The case was automatically appealed to the Southern Conference Joint Area Grievance Committee (the Area Committee). At this hearing, the transcript of the first grievance proceeding was made a part of the record and a Ryder representative made a brief statement. Taylor was not permitted to be present at this hearing; the Union representative made no statement on Taylor's behalf. The Area Committee denied the grievance with no discussion other than the following pronouncement: "DECISION: Case No. 15 DENIED, COST TO THE UNION."

On March 3, 1983, Taylor filed charges with the National Labor Relations Board, which issued a complaint against Ryder on April 11 of that year. After a hearing on July 28–29, 1983, an Administrative Law Judge (ALJ) issued a recommended decision and order on September 21, 1983. The ALJ declined to defer to the Area Committee's denial of Taylor's complaint, noting that Ryder had not offered the Area Committee decision or the Multi-State Committee transcript into evidence. Reaching the merits of Taylor's grievance, the ALJ held that Taylor's refusal to drive the Ford tractor was a protected "concerted activity" and that his termination by Ryder violated Section 8(a)(3) of the National Labor Relations Act.

Ryder filed numerous exceptions to the findings and order of the ALJ. While these exceptions were pending, the Board decided *Olin Corp.,* 268 NLRB 573 (1984), in which it restated the Board's standard for deferral to arbitration procedures. On its own initiative, the Board remanded Taylor's case to the ALJ on the deferral issue alone, with instructions to reopen the record and reconsider that issue in light of *Olin.*

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After reviewing the transcript of the Multi-State Committee hearing and the decision of the Area Committee, the ALJ issued on July 17, 1984, a supplemental decision finding that the "cursory" findings of the Area Committee provided no basis for deferral and reaffirming its original decision.

Relying on the *Olin* decision, the Board reversed the supplemental decision, [2] holding that the General Counsel had not met its burden of affirmatively demonstrating that the unfair labor practice had not received adequate consideration by the Area Committee. This appeal followed.

DISCUSSION

Taylor contends that the ALJ's decision not to defer to the arbitral finding of the Area Committee was proper because it could not be determined from the Committee's decision whether Taylor's unfair labor practice claim had been considered. The Board responds by relying upon its new criteria for deferral as set forth in *Olin Corp., supra,* and its finding that the General Counsel did not affirmatively demonstrate that deferral was not warranted.

1. *Background of NLRB's Deferral Policy.*

The NLRB's responsibility to prevent and penalize unfair labor practices historically has been pitted against a countervailing desire to encourage the private settlement of labor disputes. The tension between these competing concerns is readily apparent from Congressional directives to the Board. Section 10(a) of the National Labor Relations Act provides that the Board's power to prevent unfair labor disputes "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Section 203(d) of the Act, however, states that binding arbitration is "the desirable method of settlement of grievances arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. §§ 160(a), 173(d).

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[1] Ryder's truck drivers are covered by the National Master Freight Agreement and the Southern Conference Area Over the Road Supplemental Agreement.

[2] The Board reversed the ALJ by a 2-1 vote. The dissenting member of the panel stated that deferral was improper where there was no written decision from which the ALJ could determine if deferral criteria had been met.

In the seminal case of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board ruled that "recognition" of an arbitration award was justified because (1) the proceedings appeared to have been fair and regular; (2) all parties had agreed to be bound; and (3) the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the Act. 112 NLRB at 1802. It soon became apparent, however, that a more exacting standard was required to ensure that unfair labor practice issues were in fact being addressed and resolved. *See Raytheon Co.*, 140 NLRB 883, 886 (1963) (Board cannot neglect function of protecting rights of protected employees), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir.1964). *Raytheon Co.* added the further requirement that an unfair labor practice issue must have been "fully and fairly litigated" at the arbitration level to justify deferral by the Board. 140 NLRB at 887.[3] *See also Airco Industrial Gases*, 195 NLRB 676 (1972) (refusing to defer to arbitral award that did not indicate whether arbitrator had ruled on unfair labor practice issue); and *Yourga Trucking, Inc.*, 197 NLRB 928 (1972) (party asserting deferral defense bears burden of proving adequate presentation of unfair labor practice issue at arbitration).

The Board deviated from the *Spielberg* and *Raytheon* policy of cautious deferral in *Electronics Reproduction Service Corp.*, 213 NLRB 758 (1974), in which it ruled that arbitral findings would be given effect unless "special circumstances" precluded the grievant from a "full and fair *opportunity*" to present evidence of an unfair labor practice. 213 NLRB at 764 (emphasis supplied). Although not expressly stated, this standard in effect placed upon the grievant the burden of proving to the Board that such unusual circumstances existed at the arbitration level. *See id.* at 765 (Fanning and Jenkins, dissenting).

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The Board's new criteria established in *Electronic Reproduction* decision drew sharp disapproval from courts and critics.[4] In *Suburban Motor Freight*, 247 NLRB 146 (1980), the Board acknowledged criticisms that *Electronic Reproduction* represented an "unwarranted extension of the *Spielberg* doctrine and an impermissible delegation of the Board's exclusive jurisdiction under [the NLRA] to decide unfair labor practice issues." 247 NLRB at 146. The Board overruled *Electronic Reproduction*, even though its more liberal standard encouraged collective bargaining relationships, because it also "derogate[d] the equally important purpose of protecting employees in the exercise of their rights." *Id.* The *Suburban Motor Freight* panel explicitly ruled that it would "give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions." *Id.* The Board also expressly restored the previous burden of proof allocations of *Spielberg* and *Yourga Trucking*. *See id.*, note 7.

The Board's return to the traditional deferral criteria did not solve the difficult questions that confront Board members and courts in an effort to reconcile the opposing policies of private dispute resolution and statutory rights protection. The Supreme Court has observed that "the opinions of the Courts of Appeal strongly suggest that there is marked disagreement on the circumstances under which the policy of Board deferral must be exercised." *Schaefer v. NLRB*, 464 U.S. 945, 945, 104

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[3] The *Raytheon* majority further rejected the minority argument that deferral was warranted because the factual issue underlying the contractual and statutory issues was the same. 140 NLRB at 88–. *Raytheon* thus expressly rejected the theory that factual parallelism between contract and statutory issues would suffice for deferral to the arbitral decision. *Olin Corp.*, *supra*, at 577–78 (Zimmerman, M., dissenting).

[4] *See, e.g.*, *Banyard v. NLRB*, 505 F.2d 342, 345–46 (D.C.Cir.1974) (absent congruence between contractual and statutory issues, board policy constituted not deferral but abdication). *See also Stephenson v. NLRB*, 550 F.2d 535, 550 (9th Cir.1977) (broader criteria described as "illogical" and an unjustified extension of deferral policy); Note, 88 Harv.L.Rev. 804 (1975); Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?", 123 U.Penn. L.Rev. 897 (1975).

Some pre-*Suburban Motor Freight* Board decisions also indicated dissatisfaction with the *Electronic Reproduction* standard by using language consistent with the earlier deferral guidelines. *See, e.g.*, *Max Factor & Co.*, 239 NLRB 804 (1978); *The Mason and Dixon Lines, Inc.*, 237 NLRB 6 (1978); *The Kansas City Star Co.*, 236 NLRB 866 (1978).

S.Ct. 362, 364, 78 L.Ed.2d 323, 325 (1983) (O'Connor, J., dissenting).

2. *Olin Corp.'s New Deferral Standard.*

The NLRB presumably attempted to address this need for uniformity in *Olin Corp.*, 268 NLRB 573 (1984), in which yet another approach to deferral was formulated. The Board cited infrequent deferral under *Suburban Motor Freight* as the primary reason for its new standard, concluding that *Olin Corp.* is more consistent with "the aims of the Act and American labor policy." 268 NLRB at 574. After expressly reaffirming the general *Spielberg* criteria, the *Olin* majority went on to state its new deferral standard:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act.
>
> . . . And, with respect to the inquiry into [*Spielberg's*] "clearly repugnant" standard, . . . unless the award is "palpably wrong," *i.e.*, unless the arbitrator's decision is not susceptible to an interpreta-

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> tion consistent with the Act, we will defer.

Id. (footnotes omitted). *Olin Corp.* also modified the *Raytheon* "fully and fairly litigated" test by returning to the *Electronic Reproduction* rule placing the burden upon the General Counsel to demonstrate that deferral was not necessary. *Id.*

Taylor urges, however, that the *Olin Corp.* standard confers upon arbitral decisions a nearly preclusive effect that is inappropriate in many contexts in which contractual and statutory labor disputes may arise. Taylor contends that factual parallelism does not always guarantee legal parallelism and sets forth several instances in which *Olin's* "factually parallel" test will result in inadequate or no litigation of the unfair labor practice issue.[5]

As evidenced by the application of the *Olin Corp.* standard to Taylor's labor claim, the Board's latest attempt to formulate a consistent deferral policy has swung back too far in the direction of *Electronic Reproduction* and cannot pass muster. As noted above, the NLRB has a statutory duty to enforce the National Labor Relations Act and exclusive jurisdiction to decide unfair labor practices. The Board may not avoid this responsibility through a far-reaching deferral policy which apparently presumes that an unfair labor practice claim has been resolved through arbitration.

The Supreme Court has stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), that an employee whose grievance was dismissed at arbitration nevertheless could bring a Title VII claim arising from the same underlying facts. Recognizing that the arbitrator's competence lies in "the law of the shop, not the law of the land," the Court held that an employee may still assert statutory claims independent of any rights created by a collective bargaining agreement. 415 U.S. 36, 57, 94 S.Ct. 1011, 1024. Deferral to an arbitral finding is not justified when the arbitrator did not address or resolve a distinct statutory claim. *Id.*

Several Courts of Appeal have faced similar fact situations and ruled against deferral where the circumstances surrounding the arbitral process were unknown or unclear. In *NLRB v. Magnetics International, Inc.*, 699 F.2d 806, (6th Cir.1983), the arbitral award was accompanied by a brief discussion which gave no indication that an unfair labor practice charge was considered. The court upheld the refusal of the Board to defer to arbitration, refusing to speculate on what the arbitrator might have considered and holding that arbitration is "properly seen as an aid to the Board, not as an alternative to its processes." 699 F.2d at 809. In *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir.1981), the arbitrator stated in a written opinion that a grievant was dismissed for just cause and denied his grievance without discussing other possible motives for the grievant's discharge. Under these circumstances, the court overruled deferral by the Board because the arbitral finding did not encompass unfair labor practice issues. 643 F.2d at 969–70. Other cases have similarly refused to sanction deferral because the record did not indicate clearly that the statutory issue in fact had been presented to or decided by the arbitrator.[6] *See, e.g., Stephenson v. NLRB*, 550 F.2d 535, 540–41 (9th Cir.1977); *Banyard v. NLRB*, 505 F.2d 342, 345 (D.C.Cir.1974).

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[5] (1) The facts relevant to establishing a contract violation may differ from those facts relevant to unfair labor practice violations, although there may be some overlap. Example: An arbitrator's finding of just cause for an employee's termination may overlook a real underlying reason for discharge arising from some protected activity.

(2) The standard of review for a contract violation may differ from a Board for an analogous unfair labor practice claim. Example: The amount of allowable insubordination by an employee differs for Board and arbitral purposes.

(3) The interest of the union may be to establish a favorable interpretation of a contract, not to protect an employee from a specific unfair labor practice. Example: A group of cases may be resolved jointly on a compromise basis, despite the wishes of one grievant to proceed with an unfair labor practice complaint.

(4) A bipartite grievance committee issues a decision denying a grievance but giving no indication of whether, and if so what, evidence or issues were considered in reaching that decision. Example: The majority of Teamster grievance committee decisions do not include written explanations, as demonstrated in the decision to deny Taylor's grievance.

In a closely analogous context, courts have grappled with similar concerns in applying standards for granting preclusive effect to an arbitral finding. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), the Supreme Court rejected the contention that arbitration of wage claims precluded a later suit under the Fair Labor Standards Act based on the same underlying facts. 450 U.S. at 745–46, 101 S.Ct. at 1447–48. In *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984), the Court similarly held that an earlier arbitral finding did not preclude a civil rights action brought under 42 U.S.C. § 1983. The *McDonald* Court held that its limitation of deferral in *Alexander* and preclusion in *Barrentine* was "based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." 466 U.S. at 289, 104 S.Ct. at 1803, 80 L.Ed.2d at 308. This concern for individual rights has been expressed in refusals by other courts to give preclusive effect to arbitration in a later statutory action.[7]

The Fifth Circuit has recognized the importance of maintaining a viable forum for the resolution of statutory rights as stated by the Supreme Court in *Alexander, Barrentine,* and *McDonald.* In *McNair v. United States Postal Service,* 768 F.2d 730 (5th Cir.1985), a case which ultimately upheld preclusion for an arbitral finding, the court first reviewed the principles of deferral and preclusion. *McNair* recognized the need for employees to be able to assert statutory rights independent of the arbitration process, citing four factors to support this conclusion.

> (1) an arbitrator, schooled primarily in the law of the shop, may lack the expertise to resolve complex statutory questions; (2) "because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforce" statutes; (3) the union, which generally controls the grievance process, because its interests are not necessarily identical to those of its employees, may not adequately protect their statutory rights; and (4) "arbitral factfinding generally is not equivalent to judicial factfinding."

768 F.2d at 736, note 7 (citing *McDonald v. City of West Branch, supra*).

Relying on the principles and interests stated in the above cases, it is apparent that the *Olin Corp.* standard—like its predecessor in *Electronic Reproduction*—does not protect sufficiently an employee's rights granted by the National Labor Relations Act. By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board's responsibility under the NLRA. The ALJ in this case was presented with two grievance committee proceedings.

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[6] The full and fair litigation test was also followed in *NLRB v. Wolff & Munier, Inc.*, 747 F.2d 156 (3d Cir.1984), in which the court remanded to the Board after deferral because the ALJ's opinion did not indicate the precise reason that it deferred to the arbitral finding. The court recognized that failure to consider the statutory issue would justify the ALJ's deferral. 747 F.2d at 161 n. 14.

Other cases that have enforced deferral have done so only after a demonstration that the arbitrator fully considered and clearly decided the statutory issue. *See, e.g., Bakery, Confectionery and Tobacco Workers v. NLRB,* 730 F.2d 812, 815–16 (D.C.Cir.1984) (using *Olin* language yet continuing to require a thorough consideration of such issues by the arbitrator); *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 735 (4th Cir.1982) (unfair labor practice issue held identical to contractual issue); *Hammermill Paper Co. v. NLRB,* 658 F.2d 155, 160–61 (3d Cir.1981) (rationale for deferral evaporates when only contractual issue has been treated by arbitrator), *cert. denied* 460 U.S. 1080, 103 S.Ct. 1767, 76 L.Ed.2d 341 (1983).

[7] *See, e.g., Burke v. Latrobe Steel Co.*, 775 F.2d 88, 91 (3d Cir.1985) (ERISA claims not barred); *Consolidation Coal Co. v. Marshall,* 663 F.2d 1211, 1219 (3d Cir.1981) (Federal Coal Mine Health and Safety Act of 1969 raised independent statutory issues.

In his supplemental decision, the ALJ found that the statutory issue clearly was considered at the Multi-State Committee hearing. If that hearing had produced a dispositive result, then deferral to that result would have been proper under any of the many variations of the *Spielberg* standard. It is the Area Committee's decision, however, that is relevant for deferral purposes and the ALJ had no indication from the transcript of that proceeding whether the Area Committee considered any unfair labor practice claim.

This case does not present the court with the question of whether the facts and issues were sufficiently parallel to justify deferral, nor does it involve scrutinizing an arbitral finding for a result that is "clearly repugnant" to the Act. The overriding question in this case is whether the Area Committee ever considered any facts relevant to Taylor's statutory claim.

Under *Olin Corp.*, the Board essentially has decided that deferral is proper in all cases unless it is affirmatively demonstrated that some unusual circumstances require that the ALJ conduct an independent inquiry into a grievant's statutory claims. Such a result cannot be reconciled with the need to protect statutory rights, as expressed by the Supreme Court in *Alexander, Barrentine,* and *McDonald, supra. Olin Corp.* either overlooks or ignores those instances where contract and statutory issues may be factually parallel but involve distinct elements of proof and questions of factual relevance.

The new standard further ignores the practical reality of many bipartite proceedings, in which individual rights may be negotiated away in the interest of the collective good. The circumstances surrounding bipartite proceedings such as Taylor's Area Committee hearing hardly inspire confidence in the fairness of the process or the accuracy of the result. A recent survey of Teamster Grievance Committees casts doubt on the competence of union representatives, thoroughness of investigation, adequacy of preparation, and reliability of evidence. [8] *See generally* Summers, *The Teamster Grievance Committees: Grievance Disposal Without Adjudication,* 37 Proc. of the Nat'l Acad. of Arb. 130 (1984); *Olin Corp.*'s standard appears on its face to represent an abdication of Board responsibility, and application of that standard to proceedings such as these fully supports this conclusion. *Spielberg*'s first requirement—that the proceedings below appear to have been fair and regular—can hardly be satisfied in this context. The Supreme Court has recognized that arbitration is valuable therapy for the complicated and troubled area of labor dispute resolution. *See Carey v. Westinghouse Corp.*, 375 U.S. 261, 272, 84 S.Ct. 401, 409, 11 L.Ed.2d 320 (1964). There can be little therapeutic value, however, in a deferral policy so unmindful of the Board's statutory responsibility and of individual rights.

We therefore VACATE the Board's order deferring to the decision of the Area Grievance Committee, and REMAND the case for further consideration of Ryder's exceptions and the General Counsel's cross-exceptions to the decision of the ALJ.

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[8] This survey observes that employees have no say in determining who will represent them, committee hearings last an average of fifteen minutes, most evidence presented is secondhand or hearsay, there is little cross-examination, and hearings are held at locations far from employees, who often do not receive time off from work to attend. The author concludes that "the number of cases, the pressures of time, the unavailability of evidence, and the speed with which cases are disposed makes it impossible for the panel in many cases to hear all the relevant facts, or even to make a considered judgment on the basis of limited facts and arguments presented at the hearing. This, in turn, creates a climate and practice of inadequate preparation, summary presentation, incomplete inquiry, and decisions based on a partial skeleton or imaginary shadow of the facts." *Id.* at 138.

NLRB v. Vought Corporation-MLRS Systems Division

788 F.2d 1378 (8th Cir.), April 21, 1986—273 NLRB 1290

On petition to enforce Board Order

Before HEANEY, FAGG and BOWMAN, Circuit Judges

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HEANEY, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order which found that Vought Corporation—MLRS Systems Division (the Company) committed several violations of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.* The Company contests the Board's findings that the Company violated sections 8(a)(1) andor 8(a)(3) by attempting to enforce an overly broad no-distribution rule, and by reprimanding and firing employee David Evans, chairman of the in-plant union organizing committee. We enforce the Board's order.

I. FACTS.

The Company manufactures missile launchers at a nonunion facility in Camden, Arkansas. In June, 1982, it hired David Evans as a general assembler, labor grade two. Evans performed his job very well and, in November, 1982, was promoted to a dispatcher in the production control unit at a labor grade sixteen. His duties included inventorying, requisitioning, and replenishing depleted storage bins that contained parts for use on the launcher line. His performance as a dispatcher was exemplary through February, 1983. In early March, 1983, Evans unsuccessfully bid on a supervisory position. Shortly thereafter, he contacted the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union) to discuss organizing the plant. He later became chairman of the in-plant organizing committee, handed out literature and authorization cards, and began wearing the union insignia.

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The Company resisted the union campaign and, ultimately, dismissed David Evans. On June 3, 1983, a Regional Director of the Board issued a complaint which alleged that the Company engaged in conduct, including the discharge of Evans, which violated sections 8(a)(1) and (3) of the Act. An administrative law judge (ALJ) found that the Company violated section 8(a)(1) of the Act by requesting an employee to inform on union activities of others, by maintaining and attempting to enforce an overly broad no-distribution rule, by coercively interrogating employees about union activities, by threatening to close the plant or reduce its work force if the plant was unionized, by promising to resolve grievances if employees would abandon support of the union, by altering an employee's work assignments on account of his union support, and by threatening to discharge employee Evans for engaging in union solicitation. He found, however, that the Company had not violated the Act by issuing Evans an oral and a written warning of work deficiencies and then discharging him. He reasoned that the warnings were justified because Evans's work performance had lagged, and the firing was justified because Evans had threatened his supervisor and had used abusive language.

The Board affirmed the ALJ's findings of section 8(a)(1) violations, but reversed with respect to the ALJ's findings of no violations arising out of the warnings to and firing of Evans. The Board applied the test set forth in *Wright Line,* 251 NLRB 1083 (1981), *enf'd,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), *approved in NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). It held that the warnings and the firing were motivated by the Company's desire to quell Evans's union activities and that he would not have been warned or discharged had it not been for his union activities. The Board further reasoned that even if Evans had been insubordinate to his supervisor, the insubordination was provoked by the Company's unlawful conduct and the Company thus could not rely on the insubordination to discipline him. *Max Factor & Co.,* 239 NLRB 804, 817 (1978), *enf'd,* 640 F.2d 197 (9th Cir.1980), *cert. denied,* 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 840 (1981); *NLRB v. M & B Headwear Co.,* 349 F.2d 170, 174 (4th Cir.1965).

II. Discussion.

The Company contends that the Board erred in finding violations of the Act based on (1) the March 15 warning to David Evans to stop soliciting for the Union; (2) the alleged attempt of the Company to enforce an invalid no-distribution rule; (3) the May 5 oral warning to Evans; (4) the May 20 written warning to Evans; and (5) the discharge of Evans. [1] We discuss each contention in turn.

A. *March 15 Threat.*

On March 15, the Company's general manager called Evans's supervisors to

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[1] Because the Company did not file objections before the Board with respect to the other section 8(a)(1) violations found by the ALJ, *see* 29 U.S.C. § 160(e), andor does not challenge these findings, as affirmed by the Board, in its brief before this Court, *see Kizzier Chevrolet v. General Motors Corp.,* 705 F.2d 322, 325 n. 2 (8th Cir.1983), *cert. denied,* 464 U.S. 847, 104 S.Ct. 153, 78 L.Ed.2d 141 (1984), we grant summary enforcement of all these findings. *See Vought Corp.-MLRS Systems Division and International Union, UAW,* 273 NLRB No. 161 (1984) at 18–20, findings 1(a)–(f) & (i) and 2(d) & (e).

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his office and informed them that Evans had been passing out union information and harassing employees during working hours. He instructed them to warn Evans that this was impermissible. The supervisors then met with Evans and informed him that he would be discharged if he continued to engage in union activities during working hours.

The ALJ concluded that these Company actions violated the Act because (1) he discredited the testimony that Evans was spending an inordinate amount of time on soliciting for the Union, was harassing other employees and was falling behind in his work; (2) the Company allowed solicitation during work-time for betting pools, charitable gifts and, most significantly, for the anti-union "I'm for Vought" Committee; and (3) the Company did not have a company-wide rule against solicitation. The Board affirmed.

The Company contends that the ALJ and the Board erred in finding a violation of the Act because the permitted solicitations did not interfere with production, whereas Evans's solicitation did because he harassed and intimidated employees. The Board responds that this Court should defer to the ALJ's credibility findings that Evans's union solicitation did not have an adverse impact on employee production. In addition, it notes that the Company allowed its anti-union committee to solicit on Company time. We agree with the Board, and grant enforcement of its finding that the March 15 warning violated section 8(a)(1) of the Act.

B. *The No-Distribution Rule.*

The Board found that the Company's no distribution rule, which prohibited "reproducing, posting, or passing out typed or printed material other than Company business" without permission of the Company, was unlawfully broad. On appeal, the Company argues that it did not violate the Act because the rule was never enforced. The Board responds that this argument is without merit because an overly broad no-distribution rule violates the Act even if never enforced because of its chilling effect. *Jas. Matthews and Company v. NLRB,* 354 F.2d 432, 441 (8th Cir.1965), *cert. denied,* 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966). The Board also asserts that the record supports its finding that the Company did seek to enforce the rule on March 17, 1983, by attempting to prevent Evans from distributing union literature before working hours on the plant's parking lot. Plant security officers had informed Evans that he would not be allowed to do so and one of the officers threatened Evans. The Company responds that the rule was not enforced because plant supervisors informed the security officers that Evans was within his rights and Evans then continued to leaflet and was never disciplined for the incident.

In *DeQueen General Hospital v. NLRB,* 744 F.2d 612, 614 (8th Cir.1984), we reiterated that, "[i]n evaluating employer conduct * * * the test is not whether an attempt at [interference] has succeeded or failed, but whether 'the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their rights under section 7.' " (Citations omitted.) Applying this test, we grant enforcement of the Board's finding that the March 15 incident violated section 8(a)(1) of the Act because there is substantial evidence in the record to support the Board's findings that the Company's actions on March 15 tended to interfere with Evans's right to distribute union literature in a nonworking area on nonworking time, and that there were no special circumstances to justify the Company's attempted enforcement of the rule. *See Eastex, Inc. v. NLRB,* 437 U.S. 556, 570–71, 98 S.Ct. 2505, 2514–15, 57 L.Ed.2d 428 (1978).

C. *May 5 Oral Warning.*

On May 5, Evans's supervisor issued an oral warning to Evans that his work performance was "slipping." The supervisor noted that he had received complaints of supply shortages on Evans's work line. Evans acknowledged a short-

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age of supplies, but asserted five reasons for the shortage: 1) he had assumed the responsibilities of another employee, 2) the Company had implemented a time-consuming system of requiring supervisory signatures on requisitions for items, 3) his supervisor often delayed for days before signing his requisitions, 4) the warehouse delayed in getting parts to him, 5) and he was denied overtime work despite the fact that the line he was supplying was working overtime. The ALJ found that the Company had not violated the Act by giving this oral warning. He credited testimony that Evans was performing his function with less enthusiasm than he had shown before he became involved in Union activities.

The Board reversed this finding, relying on the *Wright Line* test. It found that the General Counsel had made a prima facie showing that Evans was disciplined for engaging in protected conduct. The Board next found that the Company had not met its burden of demonstrating that it would have disciplined Evans absent his union activity. The Board rejected the ALJ's conclusion that Evans was responsible for the supply shortage, and placed great weight on the reasons Evans gave for the shortage.

The Company contends that the Board's findings are against the weight of the evidence. The Board, in response, points out that we must enforce its findings if there is substantial evidence on the record as a whole to support its findings, and that we may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). The Board also notes that in applying the employer-motivation prong of the *Wright Line* test, "intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence[;] in analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference." *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965).

Applying these standards, we have no difficulty in affirming the Board's finding that the May 5 warning was motivated by anti-union animus. The more difficult question is whether, under *Wright Line*, the May 5 warning would have issued absent Evans's union activity. The Board points to the following evidence in support of its finding that it would not have: The Company instituted new time-consuming procedures (which it abandoned shortly after Evans was fired), assigned additional duties to Evans, and refused to allow him overtime, although it had done so before the union campaign, to cause him to fall behind in his work so the Company would have a reason to fire him and thus reduce the chance that the plant would be unionized. We believe that these findings are supported by substantial evidence on the record as a whole and are sufficient to justify the Board's finding of a violation of section 8(a)(1) of the Act.

D. *Written Warning of May 20.*

On May 18, Evans mentioned to several black employees that he had heard a rumor that a white employee was being groomed for a supervisory position over a recently promoted black employee. Evans suggested that the black employees meet with management concerning this situation. As a result of Evans's passing this rumor, on May 20, the Company issued him a written warning.

The ALJ found that the Company had not violated the Act because a review of the evidence indicated that Evans disrupted the work of at least four production employees who brought the matter to the attention of their supervisors. By a two-to-one decision, the Board disagreed, finding that Evans's remarks were protected concerted activity because the remarks related to group action concerning possible racial discrimination in the work place. *See Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir.1981); *Keokuk Gas Service Co. v. NLRB*, 580 F.2d 328, 333 (8th Cir.

1978). The Board also disagreed with the ALJ that Evans's remarks disrupted production. The Board noted that only two of the employees complained to management and that Evans's comments would not reasonably tend to incite employees or impede production.

On appeal, the Company asserts that Evans is a racist who only became active in the Union after losing a promotion to a black employee. The Board contests this characterization and argues that Evans was merely trying to advocate that unionization might help black employees settle racial difficulties at the plant. It further responds that Evans's motivation is irrelevant because he was engaging in a protected activity. *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 578 (7th Cir.1983). In addition, it asserts that little weight should be given the testimony, relied on by the ALJ, of a black employee who stated that another black employee got so upset over Evans's remarks that he refused overtime work.

Our review of the record reveals substantial evidence to support the Board's view that Evans's comments were not the sort of egregious racial rhetoric that is likely to interfere with the employees' free choice in Board-conducted representation elections, in violation of the Board rule set forth in

Sewell Manufacturing Co., 138 NLRB 66, 71 (1962), but instead were permissible comments relevant to existing racial conditions in the plant. *See NLRB v. Eurodrive, Inc.,* 724 F.2d 556, 559 (6th Cir.1984); *NLRB v. Utell Intern., Inc.,* 750 F.2d 177, 179 (2d Cir.1984). Accordingly, we enforce the Board's finding.

E. *May 24 Discharge.*

At the time of the May 20 written warning, Evans's supervisor called Evans in and informed him of the disciplinary action. His supervisor read him the written warning and asked him to sign it. Evans responded that the warning was based on facts which were not true and that he believed he was being singled out for his union activities. When his supervisor insisted that he sign the warnings, or else the warning would be placed in Evans's file anyway, Evans became angry and used abusive, profane and threatening language toward his supervisor. The supervisor viewed these remarks as insubordination and threats, and recommended that Evans be discharged. On May 24, Evans was discharged for "total disrespect to your supervisor" and "abusive, derogatory and threatening comments." The ALJ found that the Company was justified in discharging Evans because of his abusive and threatening language. He noted that participation in union activities does not insulate an employee from discharge for insubordinate conduct, and rejected the general counsel's argument that the firing of Evans for profane language was discriminatory because other employees had not been discharged for the same conduct.

The Board reversed this finding. Applying the *Wright Line* test, it first concluded that there was "overwhelming" evidence that Evans's discharge was motivated by his union activities and then found that the Company failed to demonstrate that Evans would have been discharged absent that activity. It relied on the fact that other employees who used profanity had not been discharged, and that profanity was common in the workplace. In addition, the Board disagreed with the ALJ that Evans's comment, "I'll have your ass," was a threat. The Board viewed this comment as an expression of a desire to file a grievance or report the supervisor's conduct to a higher authority. Finally, the Board found that even if Evans's comments were insubordinate, it would still find the discharge illegal because the Company provoked the conduct through repeated unlawful conduct.

On appeal, the Company asserts that the Board erred in equating its employees use of profanity during "shoptalk" to Evans's language which it claims was clearly insubordinate. The Board responds that even if Evans's comments were insubordinate, the Company provoked them by unlawfully threatening to discharge him on March 15,

and by unlawfully issuing him an oral and written warning. It notes that the Company concedes that the discharge of Evans violated the Company's usual progressive disciplinary procedures—oral warning, written warning, final written warning and suspension or discharge, and that this precedence was departed from only rarely and then for substantial reasons. The Board finally argues that there is substantial evidence in the record to support its finding that Evans was fired not for his intemperate language but because of his union activities.

Several cases have analyzed employer discipline of employees for protected activity where the employee responded with intemperate language. *See, e.g., NLRB v. Max Factor & Co.,* 640 F.2d at 205; *Hawaiian Hauling Service, Ltd. v. NLRB,* 545 F.2d 674, 676 n. 8 (9th Cir.1976), *cert. denied,* 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1061 (1977); *Dreis & Krump Mfg. Co. v. NLRB,* 544 F.2d 320, 328–29 (7th Cir.1976); *Falcon Plastics-Division of B—D Laboratories Inc. v. NLRB,* 397 F.2d 965 (9th Cir.1968); *Boaz Spinning Co. v. NLRB,* 395 F.2d 512 (5th Cir.1968). "The standard is whether [the employee's] improper conduct was so indefensible as to forfeit the Act's protection." *Max Factor & Co.,* 640 F.2d at 205 (citing *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 12, 82 S.Ct. 1099, 1101–11, 8 L.Ed.2d 298 (1962)). Additionally, "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee," *NLRB v. Southwestern Bell Telephone Co.,* 694 F.2d 974, 978 (5th Cir.1982) (ordering back pay for employee disciplined for intemperate reaction to unlawful treatment by employer); *NLRB v. Steiner Film, Inc.,* 669 F.2d 845, 851–52 (1st Cir.1982) (ordering reinstatement of employee discharged for intemperate reaction to discipline for protected activities); *NLRB v. Florida*

Medical Center, Inc., 576 F.2d 666, 673 (5th Cir.1978) (same); *NLRB v. Mueller Brass Co.*, 501 F.2d 630, 685–86 (5th Cir.1974) (explaining and applying doctrine of provoked insubordination); *NLRB v. M & B Headware Co.*, 349 F.2d at 174 (same).

Applying these standards, we find substantial evidence in the record as a whole to support the Board's findings that Evans's conduct was not so indefensible as to forfeit the protection of the Act, and that, in any event, his remarks were unreasonably provoked by repeated Company violations of his rights under the Act, and, most importantly, that he would not have been discharged for his language had it not been for his union activities.

Affirmed.

Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. NLRB

A–1 Fire Protection, Inc. and Corcoran Automatic Sprinklers, Inc. v. NLRB

789 F.2d 9 (D.C. Cir.), April 22, 1986—273 NLRB 964

On petitions to review and cross-application to enforce Board Order

Before EDWARDS and GINSBURG, Circuit Judges, and FAIRCHILD,* Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

Opinion for the Court filed by Circuit Judge EDWARDS

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HARRY T. EDWARDS, Circuit Judge: This case involves a determination by the National Labor Relations Board ("the Board") that two affiliated employers, A–1 Fire Protection, Inc. ("A–1"), which is nonunion, and Corcoran Automatic Sprinklers, Inc. ("CAS"), which is unionized, violated section 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act")[1] by diverting bargaining unit work from unionized CAS to nonunion A–1 without notifying or bargaining with the Road Sprinkler Fitters Local Union No. 669 ("the Union"). To remedy this violation, the Board ordered George Corcoran—the owner of both A–1 and CAS—to restore the *status quo ante* by resuming his bidding for CAS jobs in the same manner as he had bid for CAS jobs prior to his unlawful diversion of bargaining unit work. The Board ordered Corcoran to make whole any former CAS employees, but declined to order their reinstatement and further determined that the extension of the CAS collective-bargaining agreement to A–1 was inappropriate.

This case comes to this court on cross-petitions for review of the Board's decision filed by the Union and employers CAS and A–1, and on a petition for enforcement filed by the Board. CAS and A–1 urge this court to reverse the Board's determination of an unfair labor practice as unsupported by substantial evidence. The Union, on the other hand, argues that the Board's remedy is inadequate, and specifically challenges the Board's failure to require A–1 to comply with the CAS collective-bargaining agreement and the Board's decision not to order the reinstatement of former CAS employees.

We affirm the Board's decision in full. Its finding that Corcoran diverted bargaining unit work from CAS to A–1 is clearly supported by substantial evidence, and the extension of the CAS collective-bargaining agreement to A–1 is not necessary in light of the remedy imposed in this case. Once A–1 returns to its *status quo ante* activities, it will be a different bargaining unit

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than CAS, and contract extension would be neither appropriate nor necessary.

I. BACKGROUND

In 1973, George Corcoran incorporated CAS and A–1 as two separate automatic sprinkler installment companies. Corcoran intended to operate CAS as a union company and A–1 as a nonunion company in a double-breasted operation.[2] On August 2, 1973, CAS and the Union entered into a collective-bargaining agreement.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] 29 U.S.C. § 158(a)(1) & (5) (1982).

[2] A "double-breasted operation" consists of a union firm and a nonunion firm established by the same employer. The theory of such an operation is that union and nonunion firms compete in different and separate markets. *See South Prairie Construction Co. v. Local No. 627, International Union of Operation Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); 1 THE DEVELOPING LABOR LAW 676–81 (C. Morris 2d ed. 1983).

Until 1975, A-1's business was limited to inspections and small installation jobs, and A-1 employed no sprinkler fitters other than Corcoran and his son. In contrast, CAS was operated as a major automatic sprinkler system installation firm that employed seven to ten sprinkler fitters, and its business included mostly large installation jobs. Beginning in 1975, however, Corcoran changed the operation of both CAS and A-1. He increased the number of sprinkler fitters employed by A-1 from two in 1974 to seven in 1975, and began to bid for several large installation jobs on behalf of A-1. CAS, on the other hand, experienced a precipitous decline in both the number and size of installation jobs. In 1976, CAS won only three installation bids—all much smaller than those of 1974 and 1975—and employed only three sprinkler fitters.

The Union became concerned about the growth of A-1's business in the fall of 1975. A Union member responded, at the Union's urging, to an advertisement for A-1 employment. He was told by Corcoran that only Union members of CAS were laid off and that nonunion A-1 employees were never laid off. Corcoran also said that he planned to "phase out" CAS, with "A-1 . . . taking over the sprinkler work." On January 9, 1976, the Union filed unfair labor practice charges against CAS and A-1, alleging that the Union's collective-bargaining agreement with CAS was applicable to A-1, and that Corcoran had diverted CAS bargaining unit work to A-1 without notifying or bargaining with the Union. Thus began a tortured procedural history that has encompassed a full decade, and has included two hearings before an administrative law judge ("ALJ"), three Board decisions, and three appeals to this court.

After the first hearing in August 1976, the ALJ concluded that CAS and A-1 were a single employer for collective-bargaining purposes, and that Corcoran had used his bidding power over CAS and A-1 to reduce the amount of work for CAS employees with the intent of ultimately dissolving CAS. The Board, however, disagreed with the ALJ's findings and initially concluded that no Union work had been diverted from CAS to A-1.[3] After the Union petitioned for review, this court remanded the case to the Board in *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, [hereinafter cited as *Road Sprinkler Fitters I*].[4]

On remand, the Board reaffirmed its previous finding of no unfair labor practice, concluding that the dispute involved the scope of the bargaining unit covered by the CAS collective-bargaining agreement, and that this topic was a permissive subject of bargaining. Hence, the Union's voluntary acceptance of a limited bargaining unit was sufficient to bar any duty to bargain.[5]

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Once again the Union petitioned this court for review. We, in turn, once again remanded the case to the Board. In *Road Sprinkler Fitters Local Union No. 669 v. NLRB* [hereinafter cited as *Road Sprinkler Fitters II*],[6] we concluded that the allocation of work to a bargaining unit is a "term and condition of employment," and therefore held that an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling its statutory duty to bargain. Hence, leaving aside a clear and unmistakable waiver of the Union's right to bargain, we concluded that the proper question in this case was:

> whether Corcoran changed the scope of CAS' activities or changed the method of allocating work between CAS and A-1 so as to have caused the CAS bargaining unit to lose work which, in the light of Corcoran's past practices, CAS would otherwise have been expected to perform.[7]

Recognizing that the change in relative fortunes of the two firms might well be the result of a change in Corcoran's bidding practices, we noted that,

> [t]he crucial determinant is whether the change in relative economic fortunes was due to external economic circumstances or to a change in the employer's established practices.[8]

We concluded that a remand was necessary because the Board had failed to analyze the evidence in the record that, prior to 1975, A-1 was engaged in only small jobs and that beginning that year,

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[3] 233 N.L.R.B. 38 (1977).

[4] 600 F.2d 918 (D.C.Cir.1979). We concluded that the Board had failed to apply a "clear and unmistakable" waiver requirement to the Union's alleged acquiescence to a collective-bargaining agreement limited to CAS employees.

[5] 250 N.L.R.B. 217 (1980).

[6] 676 F.2d 826 (D.C.Cir.1982).

[7] *Id.* at 831-32.

[8] *Id.* at 832.

Corcoran had used A-1 rather than CAS for most installation projects. On remand, the Board was instructed to

> determine whether Corcoran engaged in conduct that deprived CAS of work which, in light of Corcoran's past practice, CAS would otherwise have been expected to perform. If the Board finds that Corcoran did engage in such conduct, it should either apply the "clear and unmistakable" standard to test whether the union agreed to that conduct, or explain why a different standard is inappropriate. If it concludes that there was an unwaived denial of the union's statutory rights, it should devise an appropriate remedy, which may, if warranted, include extension of the CAS collective bargaining agreement to the employees of A-1. [9]

At the suggestion of this court, [10] the Board ordered the record reopened for a new hearing before the ALJ "for the limited purpose of receiving evidence as to the issues of fact raised by the court's remand." After this hearing, the ALJ concluded that external market conditions did not justify the decline in CAS activity. Furthermore, the ALJ concluded that Corcoran had used his power over the bids made by both A-1 and CAS to increase A-1's installation work at the expense of CAS. Finally, the ALJ rejected union harassment and lower labor costs as justifications for this bidding behavior.

The Board agreed with the ALJ. [11] It found that Corcoran had deliberately diverted bargaining unit work from CAS to A-1 in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, [12] and that the change in relative economic fortunes of CAS and A-1 was not caused by external economic circumstances. As a remedy, the Board ordered Corcoran to cease and desist from unilaterally diverting bargaining unit work without first bargaining with the Union. It further ordered Corcoran "to restore the status quo ante by resuming bidding jobs for CAS in the same manner as [he] bid jobs for CAS prior to the unlawful diversion of unit work," [13] and to make whole former CAS employees for any lost earnings and benefits. The Board refused, however, to order the extension of the CAS collective-bargaining agreement to the employees of A-1 because the collective-bargaining agreement had expired in 1977, and because CAS and A-1 did not constitute a single appropriate bargaining unit.

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Cross-petitions for review filed by the Union, CAS and A-1, and a petition for enforcement filed by the Board brought the case to this court for the third time.

II. ANALYSIS

A. *The Second Hearing*

CAS and A-1 first challenge the scope of the second hearing. They argue that it was reversible error to permit the introduction of evidence about events that took place after the close of the first August 1976 unfair labor practice hearing, and that the ALJ "totally relied" upon post-1976 evidence.

These arguments have absolutely no merit. As we recognized in *Road Sprinkler Fitters II,* [14] a decision to reopen the record is within the Board's discretion. [15] There was no abuse of that discretion in this case. The bulk of the evidence at the second hearing concerned the central and dispositive issue on remand: whether the decrease in CAS business was caused by external economic circumstances. Evidence was introduced that in the years following CAS's demise, union firms successfully competed with A-1. Although the evidence concerned events that took place after 1976, the evidence is undeniably relevant in that it supports the argument that the diversion of business from CAS *before* 1976 was not the result of impersonal market forces.

Furthermore, the claim that the ALJ "totally relied" on post-1976 evidence is patently false. Unquestionably, the most persuasive evidence in the record concerned the growth of A-1—and the corresponding decline of CAS—*before* 1976. The only event that took place *after* August 1976 was Corcoran's decision not to place any bids for CAS beginning in November 1976. The Union makes no claim, however, that this event constituted an "independent violation." Rather, the ultimate demise of CAS is simply further evidence of Corcoran's diversion of CAS business.

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[9] *Id.* at 834.

[10] We said "[t]he Board is, of course, free to decide in the first instance whether anything in our present opinion should cause it to allow the record to be reopened." *Id.* at 829, n. 10.

[11] 273 N.L.R.B. No. 124 (1984).

[12] 29 U.S.C. § 158(a)(1) & (5) (1982).

[13] 273 N.L.R.B. No. 124, at 11.

[14] 676 F.2d at 829 n. 10.

[15] *See NLRB v. Amalgamated Clothing & Textile Workers Union,* 662 F.2d 1044, 1045 (4th Cir.1981).

In any event, the Union's complaint alleged a continuing violation—the diversion of bargaining unit work to A-1—and under clearly established legal principles, the Board may consider evidence relating to this continuing violation. In *NLRB v. Fant Milling Co.,* [16] the Supreme Court held that the Board was not precluded from dealing with unfair labor practices that occur after the filing of an initial unfair labor practice charge if the new unfair labor practices are "related to" the initial charge and "grow out of them while the proceeding is pending before the Board." [17] Without doubt, the further diversion of CAS business between August 1976 and November 1976 is "related to" the charge of diversion before August 1976.

B. *The Board's Findings*

CAS and A-1 next contend that the Board's finding of an unfair labor practice is not supported by substantial evidence. We find that the record evidence overwhelmingly supports the finding of an unfair labor practice, and thus uphold the Board's conclusion.

It is uncontroverted that A-1's installation business increased dramatically in 1975 and that during this same period, CAS's volume of business dropped abruptly. In 1974, A-1 made 21 installation bids—successful and otherwise—and A-1's largest successful bid only amounted to $3,087. Only one year later, A-1 made 15 *successful* bids, and its largest bid jumped to $51,900. By 1976, A-1's gross earnings **15** had increased at least fourfold over their 1974 level and the number of successful bids climbed to 24. In sharp contrast, the number of successful CAS bids dropped from 27 to 3 between 1974 and 1976. While CAS's highest bid in 1974 was $71,540, its highest bid in 1976 was only $6,037. Even Corcoran conceded that, beginning in 1976, many former CAS customers became customers of A-1.[18]

With evidence of this uncontested change in the relative fortunes of the two companies, the only real issue faced by the Board after the second hearing was whether these changes were caused by external market circumstances or by Corcoran's diversion of bargaining unit work. Once again, the evidence persuasively supports the Board's conclusion that market conditions had little to do with the demise of CAS. Several union companies testified that they regularly bid against A-1, and that union firms often prevailed over A-1 and other nonunion firms. Even Corcoran conceded that there exists no separate "union" and "nonunion" markets, and that he often bid for jobs that required payment of the prevailing wage—jobs in which union firms are not at a competitive disadvantage. Although some witnesses testified that the number of nonunion firms was growing, this growth alone does not explain the sudden drop in CAS business.

Corcoran offers nothing to counter this compelling evidence that market circumstances had little to do with the change in the allocation of work between A-1 and CAS. Instead, he merely makes the irrelevant point that the record establishes only two examples of work *directly* transferred from CAS to A-1.[19] In *Road Sprinkler Fitters II,* however, we held that a change in CAS's activities or a change in the method of allocating work between A-1 and CAS was a bargainable issue.[20] Under the law of the case, therefore, the Board did not need to find a *direct* transfer of a job from CAS to A-1 if it found that Corcoran was using A-1 to perform the *type of work* traditionally performed by CAS. With compelling evidence that external market forces did not cause the decline in CAS business, the inescapable conclusion is that Corcoran illegally diverted bargaining unit work without bargaining with the Union.

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[16] 360 U.S. 301, 79 S.Ct. 1179, 3 L.Ed.2d 1243 (1959).

[17] *Id.* at 309 (quoting *National Licorice Co. v. NLRB,* 309 U.S. 350, 369, 60 S.Ct. 569, 579, 84 L.Ed. 799 (1940)).

[18] Corcoran claimed that he bid 150 times for CAS in 1976, but that these bids were unsuccessful. However, he provided absolutely no documentation to support this claim. The record reflects only the three successful bids in 1976. Given CAS's rapid decline in fortune between 1974 and 1976, we conclude that the ALJ and the Board correctly discounted Corcoran's unsupported assertions.

[19] The two examples of direct diversion of bargaining unit work are: (1) In early 1976, Corcoran originally intended to assign a job at Alma College to A-1, then decided to assign the job to CAS as a "goodwill gesture." When the unfair labor practice charge was filed, Corcoran reassigned the job to A-1. (2) In 1975, Corcoran bid on behalf of CAS on two jobs for Engelhardt Construction, but less than two hours later filed a lower, unsolicited bid on behalf of A-1.

[20] 676 F.2d at 831-32.

Other arguments made by Corcoran are equally infirm. Corcoran claims that he ceased bidding for CAS in November 1976 because he could no longer hire Union fitters. He attributes this inability to attract Union fitters to the Union's harassment of CAS employees. The most obvious flaw in this argument, of course, is that it does not explain the diversion of CAS work *before* November 1976. Instead, at best, it merely explains Corcoran's decision to stop placing bids for an already decimated CAS. In any event, this claim of harassment finds no support in the record. Indeed, the only alleged examples of harassment are representational picketing by the Union at *A-1* jobs, and the fining of Union members who violated Union rules by working for the nonunion A-1. In neither instance did the Union harass CAS employees.[21] In sum, we easily conclude that substantial evidence supports the Board's conclusion that Corcoran diverted work traditionally performed by CAS to A-1, without giving the Union any opportunity to bargain.[22]

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C. *The Remedy*

The only substantial issue in this case is the appropriate remedy. Section 10(c) of the Act gives the Board wide discretion in devising remedial measures.[23] Judicial review of the Board's choice of remedies is limited to ensuring that the remedies effectuate the policies of the Act and are tailored to the nature of the particular unfair labor practice in question.[24] Under this deferential standard of review, we have little difficulty upholding the Board's choice of remedies in this case. Before the Board, the Union principally argued that the Board should order the extension of the CAS collective-bargaining agreement to A-1. This the Board declined to do. We agree with the Board that such an extension is not necessary in light of the *status quo ante* remedy granted in this case.

During oral argument, it became clear to this court that the dispute between the Union and the Board is more apparent than real; the dispute reflects a misunderstanding about the *meaning* of the Board's remedy rather than a disagreement about its adequacy. The remedy *first* confirms that the Union has bargaining rights with respect to all mandatory subjects of bargaining for all current and future employees of CAS and for all previous CAS employees improperly displaced by virtue of the illegal diversion of bargaining unit work. These bargaining rights include the right to bargain about seniority and other job rights that improperly displaced employees can exercise. *Second,* all CAS bargaining unit employees who suffered as a consequence of the illegal diversion of work from CAS are entitled to be made whole. This make-whole remedy will include back pay attributable to the illegal diversion, including back pay for any ongoing A-1 jobs that Corcoran is unable to assign immediately to CAS. Details of these remedial issues must await compliance proceedings. *Third,* the Board's order requires that Corcoran operate A-1 and CAS in the same manner as he did before the illegal diversion. Therefore, A-1 will have only small jobs and will not compete with CAS.

As we interpret the remedy in this case—and the Board's counsel represented that our interpretation is the correct one—the Board's order fully comports with *Fibreboard Paper Products Corp.*[25] In *Fibreboard,* the Board ordered the employer to restore the *status quo ante.* That is exactly the relief granted the Union in this case. A-1 will no longer operate as a large installation firm; all such installation work must be performed by CAS. As a consequence, A-1 will not compete for installation bids with CAS. Union fears of monitoring problems are therefore unfounded. If Corcoran wishes to compete in the sprinkler installa-

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[21] Indeed, in fall 1975, one employee was told that Corcoran was not interested in hiring sprinkler fitters for CAS. Corcoran also told this employee of his plans to "phase out" CAS with A-1 taking over CAS's sprinkler business.

[22] Corcoran argues that his decision to stop placing bids on behalf of CAS is not a mandatory subject of bargaining under *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). The short answer to this contention is that the law of this case is otherwise. *See Road Sprinkler Fitters II,* 676 F.2d at 831. We think *First National Maintenance* is inapposite in any event. That case did not involve a diversion of bargaining unit work; instead it involved an employer's decision to terminate a contract for reasons unrelated to the employer's work force. A more apt precedent is *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), which held that an employer's decision to "contract-out" maintenance services previously performed by bargaining unit personnel was a mandatory subject of bargaining. Several courts have subsequently reaffirmed the principle that the diversion of bargaining unit work is a mandatory subject of bargaining. *See Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1088 (1st Cir.1981); *NLRB v. Triumph Curing Center,* 571 F.2d 462, 471–74 (9th Cir.1978); *Office and Professional Employees International Union, Local 425 v. NLRB,* 419 F.2d 314, 321 (D.C.Cir.1969).

[23] 29 U.S.C. § 160(c) (1982).

[24] *See Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803, 2812–13, 81 L.Ed.2d 732 (1984); *Fibreboard Paper Products Corp.,* 379 U.S. at 216, 85 S.Ct. at 405.

[25] 138 N.L.R.B. 550, 554–55 (1962), *enforced,* 322 F.2d 411 (D.C.Cir.1963), *aff'd,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964).

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tion market he *must* use CAS and *cannot* use A-1, unless a *lawful* change is made pursuant to good faith bargaining under the National Labor Relations Act. Finally, once the *status quo ante* is restored, A-1 and CAS will become very different employing units. While CAS will employ almost exclusively sprinkler fitters, A-1 will employ few—if any—fitters. Just as A-1 and CAS constituted separate bargaining units in 1974, they will constitute different units after restoration of the *status quo ante.* In light of the Act's "guarantee of the right of [A-1] employees to refrain from representational bargaining,"[26] we conclude that the Board did not err in refusing to extend the CAS collective-bargaining agreement to A-1.

The cases cited by the Union are easily distinguished. Although the Board ordered the extension of collective-bargaining agreements in both *Don Burgess Construction Corp.*[27] and *Appalachian Construction, Inc.*,[28] in neither case was the nonunion affiliate a different bargaining unit. Instead, in both *Burgess Construction* and *Appalachian Construction,* the work performed by the nonunion firms was indistinguishable from that performed by the union firm. Unlike the instant case, therefore, a true *status quo ante* remedy required the extension of the collective-bargaining agreement in both *Burgess Construction* and *Appalachian Construction.*

The only apparent difference between the remedy imposed in *Fibreboard* and that imposed in this case is that the Board ordered back pay without reinstatement of former CAS employees. However, reinstatement, in traditional terms, is unnecessary under the circumstances of the instant case. Obviously, a number of bargaining unit employees must be "reinstated" to accomplish the *status quo ante* relief. But the Board cannot reasonably require more because to do so would be to ignore the economic realities of the employer's operation. Unlike the employer in *Fibreboard,* Corcoran's need for employees will depend on the number of bids won by CAS. In a potentially everchanging and fluctuating employment market, "reinstatement" is an empty notion. Given the economic realities of the sprinkler fitter business, as well as the passing of ten years since Corcoran's illegal diversion of work, we conclude that the Board correctly declined to order reinstatement in traditional terms, *i.e.* apart from its order requiring a restoration of the *status quo.* As the exclusive bargaining representative for both past and future CAS employees, of course, the Union has the right to bargain with CAS over the seniority and other job rights that former CAS employees will exercise.

III. CONCLUSION

After a decade of litigation—ten years of hearings, decisions and appeals somewhat reminiscent of the case of *Jarndyce v. Jarndyce* in Charles Dickens' *Bleak House*—this case finally comes to a close. The record in this case contains overwhelming evidence of an illegal diversion of bargaining unit work by Corcoran. The Board's remedy is entirely adequate and will place the Union in the same circumstances it enjoyed in the *status quo ante.* We grant the Board's petition for enforcement and deny the cross-petitions for review.

So ordered.

NLRB v. Affiliated Midwest Hospital, Inc. d/b/a Riveredge Hospital

789 F.2d 524 (7th Cir.), April 23, 1986

On petition to enforce and cross-application to review Board Order

Before COFFEY, FLAUM, and RIPPLE, Circuit Judges

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FLAUM, Circuit Judge: This appeal arises from challenges to a union decertification election that occurred over six years ago. The employer, which was unsuccessful in ridding itself of collective bargaining obligations, complained of a number of election irregularities, including union misrepresentation of the National Labor Relations Board's processes, failure to allow an employee properly within the unit but not on the voting list to cast a ballot, improper description of the bargaining units in the notice of election and the Board's certification orders, and confusion resulting from erroneous election notices. The Board, in a much delayed decision, affirmed the validity of the election results and subsequently, upon the employer's refusal to bargain, found that an unfair labor practice had been committed. In reaching its result the Board took a significant departure from its past precedent by declaring that misrepresentation of the NLRB's actions would no longer automatically require the invalidating of an election. Thus, on appeal, the employer contests not only the correctness of the Board's rulings on the conduct of the election but also the validity and retroactive application of the Board's new misrepresentation rule. Finding adequate support in the administrative record for all of the NLRB's conclusions, we affirm.

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[26] *Food Store Employees Union, Local No. 347 v. NLRB,* 476 F.2d 546, 549-50 (D.C.Cir.1973) (upholding Board refusal to extend bargaining order to unrepresented store), *rev'd on other grounds,* 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974).

[27] 227 N.L.R.B. 765 (1977), *enforced,* 596 F.2d 378 (9th Cir.), *cert. denied,* 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).

[28] 235 N.L.R.B. 685 (1978).

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The employees in the technical and the service and maintenance units [1] at the Riveredge Hospital in Park Forest, Illinois had been represented by the Union since June 14, 1978. Approximately one year later two employees filed petitions seeking to decertify the Union in both units. These petitions contained certain inaccuracies in that two positions, EKGEST technician and medical technician, properly included in the technical unit were placed in the service and maintenance unit and a number of positions were omitted from the technical unit description, The employer, Affiliated Midwest Hospital, Inc. ("Affiliated Midwest"), owner of Riveredge, filed its own petition in July, 1979, which contained the correct unit descriptions as stated in both the collective bargaining agreement and the initial Board certification in 1978.

On August 10, 1979, Stipulations for Certification upon Consent Election, which were designed to control the conducting of the decertification election, were signed. The Stipulations did not contain unit descriptions but did not incorporate by reference a list of eligible voters and their job classifications, a so-called *Norris-Thermador* list. *See Norris-Thermador Corp.*, 119 NLRB 1301 (1958). The *Norris-Thermador* list accurately reflected the unit classifications of the collective bargaining agreement rather than the erroneous petition initially filed by the two employees. The list did contain, however, a significant error. The names of two employees, Ronnie Green and Alberto Anton, were inadvertently omitted from the service and maintenance unit list.

The problem of conflicting unit descriptions surfaced in the Board's issuance of notices of election. Two weeks prior to the election it was discovered that the notices that the NLRB required the employer to post contained the same erroneous unit description that appeared in the employees' petition. The hospital notified the Board of the error but no changes were made and the notices were posted. Affiliated Midwest contends that these notices resulted in employee confusion, a confusion which, according to the hospital, directly caused an "unusually low" voter turnout. Only seventy-three percent of eligible employees voted in contrast to the over eighty-five percent participation in the initial certification election in 1978.

During the course of the actual voting the omission of employees Green and Anton from the *Norris-Thermador* list was discovered when both employees attempted to vote. The NLRB agents initially refused to allow the two to cast challenged ballots. Once the clerical nature of the omission was revealed, Mr. Anton was allowed to cast a challenged ballot in the service and maintenance unit. Ms. Green, however, had already left the premises and was, thus, unable to participate in the election. The voting resulted in a majority in favor of continued representation in both the service and maintenance unit and the technical unit. The vote was relatively close: the technical unit totals were forty-six to thirty-eight, while the service and maintenance totals were twenty-five to twenty-three. The challenged ballot of Mr. Anton was not included since, in the absence of a vote from Ms. Green, it was irrelevant to the ultimate result.

Affiliated Midwest filed timely objections to the election results. The objections were based on the problems surrounding the unit descriptions and the voting lists and, more significantly, a series of alleged misrepresentations made by the Union during the period between the filing of the petitions and the election. The most controversial of these statements was a leaflet entitled "U.S. GOVERNMENT ISSUED A COMPLAINT AGAINST RIVEREDGE." In fact, no action had been taken by the NLRB against the employer. The charge that had been filed resulted in a settlement containing a non-admissions provision.

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[1] A decertification petition was also filed with respect to the unit composed of registered nurses. That election, unlike the two challenged in this appeal, did result in decertification of the Union. No challenge was made to that result and it thus was not part of the appeal.

On November 21, 1979, the Regional Director recommended that the election be set aside on the grounds that the discrepancies between the election notices and the *Norris-Thermador* list evidenced a failure of the parties to agree on the bargaining unit, making certification impossible. This recommendation was rejected by the Board and the case remanded. *Riveredge Hospital,* 251 NLRB 196 (1980). The Board concluded that there was agreement on the appropriate units and that any discrepancies were immaterial. The only appropriate unit in the decertification election is the recognized bargaining unit and the proper units were deemed to be represented by the stipulated *Norris-Thermador* lists.

On remand the Regional Director once again issued a recommendation that a new election be held. With respect to the denial of Ms. Green's ability to vote and the faulty election notices, the Regional Director found there was no material error. The misrepresentation of NLRB action, however, was held to require the disregarding of the election results under *Formco, Inc.,* 233 NLRB 61 (1977), because the Union's actions "injected the Board into the campaign and caused its neutrality to be impaired."

For reasons that are not apparent from the record, the Board delayed two years before eventually overruling the Regional Director and certifying the election results. In the intervening two years the Board reversed itself for the third time in five years with regard to the effect of misrepresentations generally on labor elections. In *Midland National Life Insurance,* 263 NLRB 127 (1982), the Board held that misrepresentations would not constitute *per se* grounds for vacating an election. The decision did not expressly deal with misrepresentations concerning the NLRB's processes or actions; this is an area of voting problems where the Board, despite its machinations over general misrepresentations, has consistently refused to certify union elections. *See Formco,* 233 NLRB 61 (1977). In reversing the Regional Director in the present case, the Board expressly overruled. *Formco,* finding that there "was no sound reason why misrepresentations of Board actions should be on their face objectionable or be treated differently than other misrepresentations." *Riveredge Hospital,* 264 NLRB 1094, 1095 (1982).

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In response to the certification order Affiliated Midwest refused to bargain with the Union on the theory that the certification order was improper. Unfair labor practice charges were filed against Affiliated Midwest, which responded by contesting the merits of the Board's decision and the retroactive application of the overruling of *Formco.* The Board ruled that the employer was attempting to relitigate issues already dealt with in the certification proceedings without offering any new evidence or special circumstances that would require re-examination. On this basis summary judgment was granted.

In September of 1983, Affiliated Midwest filed a motion for reconsideration on the grounds that the Board did not have the complete record before it when it ruled on the certification question in 1982. The Board once again waited close to two years before ruling. On March 13, 1985, the NLRB denied the motion for the alternative reasons that the employer was aware at an earlier stage of the proceedings of what the Regional Director had transmitted to the Board and thus waived the argument and that Affiliated Midwest raised only legal challenges to the Regional Director's decision so that factual matters implicating the record were not at issue.

II

Affiliated Midwest comes before this court with essentially the same arguments it presented to the Board during the certification proceedings. First, and most significantly, it challenges the validity and retroactivity of the Board's new misrepresentation standard. Second, it questions the propriety of the refusal to allow an employee not on the *Norris-Thermador* list but properly within the unit to cast a ballot. Third, Affiliated Midwest claims that the erroneous unit description in the notices of election resulted in the Board certifying improper units. Finally, the erroneous election notices that were required to be posted in the hospital are alleged to have caused voter confusion sufficient to destroy the "laboratory conditions" mandated for certification elections.

Before reaching the merits there is the threshold issue of the proper standard of review. "It is well settled that direct judicial review of a Board decision to certify a collective bargaining representative on the basis of an election is extremely limited." *NLRB v. Tom Wood Datsun, Inc.*, 767 F.2d 350, 352, 353 (7th Cir.1985). The degree of the deference required is well described in the *en banc* decision in *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610, 613–15 (7th Cir.1983). The majority in *Mosey* stated that while "[w]e may assume that the soundness of an election rule is not the business of the reviewing court," the "substantial evidence on the record as a whole" standard applied to factual determinations should also apply to the application of the Board's election rules to the facts of a given case. 701 F.2d at 615. [2]

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Thus, Affiliated Midwest faces a heavy burden in establishing grounds for not enforcing the Board's bargaining order. In order to challenge the Board's policies directly, as opposed to its applications of those policies, the movant must establish that the NLRB's interpretation of the law is unreasonable. *See NLRB v. Action Automotive, Inc.*, —— U.S. ——, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985). *See also Tom Wood Datsun*, 767 F.2d at 353 ("At a minimum, we will not question a Board election rule which in our view is reasonable."). With respect to the alleged errors in the conduct of the election, Affiliated Midwest must establish that there is not substantial evidence supporting the conclusion that any election irregularities or misconduct did not "so impair the integrity of the ballot result that invalidation of the election is necessary." *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1123 (5th Cir.1975).

A. *The Demise of Formco*

This case is nothing more than the latest chapter in what has become a continuing saga concerning the NLRB's posture with regard to election misrepresentations. Prior to 1977 the Board adhered to the standard of *Hollywood Ceramics*, 140 NLRB 221 (1962), which established that certain types of representations required the invalidation of a certification election. This policy was abandoned in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), only to be reinstated twenty months later in *General Knit of California*, 239 NLRB 619 (1978). *Hollywood Ceramics-General Knit's* standard survived for four years before its most recent abandonment in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). *See generally Mosey*, 701 F.2d at 611–12 (detailing the history of the rule). Throughout this turbulent period of agency policymaking the Board consistently adhered to the policy that alterations of NLRB documents, or misrepresentations of Board processes and actions, required that an election be vacated. *See Dubie-Clark*, 209 NLRB 217 (1974); *Formco*, 233 NLRB 61 (1977); *Kinney Shoe Corp.*, 251 NLRB 498 (1980). The separate treatment provided for misrepresentations of Board actions was based in part on the additional consideration present in such cases of the NLRB's neutral role in labor disputes. *See Natter Manufacturing Corp. v. NLRB*, 580 F.2d 948, 951 (1978).

In its challenge to the reasonableness of the NLRB's reversal of the *Formco* policy, Affiliated Midwest stresses the Board's "on-again off-again" treatment of misrepresentations generally as compared to the consistent approach to *Formco*-type misstatements. The history of this aspect of labor policy illustrates a number of things, but it does not establish that the Board's choices are unreasonable. The fact that a policy has existed for a long period of time does not alone establish that all alternatives are incorrect or untenable.

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[2] The NLRB argues that the Board's application of its policies to the facts is entitled to acceptance in the absence of proof that the Board abused its discretion. The Supreme Court's decision in *NLRB v. Action Automotive, Inc.*, —— U.S. ——, 105 S.Ct. 984, 83 L.Ed.2d 986 (1985), overrules, according to the NLRB, this particular aspect of the *Mosey* decision. While the Court in *Action Automotive* did apply an abuse of discretion standard for bargaining unit determinations, that decision cannot be read to conflict directly with *Mosey*. First, since *Action Automotive* dealt primarily with the reasonableness of a Board policy, it assumed that the abuse of discretion standard applied to applications of that policy but did not contain an analysis of appellate deference. Second, this court in *Mosey* explicitly distinguished the determination of the appropriateness of a bargaining unit *and* the determination of an election policy from the application of an election policy. The two former were deemed to be classically discretionary decisions as opposed to the latter which is an application of law to facts, a type of decision traditionally reviewed under the substantial evidence standard. 701 F.2d at 615.

Any argument against the Board's decision in the present case implicitly contests two underlying conclusions. First, since the decision here is based on *Midland's* assertion that misrepresentations do not, in and of themselves, require the setting aside of elections, Affiliated Midwest is challenging the reasonableness of the *Midland* decision. In the three years between the Board's decision and this appeal, the validity of *Midland* has become well established in the courts of appeals.[3] *See NLRB v. Best Products, Inc.*, 765 F.2d 903, 911–13 (9th Cir.1985) (detailing the acceptance of the *Midland* rule). *See also NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, 498–500 (7th Cir.1984).

Second, assuming that misrepresentations are not *per se* objectionable, Affiliated Midwest also challenges the abandonment of the reason for distinguishing misrepresentations of Board actions, namely that these false statements impugn the neutrality of the NLRB. The Board justified its decision on three grounds. First, the adherence to a neutral posture was considered undercut by the fact that truthful representations of agency action are permitted. From the standpoint of appearances, any statements concerning NLRB action against a party, whether true or not, run the risk of skewing the Baord's stance in the minds of the voters. Second, misrepresentation was viewed as different from the alteration of a Board document, an action that *Midland* considered to be *per se* objectionable, 263 NLRB at 133 n. 25, on the grounds that when the speaker is a party rather than the agency itself the voters are less likely to consider the statement truthful. Finally, and most importantly, the Board held that this type of misrepresentation, like all misrepresentations, was subject to correction by the opposing party. The damage here is not so unique that only the Board can remedy it. Given the judicial acceptance of *Midland*, the Board's extension of that policy to the type of conduct involved here cannot be deemed to be unreasonable as a matter of law.[4]

More significant, from Affiliated Midwest's perspective, than the validity of the decision to forego *Formco* is the retroactive application of the new ruling. Affiliated Midwest contends that the extraordinary delay associated with this case brings this appeal into the scope of our holding in *Mosey* where retroactive application of *Midland* was denied. In *Mosey* five years had passed between a closely decided election and the appeal. During this period the Board policy with respect to misrepresentations was in a state of flux. *Midland* was decided subsequent to the oral argument in *Mosey* but prior to the original panel's decision. A majority of this court sitting *en banc* held that the facts of the case were "so unusual . . . that we cannot be sure it was in the Board's contemplation when the Board announced" that *Midland* would apply to all pending cases. 701 F.2d at 612. "We noted that remand to the Board would therefore be appropriate to allow the Board to decide which standard to apply, but declined to do so because the lengthy, Board-caused delay convinced us that its order should not be enforced at all." *Chicago Marine Container, Inc.*, 745 F.2d at 499 (describing the holding of *Mosey*). Affiliated Midwest points to the long delay, seven years, and the closeness of the election, as evidence of the analogy to *Mosey*.

"Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause 'manifest injustice.'" *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 757 (7th Cir.) (citing *Chevron Oil Co. v. Huston*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)), *cert. denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981). This court, in reliance on *Chevron*, 404 U.S. at 106–07, 92 S.Ct. at 355, has looked at three factors in deciding under what circumstances a nonconstitutional decision will be given prospective effect only: "the reliance of the parties on pre-existing law; the effect of retroactivity on accomplishing the purpose of the law; and any injustice arising from retroactive application." *Chicago Marine,* 745 F.2d at 499. *See also Lyon & Ryan Ford,* 647 F.2d at 757. This case does not present the "manifest injus-

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[3] While it has been accepted the *Midland* rule has been subject to criticism and some courts have reserved exceptions for cases where the misrepresentations are so pervasive and deceptive that the *Midland* assumption that employees can separate the truth from the falsehoods is undermined. *See, e.g., Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1173, 84 L.Ed.2d 323 (1985); *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 730 (1st Cir.1983). *See also NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, 498 n. 4 (7th Cir.1984) (reserving the possibility that *Midland* may not apply to all situations). Affiliated Midwest has not argued before this court that the misrepresentations in this case rose to a level that stripped the *Midland* assumption of its vitality. This court, therefore, need not reach the issue of whether an exception to *Midland* will be created in this circuit.

[4] The delay of the NLRB in processing this case has created an unusual situation where other courts have approved of the "*Riveredge* doctrine" before *Riveredge* itself is reviewed by this court. *See NLRB v. Best Products Co.*, 765 F.2d 903, 911 (9th Cir.1985); *NLRB v. Rolligon Corp.*, 702 F.2d 589, 594–95 (5th Cir.1983). Because this court is the first to review *Riveredge* with the benefit of a complete record, the earlier cases, while insightful, do not serve as the basis for holding that the Board acted reasonably.

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tice" that existed in *Mosey. Cf. Chicago Marine,* 745 F.2d at 499. Affiliated Midwest, unlike the employer in *Mosey,* is not facing a changed rule on appeal following an agency decision based on the former policy. The basic change in policy (*Midland*) was made prior to the NLRB's decision in this case and the expansion occurred in the present case. The employer here did not go through the extensive appellate litigation involved in *Mosey* only to have the rules changed at the last minute. Retroactive application is not as troublesome when the policy is applied to the case declaring it, as opposed to a case pending on appeal. *Cf. Best Products,* 765 F.2d at 913 ("Given that there had only been a report and recommendations to hold a hearing and no Board decision in this case before *Midland* was handed down, it is problematical whether retroactivity is even needed here."). To refuse to allow the Board to apply policy changes in the case in which the new approach is declared would severely curtail the Board's practice of declaring policy through adjudication. The prospective application of a rule announced in adjudicatory proceedings is an improper exercise of the Board's quasi-legislative power to promulgate rules. *See NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

Furthermore, to the extent retroactivity is at issue, it is hard to see how Affiliated Midwest could be considered to have detrimentally relied on pre-existing law. As pointed out in *Chicago Marine,* the area of election misrepresentations has been in such a flux that it is difficult to describe any policy as pre-existing law. *Chicago Marine,* 745 F.2d at 499. While it is true that the NLRB had been constant about its adherence to *Formco,* the decision in *Midland* was handed down prior to the ruling in the present case. This change in policy put the employer on notice that a new standard with regard to misrepresentations of Board actions was a possibility.[5] Thus from a litigation standpoint, there is not a strong reliance claim where the *initial* adjudicatory body applies a new standard in the context of an emerging change in policy or law. This is in contrast to the situation in *Mosey* and *Chicago Marine,* a case in which *Midland* was retroactively applied, where the policy change occurred after the initial Board decision.

Reliance can relate to matters outside of the actual litigation. In particular, parties can organize their affairs in a certain manner only to have the rules changed when called into court. *See, e.g., Continental Web Press, Inc. v. NLRB,* 742 F.2d 1087, 1092–93 (7th Cir.1984) (change of long standing policy with regard to scope of units in lithographic printing plants). The actual harm in the present case stems from the hospital not counteracting the Union propaganda and thus being "more honest than it was legally required to be" during the course of the campaign. *Chicago Marine,* 745 F.2d at 500. "This is not the sort of hardship contemplated in *Chevron.* . . ." *Id.* Under the circumstances of this case Affiliated Midwest was not faced with a new policy that affected the essence of its purpose and operation. The type of "injustice" that can preclude retroactive effect is not present in this case.

What remains of Affiliated Midwest's claim is the inequity of being subject to inexcusable Board delay and the incumbent issue of having an employer bargain with, and employees represented by, a union that won an election seven years ago. While this court in *Mosey* did use its equitable power to deny enforcement of an order, delay alone did not mandate that result. In *Mosey* the issue was whether the matter should be remanded where unusual circumstances made the Board's intent to have *Midland* apply to the case

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unclear. 701 F.2d at 612. Unlike *Mosey,* there is no question of Board intent. This action is at an end and there is no issue requiring remand to the Board for further proceedings. There is no reason to deny enforcement on the grounds of delay in the absence of a tangible harm to the parties. Affiliated Midwest contends that it and its employees are harmed by having the union "foisted" upon them after seven years. As sympathic as this argument is, the court in *Chicago Marine* explicitly rejected it.

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[5] Affiliated Midwest contends that if the Board had not delayed in reaching a decision its case would have been decided before *Midland* and it would have prevailed. This argument is too speculative to be accepted. It is entirely plausible that the NLRB could have promptly ruled in this case and used it as the vehicle for declaring the new policy rather than *Midland.* Indeed it may be reasonable to assume that the delay can be attributed to the process of reconsidering the *Hollywood Ceramics* and *Formco* policies.

> If the delay and cost incident to ordinary review of a representation election were enough to trigger the "unusual circumstances" exception of *Mosey*, any employer fortunate to have had a representation election at the proper time could compel the use of the [Board's former] standard by objecting to an alleged misrepresentation and going through the review process. *Mosey* clearly was not intended to produce any such result.

745 F.2d at 499 n. 7. *See also NLRB v. Schill Steel Products, Inc.*, 480 F.2d 586, 591 (5th Cir.1973) (A claim of injustice stemming from an "old" election ignores the fact "that there once was indeed a fair representation election . . . and that the union was selected by a majority of the employees."). Thus, while we in no way sanction the Board's handling of this matter and if further proceedings were necessary we would not hesitate to deny enforcement of the decision, enforcement will not be denied on the basis of the inappropriateness of retroactive application of the Board's new misrepresentation policy.

B. *Refusal to Allow an Employee to Vote*

The second alleged error in the Board's certification ruling (as distinguished from the later unfair labor practice proceeding) relates to the NLRB agent's refusal to allow Ronnie Green, whose name did not appear on the *Norris-Thermador* list, to cast a challenged ballot. "It is well settled that generally pre-election agreements are binding upon the Board." *NLRB v. Speedway Petroleum*, 768 F.2d 151, 154 (7th Cir.1985). Requiring these agreements to adhere to a standard of absolute perfection would undermine the goal of having the parties expedite the handling of representation elections without extensive Board involvement. *See Stanley Aviation Corp.*, 112 NLRB 461, 462–63 (1955).

In this case there was no allegation of manipulation: the failure to include Ms. Green's name was an inadvertent clerical error. *Cf. Illinois Valley Community Hospital*, 249 NLRB 410 (1980). Nor is this a case in which the magnitude of the error was aggravated by discovery before balloting began so that correction was possible. *See Smith & Smith Aircraft Co. v. NLRB*, 735 F.2d 1215, 1219 (10th Cir.1984); *Southhampton Marine Corp.*, 221 NLRB 649 (1975). "[T]he inadvertent omission of an eligible employee . . . does not render a vote list susceptible to challenge by either party unless the mistake is discovered in sufficient time to permit its correction before balloting begins." *NLRB v. Flowers Baking Co. of Gadsden*, 578 F.2d 1145, 1147–48 (5th Cir.1978). *See also Pyper Construction Co.*, 177 NLRB 707 (1969). *Smith & Smith*, 735 F.2d at 1219 (discussing the standard). This case is indistinguishable from *Flowers Baking* and the doctrine of that case is controlling.

Affiliated Hospital's contention that the list is invalid since the omissions meant the election was not held in the appropriate bargaining unit is untenable if *Norris-Thermador* lists are to be of any value. Under this theory the list would be a valid guide only if it were letter-perfect which would defeat the saluatory effect of having the parties stipulate to eligibility. There would have to be constant and careful agency review to prevent clerical errors from upsetting elections. Furthermore, both the Union and the employer were in a position to catch any error prior to the actual voting. While it would have been preferable for the NLRB agent to allow Ms. Green to cast a challenged ballot, as was done in the case of Mr. Anton, in the absence of willful misconduct by the parties or the Board this unfortunate clerical

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error by the parties does not require the invalidation of the election.

C. *Inaccuracies in the Certified Bargaining Unit and the Election Notices*

Affiliated Hospital's final two contentions relate to the use of the inaccurate unit descriptions contained in the initial employees' petition as the basis for the election notices. It is alleged that these errors resulted in voter confusion and ultimately the certification of improper bargaining units. The Board in its 1980 decision found any errors to have inconsequential effects on the election and that the parties had agreed to and conducted a valid election in the appropriate units. Unfortunately, the Board in issuing its 1982 decision, and its August, 1983 bargaining order, continues to describe the bargaining unit based on the erroneous unit description. Thus, the Board appears to have caught itself in a web of administrative sloppiness, declaring that the employer bargain with the units set out in the collective bargaining agreement and then ordering bargaining in the wrong unit.

With respect to the effect of the improper notices on the election, Affiliated Midwest has presented no reason to disturb the Board's finding. The discrepancies between the notices and the *Norris-Thermador* list consisted of (1) the inclusion of the positions of EKGEST and medical technician in the service and maintenance unit rather than the appropriate technical unit and (2) the failure to omit certain non-occupied positions not on the stipulated list from the notices. The Board found these errors to be immaterial. The erroneous placement or inclusion of vacant positions could not have an impact on the election, and the improper inclusion of the medical technician in the service unit was inconsequential because that employee voted in the technical unit in accord with the *Norris-Thermador* list. Under these circumstances there is substantial evidence supporting the Board's conclusion that the election was in fact held in the appropriate units. Affiliated Midwest's claim of voter confusion is nothing more than a speculative assertion. The employer focuses on the low voter turnout. There are, however, myriad reasons for why a person may fail to vote, and there is no evidence identifying a dominant factor in this case. In fact, the employee most likely to be confused, the medical technician, participated in the election and voted in the correct unit. [6]

More troubling is the Board's continued use of the improper unit descriptions. As was stated in the initial NLRB decision, "[i]t is well established that the only appropriate unit in a decertification election is the existing or recognized bargaining unit." *Riveredge Hospital,* 251 NLRB 196, 197 (1980) (citing *Booth Broadcasting Co.,* 134 NLRB 817 (1961)). *See also Fast Food Merchandisers,* 242 NLRB 8 (1979). On the basis of the *Norris-Thermador* list the Board justifiably concluded that the parties had agreed to and in fact conducted a decertification election in the recognized units. This would seem to indicate that the Board intends the employer to bargain with the units set out in the collective bargaining agreement and not those described in the employees' petition or the Board's subsequent orders.

While we are not unmindful of the fact that the Board was aware of the errors **533** in the notices two weeks prior to the election and the fact that the Board continues to rely on the notices despite acknowledgment of the error, we cannot overturn an election based on technical errors that reflect only on the NLRB's competence rather than the validity of the election. Affiliated Midwest's claim that the election was held in an inappropriate unit requires an elevation of technical perfection over reality that cannot be accepted. *See NLRB v. Southern Health Corp.,* 514 F.2d 1121, 1123 (7th Cir.1975) ("the election environment itself produces many instances of campaign impropriety which employees frequently ignore or discount."). Thus, the discrepancy between the Board's bargaining order and the units described in the collective bargaining agreement and the *Norris-Thermador* list will not serve as the basis for denying enforcement. The bargaining order and all documents required to be posted under it, however, must be modified to reflect the appropriate bargaining unit. *See generally NLRB v. Custom Excavating,* 575 F.2d 102 (7th Cir.1978); *NLRB v. Copps Corp.,* 458 F.2d 1127 (7th Cir.1972).

III

Affiliated Midwest's final objection relates not to the substance of the certification proceedings but to the procedure. In ruling on the certification issue for the second time in 1982, the Board did not have before it the full record compiled by the Regional Director pursuant to the Board's 1980 remand. This is alleged to make the order unenforceable under *Prairie Tank Southern, Inc. v.*

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[6] Affiliated Midwest argues that all election irregularities must be analyzed from an objective standard in reliance on *Litton Dental Products,* 221 NLRB 700, 708 (1975). Indeed, the Board must determine "whether the conduct could reasonably be expected to have an impact on the election." *NLRB v. Southern Health Corp.,* 514 F.2d 1121, 1123 (7th Cir.1975) (citing *Hollywood Ceramics,* 140 NLRB at 224). This does not, however, make the actual effects irrelevant where they indicate minimal impact nor does this relieve Affiliated Midwest, as an objecting party, of the obligation to present any evidence of the possibility of voter confusion. The objecting party has the burden of establishing that the election was not fair. *NLRB v. Mattison Machine Works,* 365 U.S. 123, 124, 81 S.Ct. 434, 435, 5 L.Ed.2d 455 (1961). Affiliated Midwest's speculative evidence of voter confusion does not under any standard begin to rise to a level where the fairness of the election would be called into question.

NLRB, 710 F.2d 1262 (7th Cir.1983). Although the hospital was aware of the situation at the time of the unfair labor practice proceeding, it did not raise the issue until its motion for reconsideration of the bargaining order issued in the enforcement proceeding. Under these circumstances Affiliated Midwest is deemed to have waived this argument.

In *Prairie Tank* this court created an exception to the rule that all available arguments be presented at the representation rather than the enforcement stage. The employer in that case did not object to the inadequacy of the record at the certification proceedings but did raise the point during enforcement. This Court found that the issue was preserved because Prairie Tank did object at the earliest opportunity after discovering the facts forming the basis for the argument and because in the period between the two proceedings the decision in *NLRB v. Allis-Chalmers Corp.*, 680 F.2d 1166 (7th Cir.1982) provided a new defense to the Board's treatment of the record. 710 F.2d at 1265–67. In the instant case, assuming that this case is analogous to *Prairie Tank* and thus putting aside the arguments of prior notice of treatment of the record raised by the Board, the language of *Prairie Tank* itself requires the affirmance of the finding of waiver. Affiliated Midwest did not raise the issue at its "first opportunity," the enforcement proceedings, but waited until the motion for reconsideration. An argument should be raised at the appropriate time barring extraordinary circumstances. *NLRB v. Cutting, Inc.*, 701 F.2d 659, 670 (7th Cir.1983). Here, unlike *Prairie Tank*, the employer had the benefit of the *Allis-Chalmers* decision, and *Prairie Tank*, before the Board's decision in the enforcement proceedings. Affiliated Midwest has presented no reasons why it did not raise its arguments in the enforcement proceeding; its arguments on appeal are limited to why the issue was not raised in the certification stage of the action. Thus, assuming arguendo that there was justification for waiting until the enforcement proceeding, there is no basis for excusing the failure to raise the issue until the motion for reconsideration.

IV

For the foregoing reasons the order of the Board will be enforced with the modification that the bargaining order contain the unit descriptions specified in the collective bargaining agreement.

NLRB v. Insulfab Plastics, Inc., New England Division

789 F.2d 961 (1st Cir.), April 24, 1986—274 NLRB 817

On petition to enforce Board Order

Before CAMPBELL, Chief Judge, COFFIN, Circuit Judge, and PETTINE, * Senior District Judge

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LEVIN H. CAMPBELL, Chief Judge: The question raised in this petition for enforcement of a National Labor Relations Board bargaining order is whether an employer must continue to recognize and bargain with a formerly independent local union once the union has affiliated with a large international union. The employer insists that it need not do so unless and until the Board formally certifies the affiliated union after a representation election. The Board has held, to the contrary, that an election and certification proceeding is unnecessary and that the employer commits an unfair labor practice by refusing to bargain. Thus the Board has ordered the employer to recognize and bargain with the affiliated union.

I.

The employer, Insulfab Plastics, Inc. ("Insulfab" or the "Company"), manufactures and sells plastic products at a plant in Watertown, Massachusetts. For over 25 years it had a collective bargaining relationship with an in-house union known as the Independent Workers of Insulfab (the "Union"), which represents the production and maintenance employees at the Watertown plant. In August of 1983, when the events in this case occurred, there were 32 such employees, all of whom belonged to the Union.

During contract negotiations in late 1982, members of the Union became dissatisfied with their inability to obtain wage increases from Insulfab and began discussing the possibility of affiliating with an international union. In late 1982 and again in early 1983, Union President Joseph P. Flanagan contacted Vincent J. Campbell, the Director of Organization for the New England area of the International Union of Electrical, Technical, Salaried and Machine Workers, AFL–CIO ("IUE"). At a regular membership meeting on August 9, 1983, after a presentation by IUE representatives, the approximately 20 members in attendance voted unanimously to hold a meeting for the purpose of voting on affiliating with the IUE.

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* Of the District of Rhode Island, sitting by designation.

A few days later, Flanagan posted a notice on the Union bulletin board at the plant informing the Union's membership about a special meeting to be held on August 17, 1983, to vote on whether to affiliate with the IUE. Copies of this notice were also mailed to all Union members, and copies were handed to employees at the plant. At the August 17 meeting, attended **964** by 29 of the Union's 32 members, Campbell explained what affiliation with the IUE would entail. After discussion among the members, an employee moved for a secret ballot vote. Each member then wrote either "yes" (in favor of affiliation) or "no" (against it) on a piece of paper, and the votes were counted in view of the members by two employees appointed by Flanagan to do so. The final tally was 20 in favor (including a voice vote by a latecomer to the meeting), eight against, and one blank. Subsequently, all but one member in attendance voted to make the affiliation decision unanimous.

Following the election, Flanagan sent a letter to Patrick J. Nicolazzo, Insulfab's General Manager, informing him of the election results, and stating (imprecisely) that the IUE was now the employees' bargaining agent. Nicolazzo replied that the Company "does not believe that the IUE–AFL–CIO represents a majority of [its] employees in any proper group," and refused to recognize the IUE until it was certified by the Board. Thereafter Flanagan and Nicolazzo, as well as Campbell and Nicolazzo, exchanged a series of letters in which Flanagan made clear that the bargaining representative was the affiliated Union (which continued to operate under the name of Independent Workers of Insulfab) rather than the IUE itself, and that the IUE's role would be limited to assisting in servicing the membership. The Company continued to insist, however, that it would not recognize the Union until it was certified in a Board election.

First the IUE, and later the Union, filed an unfair labor practice complaint against Insulfab, alleging that the Company wrongfully refused to recognize and to bargain with the Union in violation of sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1) & (5) (1982). On March 11, 1985, the Board adopted without comment the administrative law judge's findings and conclusions that Insulfab violated the Act in refusing to bargain since there was sufficient continuity in the identity of the bargaining agent and the election had been procedurally fair. 274 NLRB No. 126 (1985). The Board ordered Insulfab to recognize and to bargain with the affiliated Union as the exclusive collective bargaining representative of the production and maintenance employees at the Watertown plant. Also, it required the Company to furnish the Union with the requested information about job classifications, wages, seniority, and other data reasonably related to the latter's bargaining responsibilities.

II.

The Act requires an employer to bargain in good faith with the exclusive bargaining representative selected by a majority of its employees in an appropriate bargaining unit. 29 U.S.C. §§ 158(a)(5), 159(a) (1982). Insulfab contends that it need no longer bargain with the Union, which it has recognized for over 25 years, because the membership's decision to affiliate with the IUE so substantially altered the Union as to create an essentially new bargaining representative. In the Company's view, a "question of representation" exists, requiring the Board to conduct a representation election by secret ballot to decide whether a majority of the employees now support the affiliated Union. 29 U.S.C. § 159(c) (1982).

But the Board has long held, and courts (including most recently the Supreme Court) have recognized, that organizational changes such as affiliations or mergers do not inevitably raise a "question of representation" so as to necessitate a representation election. [1] So long as the changes are not sufficiently dramatic to

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[1] *See, e.g., NLRB v. Financial Institution Employees, Local 1182,* ––– U.S. –––, –––, 106 S.Ct. 1007, 1011–17, 89 L.Ed.2d 151, 54 U.S.L.W. 4203, 4205–08 (Feb. 26, 1986) (striking down as an unauthorized intrusion into internal union affairs a Board requirement that a union permit non-union employees to vote in an affiliation election); *J. Ray McDermott & Co. v. NLRB,* 571 F.2d 850, 857–58 (5th Cir.), *cert. denied,* 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978); *NLRB v. Pearl Bookbinding Co.,* 517 F.2d 1108, 1111–12 (1st Cir.1975); *NLRB v. Commercial Letter, Inc.,* 496 F.2d 35, 38–41 (8th Cir.1974).

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alter the union's identity, a decision to affiliate is an internal union matter that does not affect the representative status of the bargaining agent or end the employer's duty to continue its relationship with that union. Otherwise, the Board has reasoned, "[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." *Canton Sign Co.*, 174 NLRB 906, 909 (1969), *enforcement denied on other grounds*, 457 F.2d 832 (6th Cir.1972).

Under the Board's current test, an employer must continue to bargain with the existing bargaining agent if two conditions are met. *See NLRB v. Financial Institution Employees, Local 1182*, —— U.S. ——, ——, 106 S.Ct. 1007, 1012, 89 L.Ed.2d 151 (1986). First, the employees in the bargaining unit must have had a fair opportunity, with adequate due process safeguards, to approve the organizational change. *See, e.g., Newspapers, Inc.*, 210 NLRB 8, 9 (1974), *enforced, NLRB v. Newspapers, Inc.*, 515 F.2d 334 (5th Cir.1975). Second, there must be "substantial continuity" between the pre-affiliation and the post-affiliation union. *See, e.g., NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1111–12 (1st Cir.1975). Here, the Board determined that both requirements were satisfied and that therefore the results of the affiliation election were valid. Based on the record as a whole, we uphold the Board's findings as supported by substantial evidence.

A. *Due Process Standards*

For the Union's vote in favor of affiliation to meet the Board's standards, it must accurately reflect the sentiments of a majority of the employees in the bargaining unit. *See NLRB v. Commercial Letter, Inc.*, 496 F.2d 35, 42 (1974); *Hamilton Tool Co.*, 190 NLRB 571, 574 (1971). This means that the election must "be conducted with adequate 'due process' safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy." *Financial Institution*, —— U.S. at ——, 106 S.Ct. at 1012. We find substantial evidence supporting the Board's finding that the Union's choice "to conduct its business more informally in accordance with the traditions of New England town meeting democracy" met the necessary due process standards.

First, it appears that members of the Union had adequate notice that an election to decide whether to affiliate with the IUE would be held. Several days after the issue of affiliation was initially discussed at the regular membership meeting on August 5, 1983, Union President Flanagan posted on the Union bulletin board at the plant a notice of the special affiliation election meeting to be held on August 17. In addition, copies of the notice were mailed to all unit members, and copies were also distributed at the plant. All but three of the 32 members of the Union attended the meeting, which was held at the customary time and location of regular Union meetings.

Moreover, contrary to Insulfab's contention, there is sufficient evidence from which to conclude that the employees were adequately informed as to the effects of affiliation and that they had sufficient opportunity for discussion before voting. IUE representatives explained the supposed advantages of affiliating. They stated that the officers would remain the same, that the IUE would come in, if requested, to assist in bargaining and in the processing of grievances, that the membership retained the final decision on striking, and that the dues would increase somewhat after affiliation. Before voting, the employees had a chance to discuss the pros and cons of affiliation outside the presence of the IUE spokesmen. While Union members were not informed of every change that would take place, there is substantial evidence in support of the Board's finding that the Union members were adequately informed.

The Company charges that there was no impartial party present during the voting

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and that the voting did not follow proper rules of procedure. But we believe the Board was entitled to find, as it did, that the voting procedures, while informal, met minimal due process standards. Voting was by secret ballot, after the IUE representatives left the room. Employees preserved some measure of privacy by turning their backs to the others or by cupping their hands over their ballots. The ballots were publicly tallied by two employees. When asked if everyone was satisfied with the voting procedure, no one voiced any objection or discontent. Indeed, after the results of the secret ballot were announced, the members voted 28 to 1 to make the affiliation decision unanimous.

Insulfab has failed to point to any evidence that the affiliation election did not, in fact, reflect the views of a large majority of the employees. For example, no one in the bargaining unit is shown to have come forward to oppose the results of the affiliation election. Thus we find sufficient support for the Board's determination that the Union's decision to affiliate reflected the considered choice of the majority of the bargaining unit employees.

B. *Substantial Continuity of Representation*

Whether a union's identity has remained essentially the same or whether it has changed so substantially as to require a new representation election depends on a factual determination by the Board after it examines the various changes that affiliation may effect. *J. Ray McDermott & Co. v. NLRB,* 571 F.2d 850, 857 (5th Cir.), *cert. denied,* 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978). The Board generally considers a number of factors, including "structure, administration, officers, assets, membership, autonomy, by-laws, size," *NLRB v. Pearl Bookbinding,* 517 F.2d 1108, 1111–12 (1st Cir.1975), and looks for changes "in the rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer," *McDermott,* 571 F.2d at 857. *See also St. Vincent Hospital v. NLRB,* 621 F.2d 1054, 1057 (10th Cir.1980). So long as the Board's conclusion is supported by substantial evidence on the record as a whole, we must affirm. 29 U.S.C. § 160(e) (1982); *NLRB v. Commercial Letter, Inc.,* 496 F.2d 35, 39 (8th Cir.1974).

Here, the Board found that affiliating with the IUE does not significantly change the Union's identity.[2] The bargaining unit will remain unchanged, and the officers (as well as those responsible for negotiating and processing employee grievances) will also remain the same. Retaining the same key personnel is important, for "[w]hen the same persons participate in communications with the company with respect to grievances, contract negotiations, and the like, continuity is likely to be preserved." *St. Vincent Hospital,* 621 F.2d at 1057. *Compare Retail Store Employees Union, Local 428 v. NLRB,* 528 F.2d 1225, 1228 (9th Cir.1975) (per curiam) (affirming a Board finding that there was no substantial continuity because of a leadership change). The Union, moreover, says it will honor any existing contractual commitments to Insulfab, and its activities will continue to be governed for the most part by its own constitution and bylaws.

Insulfab contends, nonetheless, that when a small independent union affiliates with a large international union of several hundred thousand members, the changes accompanying affiliation are necessarily so great as to create an essentially new bargaining entity. Once the Union affiliates, Insulfab asserts, the IUE's constitution will significantly affect the autonomy the Union enjoyed as an independent. That **967** document, it is true, places certain obligations on the Union, such as payment of minimum dues, affiliation with district councils, and IUE approval before the membership can change the Union's constitution. The Board supportably found, however, that the Union's local autonomy is not significantly curtailed. The Union continues to retain control over negotiating and administering contracts, processing grievances, and calling strikes, with assistance from the IUE only when requested. The Board also found that "the money which currently reposes in the Independent's treasury will remain there, to be spent by the [Union] for its own purposes and at its sole discretion."

In urging what would amount to a per se rule that affiliation of a small independent with a much larger union creates a substantially different bargaining entity, Insulfab relies on three Third Circuit decisions: *American Bridge Division, U.S. Steel Corp. v. NLRB,* 457 F.2d 660, 664 (3d Cir.1972), *NLRB v. Bernard Gloekler North East Co.,* 540 F.2d 197 (3d Cir.1976), and *Sun Oil Co. v. NLRB,* 576 F.2d 553 (3d Cir.1978). Those cases, however, are distinguishable.

In *American Bridge,* the court concluded that the local was "far different" after affiliation because, unlike here, the international's constitution substantially limited the union's autonomy by giving the international responsibility over collective bargaining, grievance settlement, and calling strikes. Moreover, the court was apparently influenced in its conclusion that a representation election was necessary by the presence of many procedural irregularities, including the refusal by the union's executive committee to hold a special meeting to discuss affiliation despite the petition of more than 100 (out of some 300) members requesting such a meeting. Here, in sharp contrast, a majority of the Union membership clearly approved the affiliation in a procedurally valid election.

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[2] Insulfab argues that the ALJ's finding of substantial continuity, which the Board adopted, was based on the mistaken assumption that the Union had already affiliated when it in fact had not, pending a resolution of this case. But, even if such a misapprehension existed, we believe that the ALJ considered the effects of affiliation on the Union and articulated grounds adequate to sustain the Board's finding of continuity. *See Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 853, 85 L.Ed. 1271 (1941) (requiring disclosure of the basis of an agency's order).

Similarly, the court in *Bernard Gloekler* found that the union, by affiliating with the pre-existing local affiliate of the United Auto Workers ("UAW"), lost substantial control over its affairs, and that the structure, administration, assets, membership, autonomy, and by-laws all changed as a result. Moreover, before the affiliation vote, the UAW local had tried unsuccessfully to oust the independent by demanding a representation election. Thus the court invalidated the results of the affiliation vote in part because of its concern that the UAW local was using affiliation as a stratagem to avoid the "contract bar" rule that prohibited any representation election from taking place during the term of a collective bargaining agreement. No such concern is present here.

Sun Oil is also different from the instant case. The dispute arose there only *after* a representation election had been held at the Board's behest. In deciding that the company was not bound by collective bargaining agreements negotiated by the two independent unions before they affiliated with a large international, the court reasoned that the Board's agreement to conduct a representation election showed that, despite its position to the contrary on appeal, "the Board [had] determined, in effect, that the employees had a choice between different and distinct bargaining representatives or none." 576 F.2d at 557. Moreover, the *Sun Oil* court also found that the local independent's constitution and by-laws were "largely superseded" by the international's, and that the local was "abandoning independence for international affiliation." *Id.*

To be sure, in both *Gloeckler* and *Sun Oil* the Third Circuit attached considerable weight to the fact that an affiliated union can "flex considerably more bargaining muscle than the 30-person local independent." *Sun Oil,* 576 F.2d at 557. But the notion that a question of representation is created simply by the increase in a union's bargaining power caused by affiliation has no express basis in the Act, and has been rejected by the Board. *See New Orleans Publishing Service, Inc.,* 237 NLRB No. 134 (1978); *Newspapers, Inc.,* 210 NLRB No. 8 (1974), *enforced,* 515 F.2d 334 (5th Cir.1975). The Supreme Court's recent decision in *Financial Institution*

likewise suggests that an increase in a union's bargaining power is not, standing alone, determinative of whether affiliation raises "a question of representation." Observing that there may be a variety of reasons why a local union might seek to affiliate ("the larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union"), the Court noted that the Board has recognized that a union " 'must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process.' " —— U.S. at —— n. 5, 106 S.Ct. at 1011–1012 n. 5 (*quoting The William Co.,* 244 NLRB 953, 955 (1979)).

Especially where the union membership has expressed its desire to affiliate (at least in part to improve its bargaining posture), and the continuing majority support of the original bargaining representative is not in doubt, we are not inclined to override the Board's judgment that substantial continuity exists and to adopt instead Insulfab's suggested per se rule. Even the Third Circuit has recognized that determining whether substantial continuity exists is a fact-specific determination, to be made by the Board in the first instance after considering the particular effects of an organizational change. This makes sense since not every international exerts the same degree of control over its member locals, and the terms of affiliation will differ from case to case. Moreover, the Supreme Court in *Financial Institution* explicitly rejected the argument that affiliation *by itself* necessarily changes the union's identity and results in employees being represented by a different organization; rather, the Court asserted that unless a question of representation is raised, an affiliation vote is a purely internal union affair. —— U.S. at ———, 106 S.Ct. at 1011–1015.

Here, there is substantial evidence to support the Board's finding that the affiliation does not raise a question of representation. Moreover, since Congress has entrusted the Board with the authority to interpret and implement the Act, we have generally allowed the Board wide latitude to construe its provisions and to determine how best to effectuate the Act's policies, especially in areas implicating, as here, agency expertise. Thus such a Board decision should be sustained as long as it is not irrational or inconsistent with the Act. *See Financial Institution* —— U.S. at ——, 106 S.Ct. at 1013; *Beth Israel Hospital v. NLRB* 437 U.S. 483, 501, 98 S.Ct. 2463 2473, 57 L.Ed.2d 370 (1978). The Board's judgment in this case that a small independent's affiliation with a large international does not raise a question of representation, particularly where the membership freely chose to continue its support of its bargaining agent, is consistent with both the policy against unnecessary outside interference with union decision-making and the policy in favor of maintaining stability in the bargaining representative. *See* —— U.S. at ———, 106 S.Ct. at 1013–1016.

Enforcement of the Board's order is granted.

NLRB v. Rhone-Poulenc, Inc.

789 F.2d 188 (3d Cir.), April 24, 1986; rehearing denied July 15, 1986—274 NLRB No. 129

On petition to enforce Board Order

Before GIBBONS, BECKER, and ROSENN, Circuit Judges

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GIBBONS, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order directing Rhone-Poulenc, Inc., the employer, to bargain with the Oil, Chemical, and Atomic Workers International Union, AFL–CIO, Local 8-948, the union. The employer concedes that it refused to bargain with the union after the Board certified it as the employees' bargaining representative. It contends, however, that the Board should not have certified the union in light of irregularities in the Board-supervised election. We reject this contention and enforce the Board's order.

I.

On December 21, 1983 the employees at the employer's Lakewood, New Jersey plant participated in an election pursuant to a stipulated election agreement. Of forty-five ballots cast, twenty-four favored the union, and twenty opposed it; one challenged ballot was discounted. Within the five-day period specified by 29 C.F.R. § 102.69(a) (1985) the employer filed with the Regional Director a letter setting forth three objections to union conduct that allegedly affected the outcome of the election. The Regional Director advised the employer that within five days of the filing of the objections it had to furnish any supporting evidence it had available to it at that time. The employer subsequently submitted four employee affidavits that not only bore on the original objections but that also included new allegations about union threats and promises.

The Regional Director submitted a report to the Board recommending that it reject the three timely objections and certify the

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union as the bargaining representative. He refused to investigate the allegations first raised in the affidavits because the employer had not presented them within five days of the election. The employer then filed a timely exception to the Regional Director's report, challenging his disposition of two of the three timely objections as well as his refusal to investigate the additional allegations. A divided three-member panel of the Board adopted the Regional Director's report and recommendation and certified the union.

In order to obtain judicial review the employer refused to bargain.[1] The General Counsel filed an unfair labor practice charge, and the Board, with one member dissenting, granted his motion for summary judgment. *See Rhone-Poulenc, Inc.*, 274 NLRB No. 129, 118 L.R.R.M. (BNA) 1494, 1494 (1985).

II.

We first consider the employer's exception to the Regional Director's rejection of two of its timely objections. The employer objected first that representatives of the union "knowingly misrepresented to the eligible voters within the unit that the 'by-laws' of the National Labor Relations Board prohibit an employer from reducing any existing wage and benefits once a union wins the right to represent employees." Joint Appendix at 1. It also objected that the union, via two letters, misled the eligible voters into thinking that the Board was not absolutely neutral in the election. In the first letter Henry Santos, the president of the union, wrote, "Eveything [sic] I have stated here can be verified through Dawn Miller, she is the representative assigned to this election. She works for the Labor Board in Philadelphia." Joint Appendix at 4. And in the second letter he stated,

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[1] *See Aircraft Radio Corp. v. NLRB*, 519 F.2d 590, 591 n. 2 (3d Cir.1975).

> I spoke to Ms. Dawn Miller of the National Labor Board and told her of the company's threat of loss of benefits, she admits it is against the law and advises me to file a charge against the company with the N.L.R.B. I will discuss this with all of you on the 17th.

Joint Appendix at 5.

Treating the two objections as presenting the single issue of whether a misrepresentation by an election participant invalidates an election outcome and assuming that Mr. Santos's statements reached the eligible voters, the Regional Director ruled that the misrepresentations did not justify setting aside the election. In so ruling the Regional Director applied the rule, announced in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 131 (1982), that the Board would not probe the truth or falsity of campaign statements recognizable as originating with one of the partisans in an election.

The employer contends that the *Midland* rule should not apply in cases involving partisan misrepresentations about Board actions or positions. In so contending it asks us to ignore established Board policy. In *Affiliated Midwest Hospital Inc. d/b/a Riveredge Hospital*, 264 N.L.R.B. 1094 (1982), the Board, overruling its holding in *Formco, Inc.*, 233 N.L.R.B. 61 (1977), held that, for purposes of assessing the validity of election results, it would treat partisan misrepresentations concerning Board actions or positions no differently than it treats other misrepresentations. *See* 264 N.L.R.B. at 1094–95; *see also SDC Investment, Inc.*, 274 NLRB No. 78, 118 L.R.R.M. (BNA) 1410, 1411–12 (1985). Thus, while the introduction to eligible voters of forged or altered Board documents may still result in the setting aside of an election because the partisan nature of such misrepresentations is not evident, partisan misrepresentations recognizable as such will not. *See The Coca Cola/Dr. Pepper Bottling Company of Memphis*, 273 N.L.R.B. No. 68, 118 L.R.R.M. (BNA) 1225, 1226 (1984) (rejecting objection that union official's oral misrepresentation invalidated election); *Metropolitan Life Insurance Co.*, 266 N.L.R.B. 507, 507–08 (1983) (rejecting objection that employer's oral misrepresentation invalidated election);

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County Line Cheese Co., 265 N.L.R.B. 1519, 1519 (1982) (rejecting objection that employer's written misrepresentation invalidated election).

In light of the fact that the *Midland* rule clearly applies in the circumstances of this case, we can set aside the Board certification here only if we conclude that the *Midland* rule runs afoul either of section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c) (1982), or of the Board's own election rules. *See NLRB v. ARA Services, Inc.*, 717 F.2d 57, 63–68 (3d Cir.1983) (en banc) (plurality opinion). We conclude that it does neither. Indeed the Board's adoption of the *Midland* rule—a move that marks a return to the position initially taken by the Board in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313 (1977), and a move based on the Board's appraisal of the likely effects of partisan misrepresentations on employee free choice—is consistent with both the statute and the rules governing elections and is entitled to our deference.

III.

We turn next to the employer's exception to the Regional Director's decision not to investigate the allegations the employer made after it filed its original objections. In its response to the Board's request for evidence supporting its three timely objections, the employer submitted, without comment or explanation, hearsay evidence alleging that one employee had made a threatening statement to other employees about the consequences of a union defeat and alleging further that another employee had been promised a promotion to shop steward if the union were to prevail. That evidence was entirely unrelated to the timely objections. Relying on *Burns International Security Services, Inc.*, 256 N.L.R.B 959 (1981), which stands for the proposition that an employer may not expand timely-filed objections by furnishing evidence of unrelated objections unless it establishes that the evidence is newly-discovered and was previously unavailable, *see id.* at 959–60, the Regional Director refused to investigate these allegations because the evidence neither was newly-discovered nor had it been previously unavailable to the employer.

The employer does not contest the applicability of the *Burns* rule to the facts of this case. Rather, it asserts that this court's decision in *N.L.R.B. v. Campbell Products Department,* 623 F.2d 876 (3d Cir.1980), precludes adherence to the *Burns* rule. In *Campbell Products* we held that a Regional Director who had refused to investigate untimely objections to an election abused his discretion because he acted inconsistently with the policy announced by the Board in *American Safety Equipment Corp.,* 234 N.L.R.B. 501 (1978). *See* 623 F.2d at 880–82. In *American Safety Equipment* the Board held that a Regional Director should set aside an election if he or she receives or discovers evidence during an investigation that shows that the election has been tainted in a manner different from that suggested by a timely objection. *See* 234 N.L.R.B. at 501. This court noted in *Campbell Products,* however, that the Board was free to change the *American Safety Equipment* rule and to insist instead on strict compliance with its rule on the time for the filing of objections: "Having adopted the policy reaffirmed in *American Safety Equipment,* the Board retains the discretion to change its mind expressly and substitute a strict compliance policy." 623 F.2d at 882 n. 4.

In *Burns* the Board did exactly what we said in *Campbell Products* it was free to do. It limited its holding in *American Safety Equipment,* explaining that while the Regional Directors would have discretion to determine the scope of an investigation, they could consider new objections only if those objections were based on evidence that was newly-discovered and had been previously unavailable.[2]

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The rules with respect to the filing of objections to election conduct, including those dealing with the time of filing of objections and the method of investigating them, are all Board-made rules. In *Campbell Products* we acknowledged that the Board had discretion to interpret those rules as requiring strict compliance. Obviously the court had to acknowledge the Board's authority in that respect, for section 9 of the National Labor Relations Act confers on the Board, not on the courts, the responsibility for supervising the choice of bargaining representatives. *Chas. S. Winner v. Teamsters Local Union No. 115,* 777 F.2d 861, 863–64 (3d Cir.1985). The Board has exercised that authority, and the *Burns* rule is entirely consistent with the Board's responsibility to resolve promptly disputes over employee selection of bargaining representatives. The employer's exception to the Regional Director's adherence to *Burns* is without merit.

IV.

The Board did not err in holding that the two timely objections were insufficient to warrant setting aside the election. Nor did the Board err in declining to consider untimely objections that were based on evidence that neither was newly-discovered nor had been previously unavailable to the employer. The Board's order will, therefore, be enforced.

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[2] The Board reasoned,

> The scheme of our objections procedure allows the losing party five working days after the results are tallied in which to discover the possibility of serious misconduct which might warrant setting the election aside and to file objections. The objecting party is given a further, limited period of time in which to complete its private investigation of that alleged misconduct and promptly turn the results over to the Regional Director, who then investigates and takes appropriate action as expeditiously as thoroughness allows. The Regional Director's investigation is neither to be perfunctory nor, ordinarily, protracted. If material facts are in dispute the administrative investigation is suspended and the dispute is resolved through a hearing. But the scope of the investigation, as we made clear in American Safety, is within the informed discretion of the Regional Director. The investigation is in his or her hands; the period during which the investigation proceeds was never intended to provide more time for the objecting party to extend its own investigation in the hope of finding a basis for objection that lies beyond the matters covered in the Regional Director's investigation.
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> The objecting party may bring to the Regional Director's attention any newly discovered evidence that bears directly on the timely objections, for such evidence is more apt to aid than to encumber him. The interest in insuring the employees were not coerced also warrants the Regional Director's consideration of unrelated misconduct, unknown to the objecting party at the time the objections were filed, the existence of which comes to its attention while the Regional Director is conducting his investigation. However, since consideration of such matters might enlarge the scope and delay the conclusion of the investigation, they normally should be considered only upon presentation of clear and convincing proof that they are not only newly discovered, but also, previously unavailable. We deem this limitation necessary in order to discourage both the piecemeal submission of evidence and the leisurely continuation of private investigations while the investigation should be under the control of the Regional Director.[3]
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> [3] We expect that previously unavailable evidence, when truly encountered, usually will have come to the objecting party's attention unsolicited, not through a continuation of its own investigation.

265 N.L.R.B. at 960.

ROSENN, Circuit Judge, concurring and dissenting: I disagree with the majority's reading of *Burns International Security Services, Inc.*, 256 N.L.R.B. 959 (1981), as announcing a new policy of strict compliance with the Board's five-day rule for the filing of objections. In my opinion, the Regional Director was required by the Board's past precedents to consider the allegations Rhone-Poulenc tendered after the initial five-day period but before he began his investigation. I am therefore compelled to dissent from parts III and IV of the majority's opinion. I join, however, in parts I and II.

I.

The NLRB has a longstanding policy, recognized in *American Safety Equipment Corp.*, 234 N.L.R.B. 501 (1978), *enf. denied on other grounds*, 643 F.2d 693

(10th Cir.1981), that no matter what scope a Regional Director gives his investigation,

> if he receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election. . . . Were we to close our eyes to objectionable conduct merely because a party has failed to frame its objections properly to include such conduct, we would make a mockery of our pledge to preserve employee rights to a fair election.

234 N.L.R.B. at 501–502.

This court in *NLRB v. Campbell Products Department*, 623 F.2d 876 (3d Cir.1980), held that under the Board's settled policy, as reflected in *American Safety*, a Regional Director must investigate evidence of objectionable conduct brought to its attention after the initial five-day period for objections had passed. The court recognized "that the Board plainly has the *power* to compel strict compliance with its five day objection rule," *id.* at 880 (emphasis in original), but held that the Board was bound by its adopted policy until it "change[s] its mind expressly and substitute[s] a strict compliance policy." *Id.* at 882 n. 4.

Within the five-day period following initial objections provided for by Board practice and regulations, Rhone-Poulenc submitted evidence, in the form of affidavits, to support its initial objections to the union's campaign propaganda. *See* 29 C.F.R. § 102.69(a) (1985). Two of these affidavits, sworn to by a supervisor and an employee, also reported threats of violence by union supporters that if confirmed might require the election be set aside. Although he had not yet commenced his investigation, the Regional Director declined to consider the evidence of threats tendered in these affidavits, despite his obligation under *American Safety* to investigate all evidence of objectionable behavior that he receives. He relied on *Burns* and two other cases in holding that the evidence of threats constituted an untimely objection which he was not bound to consider. [1] The Board in affirming his decision cited no authority and summarily concluded, "we are not persuaded by the facts of this case that any special circumstance exists that would justify permitting the Employer to file untimely objections."

In a well-reasoned dissent, Board Member Hunter discussed the authority relied on by the Regional Director, including *Burns*, and found it all distinguishable. Despite the assertion of the majority of this panel that "[t]he employer does not contest the applicability of the *Burns* rule to the facts of this case," Rhone-Poulenc argues at length in its brief, as Member Hunter did in his dissent, that "*Burns* is clearly inapplicable" to the present case. I agree.

II.

This court in *Campbell Products* imposed no unusual requirement on the Board by requiring it to obey its past precedents unless it expressly rejects them. 623 F.2d at 882 n. 4. As we previously stated, all administrative agencies "have an obligation to render consistent opinions and either follow, distinguish, or overrule their own precedent." *Chisholm v. Defense Logistics Agency,* 656 F.2d 42, 47 (3d Cir.1981). The Board, as an administrative agency, may overrule its prior precedents, "so long as the Board's new position is fully reasoned and explained, and . . . the position does not exceed the bounds of the Act." *Latrobe Steel Co. v. NLRB,* 630

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[1] The other Board opinions cited as authority by the Regional Director are Parks Food Service, 235 N.L.R.B. 1410 (1978), and Tuf-Flex Glass, 262 N.L.R.B. 445 (1982), *aff'd* 715 F.2d 291 (7th Cir.1983). Both are consistent with *American Safety* and clearly distinguishable from the present case. In *Parks Food*, the union filed exceptions after the Regional Director had completed his investigation and report. 235 N.L.R.B. at 1410 n. 1. In *Tuf-Flex* also, the objections were made after the hearing officer completed his investigation and report. 262 N.L.R.B. at 445 n. 3. Such objections are untimely under *American Safety*, as this court noted in *Campbell Products*. 623 F.2d at 882 n. 4.

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F.2d 171, 177 (3d Cir.1980), *cert. denied,* 454 U.S. 821, 102 S.Ct. 104, 70 L.Ed.2d 92 (1981). This requirement that the Board, as an administrative agency, expressly state its reasoning and intent to change its established policies, is fully consistent with the Supreme Court's decisions. [2]

As the Court recently stated, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Manufacturer's Association v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983). In addition to the need of the public to be informed of a change in policy, effective judicial review requires that an administrative agency changing settled procedures explicate the change in a way that allows a reviewing court to discern the policy served by the new procedure. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 805–06, 93 S.Ct. 2367, 2373–74, 37 L.Ed.2d 350 (1973) (Marshall, J.) (plurality opinion). An agency's factual distinction between past and present cases without an explanation of the underlying policy served by their different treatments may give the reviewing court too little guidance in evaluating the propriety of a newly altered rule. *See id.* at 807–08, 93 S.Ct. at 2374–75.

The Board's decision to depart from prior norms in carrying out the policies committed to it by Congress should as a rule be entitled to deference by the courts. A reviewing court, however, cannot determine whether the new course pursued by the Board adopts a policy "consistent with its mandate from Congress," *id.* at 806, 93 S.Ct. at 2374, unless it expressly articulates its reasons for the change. A change in policy announced by the Board will be respected if "the Board has reached a fair and reasoned balance upon a question within its special competence, . . . and the Board has adequately explicated the basis of its interpretation." *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 267, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975). My concern is whether the Board has met this burden in *Burns* and announced a new policy of strict compliance with its five-day rule.

III.

In *Burns,* the Board held that a Regional Director had erred in reading *American Safety* as requiring him to consider an employer's "Supplementary Objections" filed 47 and 77 days after an election and during his investigation. Although noting that "[t]he line between evidence discovered during the investigation and new, untimely objections will not always be glaringly clear," the Board held that parties should not be allowed to file new *objections* during a Regional Director's investigation. 256 N.L.R.B. at 959.

> Entertainment of a whole new set of objections . . . would vitiate our requirement that parties file timely objections. Being inundated with successive sets of objections, the Regional Director, if he had to investigate each new allegation, could be prevented from or unduly delayed in concluding his investigation.

Id. The Board held that new and untimely objections presented during a Regional Director's investigation normally should be considered only if the presenting party gives clear and convincing proof that they were newly discovered and previously unavailable. *Id.* at 960. The Board gave two reasons for this rule: to "discourage . . . the piecemeal submission of evidence," *id;* and to prevent "the potential mischief inherent in permitting an objecting party to take control over the investigation away from the Regional Director." *Id.* at 959.

I do not think that *Burns* can fairly be read as announcing a new Board policy that henceforth no evidence of objectionable behavior would be considered after the

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initial five-day period for filing objections, even if the Regional Director had not and could not have begun an investigation of the timely filed objections. By my reading, all the *Burns* decision established is that an objecting party may not file supplemental objections during a Regional Director's investigation without a convincing showing that the objections could not have been made previously. The Board stated that some limitation of *American Safety* was necessary to prevent objecting parties from wrongly delaying the resolution of election disputes and interfering with the Regional Director's investigation with a flurry of untimely objections. The Board did not purport, as the majority contends, to announce a new policy of strict enforcement of the five-day rule.

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[2] Other circuits also require that the Board explicate the policy grounds for changing its established practices. *See, e.g.,* IATSE v. NLRB, 779 F.2d 552, 555 (9th Cir.1985); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 757 (7th Cir.1982); NLRB v. West Sand and Gravel Co., 612 F.2d 1326, 1333 n. 5 (1st Cir.1979).

The circumstances of *Burns* are distinguishable from those of the present case on two crucial grounds: (1) Rhone-Poulenc submitted the affidavits supporting further objections during the period the Board specifically provides objecting parties for the submission of supporting evidence, and before the Regional Director had begun any investigation. (2) Rhone-Poulenc's allegation of unlawful threats came in the form of evidence, not conclusory or unsubstantiated objections.

It is difficult to see how Rhone-Poulenc's action implicates the Board's concern in *Burns* that late objections would cause delay and interfere with the Regional Director's control over an investigation. Rhone-Poulenc submitted its affidavits "[w]ithin 5 days after the filing of objections," the period provided by Board regulations for an objecting party to "furnish to the regional director the evidence available to it to support the objections." 29 C.F.R. § 102.69(a) (1985). The Board's longstanding regulatory scheme clearly expects an objecting party to continue its own investigation during this five-day period, with a Regional Director's investigation to follow only if the objecting party's submission of evidence is sufficient to support *prima facie* the setting aside of the election. The majority's concern that Rhone-Poulenc's affidavits may have been the result of its continued investigation is misplaced. It was Rhone-Poulenc's obligation to investigate the election during this five day-period, and it was the Regional Director's obligation to pursue Rhone-Poulenc's evidence of objectionable conduct with its own investigation subsequent to the five-day period. Rhone-Poulenc's timely submission of evidence, whether unsolicited or obtained through its investigation, did not and could not interfere with any investigation the Regional Director might subsequently make.

Further, it is incongruous and inconsistent with the policy concerns of *American Safety* for the Regional Director to read and consider that portion of Rhone-Poulenc's affidavits that support the timely objections to campaign propaganda but ignore the rest. Under *American Safety,* which the Board has not repudiated, a Regional Director may limit the scope of its investigation but must consider evidence of election taint brought to its attention during its investigation. By ignoring the evidence of possibly unlawful threats brought to his attention *before* he commenced any investigation, the Regional Director here utterly abdicated the "Board's obligation to provide voters with the 'laboratory conditions' under which they may exercise their franchise in a free and informal manner," 234 N.L.R.B. at 501, even though it meant no delay in the proceedings or challenge to the Director's control over the investigation. I cannot believe that the Board would have intended such an anomalous and stultifying result without a thorough explication of its change in policy in response to judicial mandate.

IV.

I would therefore grant Rhone-Poulenc's petition for review in part and remand the case to the Board for investigation of the threats reported in Rhone-Poulenc's affidavits.

American Pacific Concrete Pipe Company, Inc. v. NLRB

788 F.2d 586 (9th Cir.), April 25, 1986

On application for award of attorney's fees under EAJA

Before WALLACE, HUG, and HALL, Circuit Judges

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HUG, Circuit Judge: This case concerns the accounting principles to be used in determining "net worth" for purposes of deciding whether the $5 million net worth ceiling precludes recovery of fees under the applicable provisions of the Equal Access to Justice Act, ("EAJA"), 5 U.S.C. § 504, 28 U.S.C. § 2412 (1982). There is also a preliminary issue of whether this case is moot because of the reenactment of the EAJA with an increased ceiling. We hold that the case is not moot and proceed to the merits.

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American Pacific Concrete Pipe Company ("AMPAC") petitions for review of a Supplemental Order of the National Labor Relations Board ("NLRB") denying its application for attorneys' fees under the EAJA. The NLRB denied AMPAC's request because AMPAC's net worth exceeded the $5 million ceiling established by the EAJA, 28 U.S.C. § 2412(d)(2)(B). In calculating AMPAC's net worth, the NLRB deviated from generally accepted accounting principles by eliminating any deduction for accumulated depreciation. We reverse.

I.

On February 23, 1984, AMPAC applied to the NLRB for an Order of Fees and Expenses of Litigation pursuant to the EAJA, 5 U.S.C. § 504, 28 U.S.C. § 2412, and NLRB Rules and Regulations, 29 C.F.R. Part 102. The application was made on the ground that the NLRB was not substantially justified in issuing a complaint that was subsequently withdrawn prior to hearing. AMPAC's EAJA application included a financial statement, prepared in accordance with general accounting principles, that showed AMPAC's net worth to be within the statutory ceiling of $5 million.

On consideration of AMPAC's EAJA application, the administrative law judge determined, and the NLRB agreed, that net worth, within the meaning of the EAJA, does not include an allowance for depreciation in the valuation of fixed assets. Therefore, according to the administrative law judge and the NLRB, AMPAC did not meet the "less than $5 million" net worth requirement of the EAJA.

II.

An initial inquiry is whether the extension and amendment of the EAJA on August 5, 1985 in Public Law No. 99-80, 99 Stat. 183 ("1985 Act") renders this case moot. The 1985 Act raised the ceiling for eligibility from $5 million to $7 million. AMPAC would be eligible under the $7 million ceiling even under the NLRB's calculations. We must, therefore, determine the applicability of the new ceiling to the facts of this case.

The original EAJA was enacted on October 1, 1981, and terminated on October 1, 1984. The 1985 Act extended the EAJA from October 1, 1984, even though it was actually enacted August 5, 1985. Section 7(a) of the 1985 Act provides in relevant part that "the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act." [1] 99 Stat. at 186. The adversary proceeding in this case commenced September 23, 1983, when the original EAJA was in effect, and was concluded on the merits on January 31, 1984. A timely application for fees was made within thirty days thereafter. Thus, the underlying adversary proceeding on the merits was not pending, but the application for attorneys' fees was still pending on the date of the enactment of the 1985 Act. Hence, the question before us is whether the term "cases pending" refers only to the underlying adversary proceeding or also includes the application for fees.

In *Tongol v. Donovan,* 762 F.2d 727 (9th Cir.1985), we interpreted the applicability of the original EAJA to pending cases. The pertinent statutory provision stated that the EAJA applied to any civil action or adversary adjudication "'pending on, or commenced on or after' October 1, 1981." Pub.L. No. 96-481, § 208, 94 Stat. 2321, 2330 (1980); *see Tongol,* 762 F.2d at 730, *citing* 5 U.S.C. § 504 note (1982). We held that a case was no longer pending for purposes of the EAJA when the sole issue remaining was the liability of the State of California for attorneys' fees. We cited with approval a decision of the District of Columbia Circuit in which the court held that a case was not pending for purposes

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of the EAJA when the only remaining issue on the effective date was the collateral issue of the federal government's liability for attorneys' fees. *Id.* at 731 (citing *Nichols v. Pierce,* 740 F.2d 1249, 1256 (D.C.Cir.1984)). We stressed that our holding was mandated by the strict construction required for waivers of sovereign immunity, *Tongol,* 762 F.2d at 732. In this case, we are interpreting a section of the 1985 Act that expands the federal government's liability for attorneys' fees. The same policy reasons we announced in *Tongol* apply in this case.

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[1] Section 7(b) of the 1985 Act provides that cases which were commenced during the gap in coverage between October 1, 1984 and the date of enactment of the 1985 Act, August 5, 1985, and were finally disposed of prior to the date of enactment, will be covered as if the 1985 Act were in effect. The 30-day time period for filing an application for fees is to commence running from the date of enactment. 99 Stat. at 186.

The 1985 statute involves an effective date provision with slightly different wording from the 1980 Act; it also has significant legislative history that interprets the effective date provision. The House Report accompanying H.R. 2378, which eventually became the 1985 Act, states:

> As enacted in 1980, the Act applies to actions "pending on, or commenced on or after October 1, 1981." . . . The changes which are made by H.R. 2378 which merely clarify existing law are retroactive, and apply to matters which were pending on, or commenced on or after October 1, 1981. However, changes which are made by H.R. 2378 and which expand or otherwise change existing law shall take effect on the date of enactment and shall apply to matters pending on or commenced after that date.

H.R.Rep. No. 120 (pt. 1), 99th Cong., 1st Sess. 10–11, *reprinted in* 1985 U.S.Code Cong. & Ad.News 132, 139.

Another significant piece of legislative history occurred in the debate on the floor of the House. Representative Kastenmeier, the co-sponsor of the 1985 Act, author of the House Report, and leader of the House debate prior to House passage of the amendments, stated:

> I would like to clarify the effective date provisions of H.R. 2378 [the 1985 Act] and the relationship of these provisions with the original act. Cases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill.

131 Cong.Rec. H4762 (daily ed. June 24, 1985). The bill passed by the Senate was identical to H.R. 2378 and was voted on without Senate committee consideration (*see* 131 Cong.Rec. S9991–98 July 24, 1985). Thus, there is no Senate committee report on the bill.

The Fifth Circuit has considered a similar case where only the fee application, and not the underlying action, was pending on the date of the 1985 Act. The issue there was an interpretation of the phrase "position of the government." The 1985 Act further defined the meaning of that phrase and the House Report made clear that this was a clarification of existing law. The Fifth Circuit held that the interpretation of the "position of the government" was a clarifying amendment that was applicable to the fee application that was pending. *Russell v. National Mediation Board,* 775 F.2d 1284, 1286–87 (5th Cir.1985). The opinion noted and distinguished our opinion in *Tongol. Russell,* 775 F.2d at 1287–88.

The case before us differs from the *Russell* case in that it involves an expansion of eligibility to new claimants by virtue of a higher net worth ceiling. We are, therefore, faced with the question of whether the expanded eligibility applies to this fee application that was pending on the date of enactment, when the merits of the dispute had already been resolved. The rationale of our opinion in *Tongol* would require that the original debt ceiling apply if the merits of the case were not pending on the date of enactment, absent any contrary legislative history.

Representative Kastenmeier's statement on the floor in explaining the effective date provides a slight variation on that interpretation. His statement was that "[c]ases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of the enactment of this bill." Thus, conceivably under this

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interpretation, there could be a case in which the merits were pending on October 1, 1984, but were resolved on July 15, 1985, and where the 30-day time period for the fee application would not expire until after the August 5, 1985 effective date of the 1985 Act. Under Representative Kastenmeier's interpretation, the 1985 Act would apply. The justification for that interpretation is difficult to find in the language of the statute, however; and, even assuming that it applies, it would not change the result in this case. The final disposition on the merits occurred on January 31, 1984, and the 30-day time period for filing the fee application under 5 U.S.C. § 504(a)(2) expired long before the effective date of the 1985 Act.

Thus, we hold that, under our rationale in *Tongol* and also under Representative Kastenmeier's interpretation of the effective date provision on the floor of the House of Representatives, the provision of the 1985 Act that raises the ceiling for eligibility does not apply to this case. Hence, the case is not moot, and we will decide the merits under the provisions for the $5 million ceiling contained in the original EAJA.

III.

Ordinarily, the standard to be applied to a denial of attorneys' fees under the EAJA is the abuse of discretion standard. *Timms v. United States,* 742 F.2d 489, 492 (9th Cir.1984). Further, an agency's interpretation of a statute it administers is normally afforded considerable deference, see *Hawaiian Electric Co. v. United States Environmental Protection Agency,* 723 F.2d 1440, 1447 (9th Cir.1984). However, in this case, the NLRB is not interpreting a statute within its area of special expertise; thus, its interpretation is not entitled to the deference we normally employ. We will, therefore, review the NLRB's interpretation of the EAJA in the same manner in which we review a district court's interpretation of a statute, that is, as a question of law subject to *de novo* review on appeal. *See Foster v. Tourtellotte,* 704 F.2d 1109, 1111 (9th Cir.1983).

The NLRB held that in determining net worth for purposes of eligibility under the EAJA, assets should be valued at their original cost, without deducting accumulated depreciation. To be entitled to attorneys' fees under the EAJA, a firm must have a net worth no greater than $5 million and have no more than 500 employees. 28 U.S.C. § 2412(d)(2)(B), *Unification Church v. INS,* 762 F.2d 1077, 1085 (D.C.Cir.1985). The NLRB concedes that AMPAC has no more than 500 employees, but not that it has a net worth of no more than $5 million. The financial statement, which reflected accumulated depreciation in the usual manner, showed that AMPAC's net worth was well below $5 million; however, with all depreciation eliminated, AMPAC's net worth was well above $5 million. The NLRB now argues that depreciation should not be considered in computing the company's net worth.

Although "net worth" is not defined in the legislation, the accompanying Committee Reports state that net worth is "calculated by subtracting total liabilities from total assets." H.R.Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S.Rep. No. 96–253, 96th Cong., 1st Sess. 17 (1979). The NLRB argues that additional language in the legislative history redefines how depreciable assets are to be valued in an EAJA context. The following language constitutes the NLRB's entire support for its position: "In determining the value of assets, the cost of acquisition rather than fair market value should be used." H.R.Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980). Thus, the NLRB argues, Congress intended that net worth for EAJA eligibility purposes would be calculated by subtracting total liabilities from total assets, with assets valued solely at their cost of acquisition. The NLRB contends that in determining net worth under the EAJA, neither loss nor gain in the market value of assets is properly considered; since depreciation represents a loss in market value, amounts taken as depreciation should be eliminated from an appraisal of net worth.

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Only the Seventh Circuit has addressed this issue. In *Continental Web Press, Inc. v. NLRB,* 767 F.2d 321 (7th Cir.1985), the Seventh Circuit rejected the same arguments advanced by the NLRB in this case. The court stated in its well-reasoned opinion:

> All this means to us is that the net worth figure must be derived from the company's books rather than from an appraisal. There is no indication that Congress meant by "the cost of acquisition" the undepreciated cost of acquisition. As the Board acknowledges, subtracting accumulated depreciation from the cost of acquisition "is a generally accepted accounting practice." No reason is given why Congress might have wanted to reject it.
>
> Congress did not define the statutory term "net worth." It seems a fair guess that if it had thought about the question, it would have wanted the courts to refer to generally accepted accounting principles. What other guideline could there be? Congress would not have wanted us to create a whole new set of accounting principles just for use in cases under the Equal Access to Justice Act. . . . Although many cases say that waivers of sovereign immunity are to be narrowly construed, a closer case than this one is necessary to put the precept into play.

Id. at 323.

We agree with the Seventh Circuit. It is unreasonable to conclude from this brief sketch of legislative history that Congress could have intended that generally accepted accounting principles would not apply.

The financial statement of AMPAC, prepared in accordance with generally accepted accounting principles, shows a net worth that is less than the $5 million ceiling. Thus, AMPAC is not disqualified from the EAJA award on the basis of net worth and its application must be considered on the merits. The decision of the NLRB is reversed and the case is remanded for further proceedings to determine entitlement to an award of attorneys' fees under the EAJA.

REVERSED AND REMANDED.

NLRB v. Pratt & Whitney Air Craft Division, United Technologies Corporation

International Association of Machinist and Aerospace Workers, AFL-CIO, District 91 v. NLRB

International Association of Machinist and Aerospace Workers, AFL-CIO, District 91 v. NLRB

789 F.2d 121 (2d Cir.), April 25, 1986—274 NLRB 1069

On petitions to enforce and review Board Order

Before LUMBARD, CARDAMONE and WINTER, Circuit Judges

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CARDAMONE, Circuit Judge: Our principal task on this petition is to review the voluminous administrative proceedings that passed on these claims of unfair labor practices arising from reopen-

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er negotiations. Reopener clauses in collective bargaining agreements allow both parties an opportunity to modify their existing agreement in order to meet changing economic conditions. As such, they serve to minimize economic uncertainty at the time of bargaining. But, at the same time, as this case illustrates, the reopener has a potential to destabilize existing relationships by introducing an uncertainty of possible later conflicts concerning the practices pursued by the parties. Both parties to this appeal agreed to reopened negotiations. Yet, despite the fact that new contracts were signed, today, years after the fact, an employer and union are still litigating the claims of unfair labor practices that arose before and during the reopener negotiations.

The bargaining process engaged in by an employer and a union is not like a boxing contest where one side is declared "the winner." Rather, it is a relationship where the adversaries are locked together so tightly that every action by one causes an opposite reaction by the other—verifying Newton's law in the human arena. Hence, a necessary second task is to touch lightly on the judicial role in this process. It has been wisely observed that, subject only to duty to the community, labor combatants may struggle to the limits of their self-interest without courts setting boundaries for the contest. It is a legislative function to limit "individual and group rights of aggression and defense," and to substitute in place of the ancient trial by combat the "processes of justice." *Duplex Co. v. Deering,* 254 U.S. 443, 488, 41 S.Ct. 172, 184, 65 L.Ed. 349 (1921) (Brandeis, J., dissenting). Congress has set forth those processes in the statute that defines our powers of review.

Background

Two National Labor Relations Board (NLRB or Board) decisions, *United Technologies,* 118 L.R.R.M. 1445 (February 28, 1985) and *United Technologies,* 118 L.R.R.M. 1556 (March 21, 1985), are consolidated in this appeal which encompasses three cases. In Case No. 4106 the NLRB seeks enforcement of its order finding that the employer, Pratt and Whitney Aircraft (Pratt & Whitney, Company or employer) violated § 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) (1982) by prohibiting the dissemination of scab literature and by placing constraints not permitted by statute on employee strike activity. The employer's failure to provide the union with the results of an employee survey was also found to constitute § 8(a)(1) and (a)(5) violations. In Case No. 4116, the International Association of Machinists (the Union) petitions for review from that part of the NLRB's decision holding that Pratt & Whitney had neither participated in direct dealing nor surface bargaining in violation of § 8(a)(1) and (5). In Case No. 4126 the Union further petitions for review of the Board's decision finding the employer not guilty of direct dealing during a second set of negotiations.

Thus, there are five issues raised in the three cases—(1) dissemination of Union literature, (2) constraints on employee strike activity, (3) employee survey results not provided to Union, (4) direct dealing, and (5) surface bargaining. For organizational purposes, we begin with the first two appeals that raise all five issues. These two appeals—Nos. 4106 and 4116—involve a common fact pattern arising from negotiations at Pratt & Whitney's East Hartford, Middletown, North Haven, Southington and Windsor Locks facilities in Connecticut. The third appeal—Case No. 4126—is based on negotiations at the company's Hamilton Standard plant which is also located in Connecticut.

I. Scope of Review

Because in portions of these cases there is a difference of opinion between the hearing officer and the Board, it is appropriate to discuss briefly the scope of review. Upon petition by the Board for enforcement of its order, this Court has jurisdiction over the entire proceeding. The scope of our review is long established. In 1913, the Supreme Court directed a court reviewing an Interstate Commerce Com-

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mission order to examine the record with a view to determining whether there was "substantial evidence to support the order." *Int. Com. Comm. v. Louis. & Nash R.R.*, 227 U.S. 88, 98, 33 S.Ct. 185, 189, 57 L.Ed. 431 (1913). This standard of review is now mandated by statute in cases arising under the NLRA. "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e)(1982). This standard was designed by Congress to broaden the reviewing court's scope of review and to require a closer examination of Board decisions. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The five issues raised in the appeals before us were all subject to a fact-finding hearing before an administrative law judge prior to consideration and determination by the Board. Thus, our review is governed on these petitions by the substantial evidence test.

Where the choice is between two conflicting views, even though the court might justifiably have reached a different conclusion if the case were before it *de novo*, the Board's decision may not be set aside. A Board determination may only be vacated when a reviewing court cannot conscientiously conclude—after looking at the record as a whole, including the evidence opposed to the Board's view—that the evidence supporting the Board's decision is substantial. *Id.* at 488, 71 S.Ct. at 464. The standard for review is not altered because the hearing officer and the Board, as here, disagree on some findings. But the evidence which the Board uses to support a conclusion "may be less substantial when an impartial, experienced examiner who has observed the witnesses . . . has drawn conclusions different from the Board's than when he has reached the same conclusion." *Id.* at 496, 71 S.Ct. at 468.

It is familiar law that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938) (citations omitted). "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939) (citations omitted). "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Consolo v. Federal Maritime Comm'n*. 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

Today, the standard by which a reviewing court applies the rule of substantial evidence to Board determinations is summarized in the shorthand formula that Congress has directed the courts to "assume more responsibility for the reasonableness and fairness of Labor Board decisions. . . ." *Universal Camera*, 340 U.S. at 490, 71 S.Ct. at 465. With this precept in mind, we consider the three cases on appeal.

II. Scab Literature

A. *Background*

The employer and the Union through its four locals are parties to four existing collective bargaining agreements which were to run for five years.[1] Pursuant to these agreements, either party could reopen negotiations during a specified period for the limited purpose of changing the base hourly wage rate and cost-of-living allowance (COLA) for the final two years. If the new negotiations failed to produce modified agreements, then other aspects of the existing contracts, specifically the dues **127** checkoff and no strike or lockout provisions, would become void. These agreements, executed on November 28, 1977, were by their terms effective until November 28, 1982. The reopener negotiations could occur only between mid-August and November 30, 1980.

The actions contested on these appeals were all taken before or during the reopener negotiations. As the reopener period approached, both sides sought to strengthen their respective positions. Since the Union was not operating under a union security clause, it attempted to increase its membership. As part of a membership drive, it distributed and posted literature through Local 1746A at the employer's Southington plant.

The first distribution occurred on February 26, 1980. The literature encouraged Union membership and referred to non-Union employees by such names as "scabs" and "freebies". The author Jack London's definition of "scab" was included, describing a scab as lower than a rattlesnake, toad and vampire. "The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer." *See National Association of Letter Carriers v. Austin,* 418 U.S. 264, 268, 94 S.Ct. 2770, 2773, 41 L.Ed.2d 745 (1974) (quoting London's piece in full). The local continued this pattern of derisive language when it republished on April 16 the London definition and informed employees it would publish a list of non-Union employees working at the Southington facility. One such list appeared on May 7; two more lists were later distributed on May 13 and May 20. The May 13 distribution used the scab language and further elaborated on the aid that non-union employees gave the employer in the upcoming negotiations; it urged these employees "to get 'born again'—to ride the Union train and pay the Union fare." The second again referred to the non-Union workers as scabs.

The employer responded on May 30. It believed that such language violated the collective bargaining agreement's stricture that workers be free to choose whether or not to become Union members, and that it was contrary to an arbitrator's decision, at another plant, which prohibited the verbal use of such reviling language. As a result, the employer banned further distribution of this literature on its premises and threatened disciplinary action against any employee disregarding the prohibition.

B. *Administrative Decisions*

The ALJ found that the leaflets were distributed as part of an organizational campaign and as such were protected activity under § 7, 29 U.S.C. § 157 (1982). He further held that the scab terminology did not take the publications outside that protection. Relying on *Austin,* and *Linn v. United Plant Guard Workers of America,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the ALJ concluded that the Union was entitled to disseminate such literature and that the employer's efforts to prohibit it violated § 8(a)(1). He noted that the employer had not shown any labor unrest directly attributable to the challenged language. The NLRB adopted these findings and upheld the ALJ's determination that the employer's conduct violated § 8(a)(1). *United Technologies Corporation,* 118 L.R.R.M. at 1557–58.

C. *Discussion*

Consistent with the § 7 right to organize for the purpose of collective bargaining, workers can join, form, or assist labor unions and otherwise engage in group activity. 29 U.S.C. § 157. These rights extend not only to actions associated with collective bargaining, but also to actions directed at the workers' "mutual aid or protection." *Id.*

As part of their organizational efforts, unions may—subject to time, place and manner restrictions—communicate on an employer's premises with employees whom they currently represent. *NLRB v. Magnavox Co.*, 415 U.S. 322, 325, 94 S.Ct. 1099, 1102, 39 L.Ed.2d 358 (1974). Such communication facilitates the process of transforming single workers into a collective bargaining entity and ensures that workers have the information necessary to

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[1] The Locals had the following jurisdictions: (1) # 700-Middletown plant; (2) # 707-North Haven; (3) # 1746-East Hartford; and (4) Lodge 1746A-Southington. All four are affiliates of IAM District # 91.

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make informed choices regarding their representational status and the positions to be taken on particular bargaining issues. Where, as here, a recognized union is engaged in a post-recognition membership drive aimed at non-union workers, its communicative actions—absent some statutory violation—are protected by § 7. *Austin,* 418 U.S. at 279, 94 S.Ct. at 2778. Thus, the distribution of these union leaflets or fliers is protected activity under § 7. *NLRB v. New York University Medical Center,* 702 F.2d 284, 289 (2d Cir.), *vacated on other grounds,* 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 73 (1983).

Section 8(a)(1) prohibits employers from interfering with the exercise of § 7 rights, and an employer cannot, for example, arbitrarily issue a blanket rule forbidding distribution. Although distribution and posting of union literature may not be prevented during non-working time in non-working areas, such a restriction is enforceable when special circumstances are shown. Such special circumstances exist when the leaflet is on its face inflammatory or potentially inflammatory. "[T]he critical question is not merely whether the leaflets are provocative, but whether the provocation could be expected to threaten plant discipline." [8] *New York University Medical Center,* 702 F.2d at 290. Special circumstances must be proved by the employer. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803-04 n. 10, 65 S.Ct. 982, 988 n. 10, 89 L.Ed. 1372 (1945). In evaluating such a claim, deference is granted to the Board's findings.

Language in union distributions can threaten plant discipline in two possible ways. First, the words chosen could themselves be so offensive on their face as to create a reasonable expectation that plant discipline will be disrupted. *New York University Medical Center,* 702 F.2d at 290. Neither the use of the scab terminology nor the London definition fall in this *per se* category. The Supreme Court has noted, that "the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7. . . ." *Linn,* 383 U.S. at 60–61, 86 S.Ct. at 661–62. Second, the language can be sufficiently provocative so that in the context of the particular negotiations, plant peace is threatened, and § 7 rights are outweighed by these concerns of plant discipline. Pratt & Whitney failed to show that this was the case here. No example of actual unrest can be pointed to, nor was the language shown to implicate safety concerns. *See New York University Medical Center,* 702 F.2d at 289–91; *cf. Southwestern Bell Telephone Co.,* 200 NLRB 667, 670–71 (1972) (employees wore T-shirts adorned with anti-employer language perceived as threat to plant discipline); *Proctor & Gamble Mfg. Co.,* 160 NLRB 334, 391–95 (1966) (actual fight between two employees). Since the scab terminology has been previously accepted, and there is no proof demonstrating labor unrest, we accept the Board's findings that the employer violated § 8(a)(1) by prohibiting the distribution and posting of the scab literature.

III. THE SURVEY

A. *Background*

During the period from April 1 to August 1, 1980, the employer conducted interviews and surveyed employees at all four plants who were hired after November 1977. Pratt & Whitney conducted the survey to determine employees' attitudes regarding the workplace and to evaluate employees' knowledge of and attitudes toward various benefit programs provided by the employer. *United Technologies,* 118 L.R.R.M. at 1559. The survey asked the em-

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ployees to rate their various health, vacation, and bonus benefits on a scale of poor to excellent. Additional questions probed whether the employees were satisfied with their remuneration and examined whether there was general knowledge concerning the calculation of retirement benefits. Employee views and suggestions on any aspect of the company's performance were also solicited. Three of the interviews included brief discussions of the issues to be raised in the upcoming reopener negotiations. Employee participation was voluntary and all responses were to be confidential. From the survey responses, a report was subsequently prepared that enabled Pratt & Whitney to ascertain employee opinions regarding the employer's wage structure, fringe benefits and physical working conditions.

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[8] One exception to this would be in a case where statements made by the Union both were defamatory and known to be false when stated. In *Linn,* 383 U.S. at 61, 86 S.Ct. at 662, the Court made clear that these statements are not protected under § 7.

In this case, the use of the word "scab" was not false and thus not libelous since the language was in fact directed at employees who were non-union members. *See Austin,* 418 U.S. at 283, 94 S.Ct. at 2780. Additionally, no defamation claim was ever asserted in this case.

The union was first made aware of the survey during early July by employees and shop stewards at the North Haven plant. That plant's personnel manager informed the president of Local 707 that the "interviews were being conducted by a guidance counselor from one of the local high schools and that they were directed toward improving the preparation of the students from that school for employment at [Pratt & Whitney]." When asked whether the questions addressed contractual benefits, the manager responded that the survey "related to the employees' knowledge of the benefits that they received and the conditions under which they worked." The Local President's request to participate in administering the survey was turned down, as was his request for its results.

B. *Administrative Decisions*

The ALJ found that the survey, undertaken by the employer without notifying the Union, constituted direct dealing in violation of § 8(a)(1) and (5). Relying on *Obie Pacific Inc.,* 196 NLRB 458, 460 (1972), the ALJ held that though an employer may communicate with its employees, it cannot use a survey for the purpose of ascertaining employee sentiment and undermining the Union just before a negotiating session, when such knowledge could be used to gauge the strength of employee support for various provisions of the union bargaining position. He noted that additional factors, specifically the "failure to notify the Union of its intention to take this survey, its refusal to permit the Union to either sit in on the interviews or see a copy of the questions being asked, and its refusal to furnish the Union with a copy of the results of that survey constituted additional aspects of . . . [the employer's] refusal to bargain in good faith with the Union."

The Board reversed the ALJ's determination that the employer's conduct *in taking the survey* amounted to an unfair labor practice. *United Technologies,* 118 L.R.R.M. at 1559–60. The Board distinguished *Obie Pacific,* and other similar cases observing that the violations in those cases were all based on employer attempts to circumvent the union by soliciting information directly relevant to ongoing negotiations or current union positions. In contrast, the Board found that the survey's questions "solicited employee sentiment with respect to contractual benefits which were clearly outside the scope of the upcoming reopener negotiations." *Id.* at 1559. It noted that the questions were not designed to increase the employer's knowledge of the employees' positions; rather, they were intended to ascertain how well the employer was communicating its position to the employees. Unlike *Obie Pacific,* the employer did not hold itself out as the employees' friend, ready to correct employee complaints voiced in the survey, and impliedly indicating the Union's comparative inability to produce results. Given these findings, the Board concluded that there was no labor violation implicated in taking such a survey.

The Board nonetheless affirmed that part of the ALJ's decision which found that the failure to provide the Union with the *survey results* violated § 8(a)(1) and (5). Although the information sought was not directly relevant to the reopener negotiations, it did relate to wages and other terms of employment. Such information must be provided to the Union when requested because it is presumptively relevant to general collective bargaining, though an employer may rebut this presumption by showing that the requested information is not relevant. Here the company did not meet that burden simply by denying the Union's request without explanation, or by later stating that the survey information is irrelevant because it relates only to employees with limited seniority.

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C. *Discussion*

The issue is whether the refusal to supply the survey results constituted an unfair labor practice under § 8(a)(1) and (5). An employer has an obligation to provide a union with all information necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–36, 87 S.Ct. 565, 567–68, 17 L.Ed.2d 495 (1967); *Prudential Insurance Company of America v. NLRB,* 412 F.2d 77, 81 (2d Cir.), *cert. denied,* 396 U.S. 928, 90 S.Ct. 263, 24 L.Ed.2d 226 (1969). This obligation extends not only to information relevant to the negotiation of a new collective bargaining agreement, but also encompasses information relevant to the supervision of an existing agreement. *See Acme,* 385 U.S. at 436, 87 S.Ct. at 568; *Prudential,* 412 F.2d at 81. Refusal to provide such information is a failure to bargain in good faith. *See Acme,* 385 U.S. at 435, 87 S.Ct. at 567; *NLRB v. Leonard B. Hebert, Jr. & Co.,* 696 F.2d 1120, 1124 (5th Cir.), *cert. denied,* 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88 (1983).

Wage and other benefit material pertaining to bargaining unit employees must be produced by an employer as it is presumptively relevant to the union's duties as exclusive bargaining agent. *Grand Islander Health Care Center,* 256 NLRB 1255, 1256 (1981); *Western Massachusetts Electric Company,* 234 NLRB 118, 118–19 (1978). Consequently, the facts gleaned by the survey—admittedly relating to wages and fringe benefits—are pertinent to the union's role as representative both for the existing contract and for the new contract being negotiated pursuant to the reopener clauses.

The employer argues that the Board's initial finding—that the taking of the survey did not constitute direct dealing because the subjects inquired into were not subjects of bargaining under the reopener clause—logically leads to the conclusion that the survey results were not material to the upcoming negotiations. To the contrary, the first finding does not compel the second. Although the questions related to issues outside the scope of the reopener negotiations, they addressed areas important to the Union's role in supervising the existing agreement and could have played a role in any Union decision regarding whether to accept a three-year as opposed to a two-year offer. Further, Pratt & Whitney's argument is procedurally barred as it did not present this argument to the Board. 29 U.S.C. § 160(c) (1982).

The employer also asserts that it cannot reveal the survey results because it told the employees that the responses would be confidential. Unquestionably, there are instances when the harm to employees that might result from disclosure are significant enough to affect the union's right to obtain the information. In *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 312–17, 99 S.Ct. 1123, 1130–32, 59 L.Ed.2d 333 (1979), the Supreme Court held that an employer did not have to turn test questions over to the union where such dissemination would ruin the test's value because future takers would already know the questions. The Court explained that these tests were critical in determining who would be the best suited for a particular company position.

The confidential concerns in this case do not rise to the same level as those recognized in *Detroit Edison,* 440 U.S. at 317–20, 99 S.Ct. at 1132–33, which involved the potential for harassment and embarrassment associated with psychological testing. A mere promise of confidentiality is not a defense to furnishing the results, though the reason for making such promise may provide a defense. But here the employer cannot identify any substantial reason why the information should remain confidential. Many employers are interested in learning how effectively their benefit packages are communicated to employees and whether their employees are satisfied. Simply asserting that the results should remain confidential because the employees were promised confidentiality does not discharge the employer's burden. Hence, the refusal to disclose the survey results was properly found to violate § 8(a)(1) and (5). We therefore agree with the Board's conclusion and order.

IV. FOREMAN STRONCEK'S REMARKS

A. *Background*

We turn now to events which occurred during the actual reopener negotiations. We begin with the actions of one individual during these negotiations—Foreman Stroncek. The allegations arising from the entire pattern of bargaining will be discussed later.

On November 26, 1980 as the reopener negotiations stalled and a strike appeared more likely, Stroncek called a meeting of the employees in his department at the East Hartford Plant to answer questions regarding the possibility of a strike and the workers' rights if a strike should occur. He told the employees that they would have to call in every day that they missed work and provide a reason for their absence. Failure to follow these procedures would warrant dismissal. The shop steward was absent at the time of the meeting and his efforts to have a new meeting scheduled in order to advise employees that they did not have to call in daily were rebuffed. On the same day, Pratt & Whitney published a special edition of its plant newsletter answering a number of questions concerning the workers' rights and responsibilities during a strike. Workers were informed that they had the right to strike, that they could resign from the Union before a strike, that as economic strikers they could be reinstated after the strike's termination, and that no strike at Pratt & Whitney had resulted in increased benefits to strikers.

B. *Administrative Decisions*

The ALJ held that the call-in requirement would interfere with and impede the worker's right to strike. Since an employer is prohibited under § 8(a)(1) from interfering with workers' protected rights, the foreman's actions constituted an unfair labor practice. The Board upheld this result, though it relied on different testimony to support the factual findings. *United Technologies,* 118 L.R.R.M. at 1557–58 & n. 4.

C. *Discussion*

Section 8(a)(1) prohibits an employer from interfering with employees' § 7 rights. One of which—derived both from § 7 and specifically authorized by § 13—is the right to strike. 29 U.S.C. § 163. Thus, employer actions which interfere with or attempt to discourage the exercise of the right to strike—by threatening employees with sanctions or penalties or imposing impermissible obligations on striking workers—are unfair labor practices within the meaning of § 8(a)(1). *See, e.g., NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 235–36, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308 (1963). Workers are not required to call in each day of a strike, nor are they required to provide reasons for their absence. Even though no strike took place in this case, advising the East Haven employees that a "call-in" was required interfered with their right to strike. Moreover, threatening discharge for failing to obey these edicts might have discouraged some employees from striking. Therefore, Foreman Stroncek's remarks as a representative of the employer violated § 8(a)(1).

V. THE DIRECT DEALING AND SURFACE BARGAINING CHARGES

A. *Background*

We now turn to the Union's allegations that the company's conduct throughout the reopener negotiations reveals a policy of

direct dealing and a refusal to bargain in good faith. Several months preceding the actual negotiations the Union undertook two actions. It requested the company to supply data concerning wages, hours, and other conditions of employment, and it began a campaign to inform the workers of the Union's position and to compare the employer's wage and benefit package with those offered by major aerospace firms throughout the country. At this time Local 1746 was also engaged in its membership campaign and was distributing the challenged scab literature. This provoked preliminary skirmishing over furnishing the data, comparing nationwide aircraft rather than eastern aircraft engine manufacturers, and discussing informal reopener sessions without the full Union bargaining committee.

On November 1 the company made its first direct communication to its employees. Replying to the many prior Union mailings, it sent every bargaining unit employee a letter that compared the company's wage and benefit package with those of major East Coast engine manufacturers and chided the Union for its comparisons to West Coast aircraft manufacturers. Further, employees were told that the Union's advance publicity was putting the parties on a "collision course", and that only through "common sense" and "good faith negotiations" could this pre-Christmas collision be avoided. The letter concluded by asking each employee to read the benefit comparisons and draw his own conclusions.

Six bargaining sessions ensued between the employer and the Union. The first was held on November 3. The Union's initial proposals were rejected by the employer as "pie in the sky;" the company made no counter-offer. Starting on November 4 and concluding on November 10, the

Union sent six fliers to the employees describing the first bargaining session and providing strike-related information. The second negotiating session held on November 11 produced no change. On that day the employer communicated directly with the employees for the second time. It distributed a bulletin, which it had shown the Union, attacking the Union's high initial demands, and characterizing them as "thoughtless and irresponsible." The third meeting occurred on November 14 without changing the status quo. No offer was made by the company. The Union inquired as to whether an offer was being made to the Teamsters at the company's Sikorsky plant and, if so, objected to using such a small plant as a potential trendsetter for all of Pratt & Whitney's labor negotiations. The Union also demanded that any offer made at Sikorsky also be made to it.

The company announced on November 16 that the Sikorsky workers had accepted a new three-year contract outside the scope of their contract's reopener terms. The next day the company distributed a bulletin to its supervisory personnel, which was available to all employees. Various aspects of the Sikorsky agreement were discussed and the benefits resulting from not limiting negotiations to the terms of the reopener were presented. The Union responded defending its decision to avoid Sikorsky-like negotiations, including early reopener bargaining on a wide range of issues and "private meetings" with the employees. The fourth bargaining session took place on November 18. Again, the employer refused to make an offer, but stated that when it made an offer it would be similar to the Sikorsky three-year offer. The Union replied that it would not accept any contract whose terms extended beyond the reopener's scope. The day immediately following this meeting the company communicated a third time with the employees in a bulletin addressed to supervisors, but again seen by all employees. It discussed the Sikorsky agreement and described the Union's recalcitrance as "unrealistic".

Mediators were finally called in and both parties had separate meetings with them on November 20 and 24. A revised Union offer was presented and a decision reached for both parties to begin direct bargaining later on the 24th. At this meeting the employer made its first offer for a new three-year comprehensive collective bargaining agreement, practically identical to that accepted by the Teamsters at Sikorsky. The proposal provided for a wide range of benefits and a new savings plan was introduced to replace the Christmas bonuses that the company hoped to eliminate. Consistent with its prior aversion to the Sikorsky contract, the Union rejected this offer, stating that it was only interested in an agreement structured within the terms of the reopener provisions. On November 25 both parties again met individually with the mediator.

The parties met for a fifth negotiating session on November 26. The company presented a two-year wage and COLA proposal which included a wage increase and a 30 percent capped COLA. In comparison to the Union's latest proposal which would have increased labor costs by 45 percent, the employer's proposal would have raised its costs by 20.3 percent. The Union deferred comment on the proposal pending further study. The final meeting took place on November 29. The company's improved offer—a two-year wage increase with quarterly capped COLA adjustments amounting to a 23.3 percent increase in labor costs—was orally presented. The savings plan was included and the Christmas bonus dropped, though the company recognized that the plan was outside the reopener's scope. Union requests to modify the offer by transferring the savings plan costs to the COLA were refused and the Union stated that it would recommend rejection of the offer. The company made its offer public before the Union received the official written version. On November 30, two full page advertisements were placed in area newspapers; one describing the employer's offer, the other reprinting an earlier editorial concerning a possible strike.

The ratification meeting took place on November 30. Although a majority of the employees rejected the company's offer, the rejection was by less than a two-thirds vote. Under the Union's International Constitution a strike is only permitted upon a two-thirds vote rejecting an offer, and it further provides that if a strike is not authorized, the offer is automatically accepted. Consequently, Pratt & Whitney's offer was accepted.

B. *Administrative Decisions*

The ALJ concluded that the employer's refusal to provide the requested wage and hour information was not an unfair labor practice. Nonetheless, he held that the employer engaged in surface bargaining and in direct dealing through its combination of bargaining tactics and communications with the employees. All except two of the ALJ's conclusions were accepted by the NLRB. The Board rejected the findings that the employer participated in direct dealing and surface bargaining. The Board looked at the totality of the bargaining relationship to find two parties involved in "very hard and intense bargaining." *United Technologies,* 118 L.R.R.M. at 1561. It believed that the Union started the ball rolling by disseminating literature months before the beginning of the reopener negotiations. Throughout the negotiations, the Union informed the employees of their strike options and otherwise "engaged in a fair degree of saber rattling." *Id.* at 1561–62. Much of this occurred before the employer's position was even known. The employer, which has a right under § 8(c) to communicate with its employees, could therefore legitimately criticize the Union's tactics and disseminate its views. The Board noted that: "[i]n no instance did the [company's] material contain proposals or ideas which were not first submitted to the Union at the bargaining table." *Id.* at 1562. Since free discussion ultimately benefits the workers, employers should be encouraged to exercise their § 8(c) rights, absent explicit or implicit attempts to have the employees abandon the union. As there were no such attempts, there was no direct dealing.

The Board also rejected the ALJ's finding of surface bargaining. It first noted that the ALJ based his opinion on "the . . . [employer's] conducting of the wage survey, its communications with employees which the [ALJ] found constituted direct dealing, its conditioning of its offer of early negotiations on the Unions's being willing to meet outside the presence of its full bargaining committee, its delay in submitting counterproposals, the inclusion of a savings plan in its counterproposals, and its prohibiting the employees' distribution of prounion anti-scab literature." *Id.* These factors no longer were valid because the Board reversed the ALJ's finding that the taking of the survey violated § 8(a)(5) and his finding of direct dealing. Similarly, the employer's refusal to make any offer until late in the reopener negotiations had already been upheld and therefore added little. Conditioning early meetings on the absence of the full bargaining committee was not bargaining to impasse, nor was it suggested to be a separate unfair labor practice. The remaining possible factors for finding surface bargaining—the company's unlawful ban on the employees' dissemination of the antiscab pamphlets and its refusal to provide wage survey information, provided an inadequate basis to support a finding of surface bargaining. *Id.* Therefore, the Board dismissed the surface bargaining finding. In the discussion that follows we analyze both direct dealing and surface bargaining.

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C. *Discussion*

1. Direct Dealing by Employer

When workers have determined who their bargaining representative will be, an employer must bargain in good faith only with that representative. *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 684, 64 S.Ct. 830, 833, 88 L.Ed. 1007 (1944). The employer must "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . . ." 29 U.S.C. § 158(d). A reciprocal duty is placed on the union.

Labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade. As discussed earlier, unions are granted extensive powers to communicate with employees in the represented unit. Consistent with the First Amendment, the employer must also be afforded an opportunity to communicate its positions. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547 (1969). This First Amendment right is embodied in § 8(c), which allows the employer to express "any views, argument, or opinion" in any media form without committing an unfair labor practice provided that "such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); *Gissel,* 395 U.S. at 617, 89 S.Ct. at 1941.

Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance. *NLRB v. General Electric Co.,* 418 F.2d 736, 764 (2d Cir.1969) (Waterman J., concurring), *cert. denied,* 397 U.S. 965, 90 S.Ct. 995, 25 L.Ed.2d 257 (1970). Yet, an employer's right to communicate with its employees is not unlimited. Attempts to coerce the employees, or to portray the employer rather than the union as the workers' true protector, remove such speech from the penumbra of protection and may constitute an unfair labor practice. *Adolph Coors Company,* 235 NLRB 271, 277 (1978). The fundamental inquiry in a direct dealing case is whether the employer has chosen "to deal with the Union through the employees, rather than with the employees through the Union." *General Electric,* 418 F.2d at 759. Efforts to bypass the Union are considered direct dealing prohibited by § 8(a)(5). Moreover, such acts circumvent the workers' § 7 right to select a representative and bargain collectively. *Texas Electric Corp, Inc.,* 197 NLRB 10, 14 (1972).

Direct dealing is identifiable in two ways: the employer's communications themselves can provide a basis for finding an unfair labor practice; additionally, the challenged communications can be viewed

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within a pattern of other unfair labor practices which, when examined in its totality, reveal direct dealing in violation of § 8(a)(5). *Adolph Coors Co.,* 235 NLRB at 277. We examine the facts in light of these two possibilities.

None of the employer's communications to its employees were coercive. While strong language was used, stating that the union was on "a collision course," that their preparation was "thoughtless and irresponsible", and that their offers were "unrealistic", the employer never directly said—nor even implied—that the workers would be better off without the Union. Further, each substantive proposal brought to the workers' attention was first presented to the Union at the bargaining table. The communications recognized the Union as the legitimate bargaining representative, acknowledged that there were only a limited number of mandatory bargaining subjects under the reopener provisions, and urged the workers to act through Union channels or at the ratification meeting. In advising the workers of their rights and obligations during a strike—except for Stroncek's remarks—no undue burdens were placed on the employees, nor were there any threats if a strike ensued. The Union concedes that the communications themselves did not constitute an unfair labor practice since it argues that the communications were direct dealing only when viewed in the context of the entire negotiations, with particular emphasis on what the Union characterizes as surface bargaining.

We cannot agree. Examples of cases finding direct dealing illuminate our disagreement. In *General Electric Co.,* the employer combined a single take-it-or-leave-it offer with an extensive publicity campaign aimed at its employees. The campaign's purpose was to counter what the company recognized as the employees' perception, derived from prior labor disputes, that compromise positions actually adopted were only adopted because of the strength of the union rather than the fairness of the employer. 418 F.2d at 740–41. Additionally, the employer improperly took unilateral action on an insurance issue and refused to furnish legitimately requested information. Particular aspects of the employer's bargaining strategy such as repeatedly taking "unreasonable" positions on minor issues solely for the purpose of avoiding settlement were also criticized. *Id.* at 757–58.

Certain principles may be discerned from decisional law. Statements threatening employees' § 7 rights or suggesting they abandon the union implicate § 8(a)(5). Comments innocuous in themselves may—when coupled with a refusal to bargain or surface bargaining at the negotiating table—constitute direct dealing. Employers' messages to employees that exalt its proposals or criticize the union do not rise to the level of an unfair labor practice unless the language is strong or other unfair labor practices are found. Compare *Texas Electric Corp.,* 197 NLRB at 12–14 (anti-union employer speech plus aid in revoking union certification exalted the employer at the union's expense and constituted direct dealing) with *Endo Laboratories, Inc.,* 239 NLRB 1074, 1084 (1978) (non-coercive substantially truthful comments accompanied by public proposals first submitted to the union do not constitute direct dealing since the possibility of circumventing the union is remote). Thus, determining whether direct dealing has taken place is a complex task involving a balancing of the rights of the workers, the union, and the employer. In that balancing process, the employer's right to present its position so that employees may hear both sides should not be downplayed.

In light of the relevant law, the employer's communications here did not amount to direct dealing. The information was first given to the Union; the language was non-coercive; and the Union was consistently acknowledged as the legitimate bargaining representative. None of the three instances of misrepresentation are outcome-determinative: (1) The failure to tell the workers that the savings plan was replacing Christmas bonuses is harmless because it is non-coercive, so there is no

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violation of § 7 rights. Moreover, the savings plan was more costly for the employer than the Christmas bonuses. Hence the workers' benefits were not reduced. (2) Advising the employees via a newspaper advertisement that they could continue to work during extended negotiations was also non-coercive and did not diminish the Union's status. (3) Foreman Stroncek's comments, though admittedly coercive with regard to employees' § 7 rights, did not purport to coerce the employees to abandon the Union or accept the employer's offer. Further, the Union had information readily available to show that each of the statements was false, and therefore it could easily have rebutted them. Moreover, for the reasons discussed below there was no surface bargaining. Finally, none of the existing independent unfair labor violations found here—the refusal to provide survey information, the ban on the distribution of scab literature, and Foreman Stroncek's comments—implicate § 8(a)(5). None so limited the Union's bargaining power, or coerced the workers to abandon the Union in favor of the employer as to support a finding of direct dealing. [3]

2. Surface Bargaining

The Board also found that Pratt & Whitney did not engage in surface bargaining. Surface bargaining is characterized by an employer's refusal, in violation of § 8(a)(5), to participate in meaningful, good-faith bargaining with its employees' chosen representative. *The General Athletic Products Co.*, 227 NLRB 1565, 1574 (1977). When an employer chooses one opening position and thereafter refuses to bargain, or creates non-issues simply for the purpose of forestalling agreement, it is engaging in surface bargaining, because it implies that the company can successfully circumvent the union. *See General Electric*, 418 F.2d at 763.

The employer's challenged actions do not point to bad faith. Significantly, the employer did not adopt one bargaining position. Although a party is not obligated to deviate from an established bargaining position, a rigid single offer coupled with a specific refusal to consider alternative positions suggests surface bargaining. *General Athletic Products Co.*, 227 NLRB at 1574. Pratt & Whitney opened negotiations with a three-year offer, which though not a mandatory subject of bargaining, was legitimately presented provided the employer did not insist upon their inclusion. *NLRB v. Borg Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958). It properly did not bargain to impasse, but instead later formulated a two-year offer whose terms were within the reopener's scope. This two-year offer was also modified in an attempt to reach agreement. Certainly such efforts constitute meaningful bargaining.

Additionally, as discussed previously, there was no direct dealing. In communicating through the media the proper role of the Union was not overlooked. Having concluded that there was actual bargaining, substantial evidence supports the Board's conclusion that the employer was not guilty of bad faith bargaining when the record as a whole, including the independent unfair labor practices that were found, is considered.

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[3] Both the Board and ALJ found that the timing of the employer's offer was not in itself an unfair labor practice. This issue is not before us and we therefore accept the Board's determination. We add here only that an offer's timing may be evidence pointing either to direct dealing or surface bargaining. When a *pro forma* offer is made—one where a company presents an incomplete offer to the union and having shown it to the union first, then quickly makes it available to the employees—direct dealing concerns may be implicated. In such a case the real objective is to circumvent the union and make the offer to the employees directly by first making the union an offer known to be unacceptable. In Cases No. 4106 and 4116 timing does not implicate direct dealing concerns. Although the offers were made orally, the Union was made aware of the Sikorsky contract and told that it would receive a similar offer.

VI. THE HAMILTON STANDARD NEGOTIATIONS

A. *Facts*

Local 743 represented employees at the Hamilton Standard Plant. Both parties

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were governed by a collective bargaining agreement identical to the one previously discussed, except its effective dates were from April 1977 to April 1982. The beginning of reopener negotiations was set for April 1980. The Hamilton Standard contract had always been negotiated after the East Hartford contract and has followed that contract's language.

The first reopener meeting occurred on April 6, followed by one on April 9. The third meeting was held on April 13, at which the employer made its first offer—a two-year offer. Both sides modified their wage positions on April 20, but nonetheless rejected each others' offers. A final meeting was held on April 23, just prior to the Union's scheduled ratification meeting set for the 26th. The Union again modified its proposal and the company responded with a final offer, which actually contained two alternatives. The first was consistent with the reopener, but the second was a completely new three-year offer that was "substantially similar" to the offer rejected at the East Hartford facility. The Union rejected the three-year proposal.

On April 23 the company distributed leaflets similar to those used in the prior reopener negotiations. The leaflets presented both of the employer's offers, advocated the three-year offer, recognized that the Union was not bound to discuss its terms, and asked that the employees consider both positions and attend the ratification meeting. While distributing these leaflets, company supervisors made certain challenged statements. One supervisor described the employer's two-year proposal as "substandard," read the entire three-year offer and told the employees that if they wanted the three-year package, they ought to "get over to the Union and let the people know what they wanted. . . ." *United Technologies,* 118 L.R.R.M. at 1446. At another gathering, two company officials endorsed the three-year plan, urged the employees to petition the Union to consider it, and told them that the company was bringing it to their attention because the Union was unwilling to consider it. *Id.* A second communication was made to the employees on April 24. In a letter, Pratt & Whitney again touted its three-year proposal stating the reasons why both the company and the employees should favor it. Additionally, the company expressed a willingness to modify the three-year offer provided that the total cost remained within the company's ceiling and told the employees that such was the course that future negotiations would take.

The ratification meeting took place as scheduled. Only the two-year offer was discussed, and it was rejected by the employees. The Union failed again to garner enough votes for a strike and the offer was therefore accepted.

B. *Administrative Determinations*

The ALJ found direct dealing. He recognized that the employer was entitled to make the three-year offer, but held that it could not publicize its contents because of the offer's timing. [4] The NLRB reversed. First, it noted that since the employer had a right to make the offer, the only issue was whether its publication was direct dealing. The offer was first made to the Union, there was no coercive language nor any attempt to have the employees abandon the Union, and there was no surface bargaining, all factors which the Board found weighed against a finding of direct dealing. The offer's timing was not discussed, other than noting that it first was made available to the Union. The various remarks by company officials were found protected under § 8(c) because they were noncoercive and the "substandard" comment was directed at one of the company's proposals, not at the Union's demands. *Id.* at 1447–48 n. 7.

C. *Discussion*

As the Board observed, the employer had the right—regardless of Union

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[4] "[I]t seems to me that given the nature and timing of the three-year offer, it was made, not with any genuine expectation that the Union would, or even could seriously consider it. Rather, it is my belief that the manner and timing of this offer smacks more of a publicity ploy which, when publicized to the employees, was designed to create confusion and to create doubts in the employees' minds as to the efficacy of their representative's bargaining capability."

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sentiment—to propose the three-year contract. Moreover, it could also legitimately determine when it would make such an offer. Once that offer was made, the employer was then free to inform the employees of its contents and to advocate its acceptance. It is only prevented from making an offer directly to employees when it fails to make a prior showing to the Union, subject to the caveat that in making its presentation it cannot hold itself to be the employees real benefactor, thereby leading employees to leave the Union.

The employer acted within these bounds. The offer was made first to the Union and then presented to the employees in factually correct, non-coercive language. The Union's role in the process was recognized as was the Union's right not to bargain on the three-year offer. Employees were told to inform the Union of their position and to vote at the Union ratification meeting. While some of the managers' remarks might indicate employer expressions that the Union was standing in the way of an agreement that would be better for both the workers and the company, these statements are not as blatant as those made in *Texas Electric Corp.*, 197 NLRB at 10, nor were there subsequent employer unfair labor practices.

The Union claim of surprise is irrelevant since the employer's actions were legal. Further, that claim is somewhat disingenuous because the Union had seen a similar offer a few months earlier. Local 700 had representatives at the previous reopener negotiations and the Union itself had accepted a similar offer at Pratt & Whitney's Government Products Division. The Hamilton Standard contract was tied historically to the East Hartford contract, so it appears reasonable to anticipate that the employer would adopt a similar bargaining stance. Moreover, when the Union first stated that it was opposed to a three-year contract, the employer specifically reserved the right to make such an offer.

The lack of surface bargaining also supports our conclusion. Neither the ALJ nor the Board found that the employer negotiated in bad faith. The company made an offer within the reopener's scope and modified it in an attempt to reach agreement. It made a three year proposal, offered to modify it, and did not bargain to impasse. The employer's activities are in no way comparable to the intransigence, pettiness, and deliberate attempts to undermine the Union as were found, for example, in *General Electric*.

Conclusion

Looking at the record as a whole, there is substantial evidence supporting the Board's decisions in all three cases. Moreover, those decisions strike us as fair and reasonable. Accordingly, we enforce the Board's petition in Case No. 4106, in which the Board found that the employer had violated § 8(a)(1) by prohibiting the distribution of the scab literature and placing illegal restraints on the employees' right to strike. Sections 8(a)(1) and (5) were also violated by the employer's refusal to provide the Union with the survey results. In Case No. 85–4116, we deny the Union's petition for review and affirm the Board's decision that there was no direct dealing or surface bargaining. In Case No. 85–4126, we enforce the Board's petition as we agree that there was no direct dealing during the Hamilton Standard negotiations. In sum, we enforce the Board's orders and affirm its decisions in both 274 NLRB No. 87 and 274 NLRB No. 163.

City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Co. v. NLRB

787 F.2d 1475 (11th Cir.), April 28, 1986

On petition to review Board Order

Before Hill, Circuit Judge, Tuttle and Henderson[*], Senior Circuit Judges

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Hill, Circuit Judge: This case involves a petition for review and cross-application for enforcement of an order issued by the National Labor Relations Board (hereinafter "the Board") on January 9, 1984, against City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company (hereinafter referred to collectively as "City Cab").[1] Ap-

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[*] See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[1] The ALJ determined that as these companies had common officers, directors, and management, shared offices and facilities, had a common labor policy, and held themselves out to the public as a single, integrated

Continued

pellant seeks review of the Board's affirmance and adoption of an Administrative Law Judge's findings that the Regional Director for Region 12 of the Board appropriately set aside an informal settlement agreement and that appellant violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158 (the "Act") by unilaterally changing the terms and conditions of its employees' employment. Specifically, appellant claims that (1) the Board's determination that appellant's unilateral changes in rental rates of its cabs and in other terms and conditions of employment of its drivers constituted an unfair labor practice is not supported by substantial evidence; (2) the Board abused its discretion in setting aside a settlement agreement entered into between appellant and the employees' union; and (3) the Board abused its discretion in instituting formal proceedings against appellant based upon allegations of post-settlement unfair labor practices inasmuch as charges with respect to the overwhelming majority of these practices were time-barred.

FACTS

The following facts are relevant to the decision in this case. Appellant City Cab operates taxi service in and around Orlando, Florida. Most of City Cab's drivers lease their cabs from City Cab for a fixed daily rate. In January, 1977, Yellow, City, Dixie, Independent Cab Drivers Association [hereinafter "the Union"], an in-house labor organization formed by drivers for City Cab, filed a petition with the Board seeking to represent taxi drivers under contract with appellant. The Board rejected City Cab's claim that the drivers were independent contractors and directed an election which the Union won. The Union and City Cab subsequently entered into an interim collective bargaining agreement. Following a 1978 United States Court of Appeals decision finding certain taxi drivers in Chicago to be independent contractors, City Cab withdrew its recognition of the Union. After the Union filed a refusal to bargain charge against City Cab, the Board reaffirmed its previous position and found appellant's refusal to bargain constituted a violation of the Act. City Cab then petitioned the United States Court of Appeals for the District of Columbia for review of the Board's decision.

On July 3, 1979 the Union filed an unfair labor practices charge against City Cab, alleging unlawful unilateral changes in the driver's wages and working conditions. On July 25, 1979 the Regional Director issued a complaint alleging six instances of unilateral changes in terms and conditions of the driver's employment. In August 1979, the parties entered into an informal settlement agreement consisting of three documents: a standard "settlement agreement" form, a "notice to employees," and a "stipulation." In the notice, City Cab agreed to make no unilateral changes with respect to wages, rates, and other matters and that it would if necessary make whole any employees who had suffered monetary loss as a result of any unilateral changes in terms and conditions of employment. The settlement agreement, set forth on one of the Board's standard forms, promised, among other things, to comply with all terms and provisions of the notice. The agreement also provided that City Cab would "make whole the employees named below by payment to each of them of the amount set opposite his or her name," and though none of the employees were named in the agreement a clause regarding back pay stated that "[b]ack pay shall be computed in accordance with established agency policy." The stipulation recognized the pending Court of Appeals case on the independent contractor issue, and provided that if City Cab's appeal in the District of Columbia Circuit was successful, the complaint would be dismissed. However, if the D.C. Circuit affirmed the Board's position that the drivers were employees as defined in the Act, and thus within the purview of the protection afforded by the Act, then City Cab would carry out the provisions of the settlement agreement.

On July 3, 1980, the United States Court of Appeals for the District of Columbia rendered a decision affirming the Board's assertion of jurisdiction over appellant's drivers and enforced the bargaining order against the company. *City Cab Co. of*

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Orlando, Inc., et al. v. N.L.R.B., 628 F.2d 261 (D.C.Cir.1980). The parties subsequently began discussions in an attempt to effectuate the August, 1979 settlement agreement but were unable to reach agreement as to the amount of back pay due

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enterprise, they were a single employer for purposes of the National Labor Relations Act.

the drivers. Thereafter City Cab instituted a series of changes, occurring between September, 1979 and July 1981, as to the daily cab rental rate and mileage surcharge to City Cab's drivers, changes which the Board would later determine were made without advance notice to the Union. On July 20, 1981 the Union filed a second unfair labor practices charge against City Cab concerning the reinstatement of a daily mileage surcharge on July 13, 1981. Meanwhile, City Cab and the Union continued negotiations regarding implementation of the August 1979 settlement. On August 26, 1982, the Regional Director set aside the settlement agreement because it "had failed in its purpose and because of allegations of post-settlement violations of the Act." Shortly thereafter, in September, 1982, the Director issued a consolidated complaint, based upon violations alleged in both the July 1979 and July 1981 complaint as well as violations alleged to have occurred between September 30, 1979 and the July 13, 1981 violation. The ALJ concluded that the alleged violations were unlawful unilateral changes in violation of the Act and ordered City Cab to compensate its drivers for any loss of earnings they had suffered as a result of these changes.

City Cab filed exceptions to the ALJ's decision, complaining that the ALJ's finding that City Cab had made unlawful, unilateral changes was not supported by substantial evidence, that any claims regarding unfair labor practices were time-barred, and that the Board abused its discretion in setting aside the settlement agreement. The Board affirmed and adopted the ALJ's ruling, resulting in the instant appeal.

DISCUSSION

Whether City Cab's Changes in Cab Rental Rates and Other Working Conditions Violated the Act

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their right to, among other things, organize and bargain collectively. Section 8(a)(5) of the Act requires that an employer bargain with the duly designated representative of its employees. Section 8(d) sets forth the parameters of this obligation, requiring that the parties "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder. . . ." In addition, employers may not impose new or different working conditions without first affording the employees' representative an opportunity to bargain over them. *A.H. Belo Corp. v. N.L.R.B.,* 411 F.2d 959, 970 (5th Cir.1969), *cert. denied,* 396 U.S. 1007, 90 S.Ct. 561, 24 L.Ed.2d 498. On the other hand, an employer may lawfully make changes in working conditions without obtaining the agreement of the employees' representative if the changes act merely to maintain a "longstanding practice" and are so "automatic" as to constitute a "continuation of the status quo. . . ." *N.L.R.B. v. Katz,* 369 U.S. 736, 746, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962). The burden is on the employer to show that these changes satisfy this standard *N.L.R.B. v. Allis-Chalmers Corp.,* 601 F.2d 870, 875 (5th Cir.1979).

Appellant initially contends that the Board's finding that City Cab violated sections 8(a)(5) and (1) by unilaterally changing the rental rates and other terms and conditions of employment of its drivers is not supported by the evidence. Specifically, City Cab asserts that it was not required to bargain with the Union regarding the changes of which the Board complains as those changes were merely the continuation of established practices which operated merely to maintain the status quo relationship. City Cab notes that it began systematic adjustments in 1977 and that these adjustments were integrally tied to both swings in demand for taxi service and in driver availability. Though the volatility of market influences prevented the timing and amount of adjustments from being identical in each case, the policy of the adjustments remained consistent, so that a bargaining obligation under the Act was not invoked.

This court will uphold the Board's findings of fact if those findings are supported by substantial evidence. *Ona Corp. v. N.L.R.B.,* 729 F.2d 713, 719 (11th Cir.1984). A review of the record convinces us that the Board's findings of fact satisfied this substantial evidence standard. The parties stipulated that City Cab engaged in five of the six changes alleged in the July 1979 complaint. City Cab further stipulated to nineteen additional changes between 1979 and 1981. Seven of these changes occurred after September 1980, the date of the D.C.

Circuit's denial of appellant's petition for rehearing on their unsuccessful appeal. Of these changes, fifteen increased the charges, surcharges, or late penalties extracted from the drivers, while one adjusted the bidding procedure, and another increased the minimum number of shift assignments required before a cab would be issued to a driver.

We view specifically the numerous and irregular fluctuations in cab rental rates which occurred on and after the initial unilateral change in May, 1979. Evidence indicated that in 1978 City Cab operated under an announced schedule of rental rates. The schedule provided for three daily rates—$28.00, $30.00 or $32.00—depending on the particular month. The scheduled rate for May, 1978 was $28.00. In May, 1979 City Cab announced that the daily rental rate would be $32.00. During the next twenty-one months, City Cab raised or lowered the rental rate on twelve occasions. The new rates ranged from a minimum of $30.00 per day to a maximum of $36.00. Before the May, 1979 change, rates had held steady for at least a month, and sometimes for as long as four months. During the period in question, City Cab changed its rates at frequent and irregular intervals, sometimes more than once in the same month. For example, the rental rate was changed twice during the months of November, 1979 and October 1980, and three times during December, 1979. One witness testified that the rates were changed so often that drivers could not keep up with them, while another testified that appellant changed the rates unpredictably and that the drivers never knew what to expect. Testimony was also introduced that appellant never afforded the Union notice of these changes. The record demonstrates similar unprecedented fluctuations in the timing and amount of the mileage surcharge which City Cab also commenced in May, 1979. [2]

On this record, City Cab may not contend that its 1979–81 changes in the rental rate and the mileage surcharge were "a mere continuation of the status quo." *N.L.R.B. v. Katz,* 369 U.S. 736, 746, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962). To the contrary, the unprecedented and irregular nature of the changes suggest that they were "the product of an ad hoc decision-making process rather than a continuation of an established company policy." *Aaron Bros. Co., v. N.L.R.B.,* 661 F.2d 750, 754 (9th Cir.1981).

City Cab cites a number of cases for its position that changes similar to those which it instituted have previously been upheld. These decisions are inapposite to the case before us. Unlike the authority cited by appellant, City Cab had not committed itself to any fixed practice, such as switching from piece rates to hourly compensation during shifts from regular production to sample making, [3] providing automatic pay increases after designated lengths of employment or adjusting an employee's compensation in accordance with the particular job which he occupies. [4] As recognized by the ALJ, if City Cab had any practice at all, it was simply one of constant change. City Cab also argues that certain factors beyond its control necessitated these changes, such as totality of consumer demand and the amount of fares allowed by the city, and that as such the changes were merely an automatic response to these factors. Some of the factors were beyond appellant's control, some were not. [5] Whatever the origin of these factors, the changes City Cab instituted were not the "automatic" changes contemplated by the authority upon which it relies. In fact, the record is replete with admissions that City Cab's response to these changes was instead based upon a delicate and sophisticated analysis of a number of economic factors, such that the company exercised an impermissible degree of discretion for purposes of the Act. Substantial evidence supports the Board's finding that the changes instituted by City Cab constituted violations of sections 8(a)(5) and (1).

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Withdrawal of the Settlement Agreement

On August 26, 1982, the Regional Director set aside the settlement agreement on the grounds that it had "failed in its purpose and because of allegations of post-settlement violations of the Act." City Cab challenges this action, contending such action constitutes an abuse of the Director's discretion as the alleged violations upon which the Director relied in setting aside the agreement were not the subject of timely filed charges. Appellant notes that section 10(b) of the Act provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior tot the filing of the charge." City Cab then contends that the decision in *Inyo Lumber Co.*, 98 N.L.R.B. 984 (1952) extended this limitations period to require that a settlement not be set aside on the grounds of post-settlement unfair labor practices unless a charge regarding those practices is filed within six months of the violation. As no charges were filed within six months of all but one of the alleged violations giving rise to withdrawal of the settlement agreement, City Cab asserts the withdrawal was improper.

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[2] City Cab initially introduced a surcharge of 5 cents per mile for every mile over 200 which a driver exceeded during a day. It raised that surcharge to 20 cents a mile and lowered the mileage standard to 160 in November 1979. Further changes lowered the surcharge to 10 cents a mile, raised it to 20 cents a mile with a standard of 170, eliminated the surcharge, and reinstated the surcharge at 20 cents a mile above 170.

[3] *N.L.R.B. v. Phil-Modes, Inc.,* 406 F.2d 556 (5th Cir.1969).

[4] *N.L.R.B. v. Southern Coach & Body Co.,* 336 F.2d 214 (5th Cir.1964).

[5] The evidence demonstrates that one of the most significant factors considered by appellant in instituting its changes was the number of drivers willing to work for appellant. It can hardly be argued that this factor was not directly controlled by appellant's rental rates. We agree with the ALJ's observation that appellant, in considering this factor, overlooked the fact that this factor, integrally tied to the employeremployee relationship, is one which federal labor law seeks to control.

Appellant also asserts that the Board violated its own regulations by setting aside the settlement. City Cab points to section 17250.5 of the National Labor Relations Board's Division of Trial Examiners Public Manual which, at the time of the conduct at issue, provided in part that "where charges of violations of the settlement agreement are not filed within six months of the violation, the Board will not set aside the settlement." As *Gulf States Mfrs., Inc. v. N.L.R.B.*, 579 F.2d 1298 (5th Cir.1978), *aff'd in part and remanded in part,* 598 F.2d 896 (5th Cir.1979) (en banc) establishes that the Board's failure to adhere to its own regulations renders its decision invalid, appellant asserts, the Board's withdrawal of the settlement, which in the absence of timely filed charges violated section 17250.5, is invalid.

In determining the validity of appellant's complaint as to this issue, we note first that both the Board and the Regional Director relied on two grounds in setting aside the settlement agreement—the alleged post-settlement violations and the inability of the settlement agreement to effectuate its purpose. As a prefix to addressing this issue, we determine whether the Board considered either ground sufficient in and of itself to set aside the agreement. A review of the record convinces us such was the case with respect to the latter ground. The Board noted in its opinion as an undoubted fact appellant and the Region's inability to agree on an appropriate backpay formula and amount, despite the fact that administering this remedy was a primary purpose of the agreement. The Board then cited and quoted from a previous Board opinion holding that in such circumstances there had obviously not been a meeting of the minds when the settlement was executed, so that withdrawal of the settlement agreement was warranted. The Board found that principle equally applicable in this case. We conclude the Board considered the defeat of the settlement's purpose an independent basis for setting aside the agreement.

With this in mind, we now review whether the Board's determination that the settlement agreement failed its purpose and the Board's subsequent withdrawal of the agreement on that ground was proper. Where the purpose of a settlement has been defeated, it is the Board's duty "to take fresh steps to prevent frustration of the Act." *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 254, 65 S.Ct. 238, 241, 89 L.Ed. 216 (1944). The case before us presents such a situation. The language of the settlement agreement indicates that addressing and disposing of the issue of backpay was a primary purpose of the settlement. Union President William Cruz testified that it was his understanding that the agreement would require City Cab to compensate the drivers for all losses suffered from 1979 until the date of an agreement on rental rates.[6] City Cab agreed to "make whole any employees who ha[d] suffered monetary loss" by reason of the rate changes and to pay backpay to its employees "in accordance with established agency policy." The evidence clearly indicated that City Cab employees had in fact suffered losses from the changes instituted. Of the nineteen changes stipulated to by the parties as occurring after the violations alleged in the July 1979 complaint, fifteen of the changes increased the charges, surcharges, or late penalties to which the drivers were subject. A compliance officer who examined the tax records of some City Cab drivers testified that most of these drivers asserted their income had in fact declined after the cab rental changes. Union Vice President Robert Harris' testimony further supported this assertion.

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[6] On July 21, 1981, the parties reached agreement on cab rental rates, including a $42.00 daily rate. This agreement was incorporated into the collective bargaining agreement executed on February 2, 1982.

Yet it is undisputed that City Cab and the Regional Director could not agree on an appropriate formula or amount for computing the backpay due. Robert R. Morley, a compliance officer with the Board and extensively involved in the City CabUnion matter, testified that City Cab owed "substantial backpay" under the settlement agreement entered into between appellant and the Union. Morley devised three possible methods for computing the backpay liability depending upon the time period determined applicable. The amount of backpay owed pursuant to these calculations was $200,000, $400,000 and $800,000 respectively. Morely testified he followed established Board policy in arriving at these calculations. Despite this, following a conference with the Regional Director in September 1981, City Cab delivered a letter to the Director in which it denied it had any backpay liability at all. This contention was based primarily on its assertion that the settlement agreement prohibited only unilateral changes made after the D.C. Circuit decision and as it had not increased the rates to drivers since that time no backpay was due. The company maintained this position through almost the entire negotiation period. Finally, in a July, 1982 letter, City Cab presented its only written offer, offering to pay "50% of the amount computed per driver for period involved," an offer which the Region considered unacceptable.

Assuming, *arguendo,* that appellant's interpretation that no backpay is owed pursuant to the settlement agreement is reasonable, and accurately reflects what was in **1482** its mind at the time of the settlement, the other parties to the settlement had markedly different ideas as to what the settlement was intended to cover. As noted earlier, appellant argued that the settlement was intended to remedy only violations occurring *after* the Court of Appeals' final ruling. This interpretation was based on the language of the stipulation which stated that the settlement agreement was to become effective upon the final disposition in the test of certification case. Neither the Region nor the Union agreed with this interpretation. The Union's understanding was that the settlement covered all changes in rental rates from the time the settlement agreement was signed in 1979 until the Union and City Cab reached agreement on rental rates in 1981. The fact that this was not the reading the employer gave the agreement is abundant evidence that it was not sufficient for its purpose. As far as *Inyo Lumber* is concerned, this happening of post-agreement adjustments without bargaining might not in themselves be sufficient for setting aside the settlement agreement because of the lack of timely-filed charges, but the fact that the agreement was not sufficient to lay at rest the rights and obligations of the parties as to these violations amply supports the conclusion that the settlement agreement did not effectuate its purpose. Under such circumstances, it is clear the purpose of the settlement agreement had been defeated, and thus the Regional Director acted properly within his discretion in setting aside the settlement agreement. *See e.g., N.L.R.B. v. International Union of Operating Engineers,* 460 F.2d 589, 597 (5th Cir.1972); *International Photographers of Motion Picture Industries, Local 659 v. N.L.R.B.,* 197 N.L.R.B. 1187 (1972), *enforced,* 477 F.2d 450 (1973), *cert. denied,* 414 U.S. 1157, 94 S.Ct. 914, 39 L.Ed.2d 109 (1974).

In so ruling, we need not address whether the settlement agreement could have been properly set aside on the basis of the post-settlement violations. Thus, while there is much argument by both parties in their briefs about this issue, we need not explore the effect section 10(b) has upon the Board's ability to set aside a settlement agreement for post-settlement violations which are not the subject of charges filed within six months of the violations. This being the case, the *Inyo Lumber* decision and the Board provision cited by City Cab are inapplicable to our determination of this issue.

Whether Board Action With Respect to the Post-July, 1979 Violations is Time-Barred

We now turn to City Cab's final contention of error, that the Board's failure to find that most of the alleged violations in the consolidated complaint were time-barred by section 10(b) renders its decision and order unenforceable. Here, the Union's July 3, 1979 charge was filed two months after the May, 1979 violations. The Union's second charge was filed July 20, 1981, after the Company reinstated an excess mileage surcharge on July 13 of that year. City Cab asserts that since this charge was filed almost two years after the unilateral changes in late 1979, and almost a year after the unilateral changes in late 1980, section 10(b) prevents the Board from alleging or finding that the 1979 and 1980 conduct was in violation of the Act.[7] City Cab relies upon *Inyo Lumber* as its principal authority, contending the decision requires that charges pertaining to post-settlement violations be filed within six months of the violation and precludes prosecution of post-settlement violations for which no timely charge is filed.

In *Inyo Lumber,* a Union's February 27, 1950 charge accused the employer of conducting coercive interrogations. The parties executed an informal settlement on March 29, 1950, before any complaint was filed. During May, June or July of 1950, the employer apparently engaged in a number of unfair labor practices—threats, antiunion discharges, and the discretionary shutdown of the employer's operation. On March 3, 1951, nearly ten months after the employer's alleged misconduct between May and July 1950, the Union filed a charge regarding these violations as an amendment to its original February 18, 1950 charge. A complaint subsequently issued. In dismissing the complaint, the Board noted that section 10(b) did not preclude it from prosecuting both pre-settlement and post-settlement violations merely because the post-settlement charge and complaint may have issued more than six months after the original or the subsequent misconduct. However, the Board determined to exercise its *discretionary power* to dismiss the complaint under the circumstances presented because "the Union waited for more than 9 months [to file its amended charges] and nothing appears in the record to explain or mitigate that delay." In so ruling, the Board explained that a policy prohibiting a charging party from overturning a settlement on the basis of unjustifiably delayed complaints about post-settlement misconduct may serve to reassure charged parties that they can engage in settlements without the risk of having them overturned on the basis of stale claims.

We find that the decision on this issue is not controlled by *Inyo Lumber.* The Board in *Inyo Lumber* recognized that section 10(b) did not preclude it from reactivating the original charges, then elected to exercise its discretion to refuse to reactivate the complaint on the facts before it in that instance. The Board was equally at liberty to exercise its discretion to reactivate the complaint, which it did here. More importantly, in *Inyo Lumber* a settlement agreement existed which was subjected to attack based on the unfair labor practices not the subject of a timely charge. In contrast, we have upheld the withdrawal of the settlement agreement here not because of such unfair labor practices, but because it did not effectuate its purpose. As such, the concerns expressed by the Board in *Inyo Lumber,* that delayed complaints about the post-settlement conduct would serve to undermine the settlement agreement, are not invoked.

We instead find this case controlled by *N.L.R.B. v. Fant Milling,* 360 U.S. 301, 79 S.Ct. 1179, 3 L.Ed.2d 1243 (1959). In that case, the Court addressed whether a complaint can properly include allegations of conduct violative of the Act, which conduct occurred subsequent to the filing of the charge which forms the basis for the complaint. The court concluded that section 10(b) placed no such restriction on the Board. The Court held that the Board may deal with subsequent conduct under a previous charge if the conduct is "related to" the unfair labor practices alleged in the charge and "grow[s] out of" them while the proceeding is pending before the Board. The Court reasoned that Congress would never have intended that section 10(b) preclude the Board from " 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grew out of them while the proceeding is pending before the Board.' " 360 U.S. at 309, 79 S.Ct. 1184 (quoting *National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 369, 60 S.Ct. 569, 579, 84 L.Ed. 799 (1940)). More importantly, the Court noted that the six-month limitation period imposed by section 10(b) does not relate to conduct subsequent to the filing of the charge, so that even unfair labor practices occurring more than six months after the charge can properly be the subject of a complaint and remedial action by the Board if sufficiently related to the charge. 360 U.S. at 309 n. 9, 79 S.Ct. at 1184 n. 9.

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[7] We recognize that section 10(b) is applicable to the extent that the July 20, 1981 charge is timely only as to the July 13, 1981 conduct. Thus, if violations occurring after the July 3, 1979 charge are to be the subject of Board action at all, they must be pulled within the purview of the earlier July, 1979 charge.

Thus, without the filing of additional charges, a Board complaint may encompass not only the subject of a timely charge but any subsequent misconduct that is sufficiently related "to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge." *N.L.R.B. v. Rex Disposables,* 494 F.2d 588, 590 (5th Cir.1974). Given a sufficiently close relationship between all the allegations in the complaint, it is irrelevant to section 10(b), or to any other policy of

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the Act, that the complaint may issue more than six months after some or all of the conduct alleged to violate the Act. *N.L.R.B. v. Central Power & Light Co.,* 425 F.2d 1318, 1320–1321 (5th Cir.1970); *N.L.R.B. v. Jack La Lanne Management Corp.,* 539 F.2d 292, 295 and n. 1 (2d Cir.1976).

In the instant case, as noted, the Union filed a timely charge as to the initial round of unilateral changes. The charges were of precisely the same class of violations as was prescribed in the original complaint. Accordingly, had the settlement not intervened, and if the Regional Director's investigation had brought to light the 1980 and 1981 violations, *Fant Milling* authorized the Board to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates. [8] *See also N.L.R.B. v. International Union of Operating Engineers,* 460 F.2d 589, 600–61 (5th Cir.1972); *Eastern Main Medical Center v. N.L.R.B.,* 658 F.2d 1, 6–7 (1st Cir.1981).

The same principles are equally applicable here despite the settlement agreement. After a timely charge resulting in the issuance of a complaint, the settlement agreement brought to a halt for a time the Board's investigatory process. With the withdrawal of the settlement agreement, the Board's investigatory powers were reinstated, and ". . . once the Board's (jurisdiction) is properly invoked by the timely filing and review of a charge, any unfair labor practices thereafter committed by a respondent and uncovered while the charge is being investigated become cognizable by the Board and may be included in the complaint." *Ferro Stamping and Mfg. Co.,* 93 N.L.R.B. 1459 (1951). In particular the Regional Director was authorized to consolidate within his amended complaint all the post-settlement violations of the Act that had come to his attention whether or not those violations were the subject of any additional "timely" charge as long as they were sufficiently related. *See Globe Gear Co.,* 189 N.L.R.B. 422 (1971), *enforced,* 451 F.2d 1348 (6th Cir.1971). This is exactly what he did. We conclude Appellant's reliance on section 10(b) is misplaced.

Having concluded that all of appellant's allegations of error are without merit, it is hereby ordered that enforcement be GRANTED.

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[8] Appellant asserts that as neither the ALJ nor the Board invoked *Fant Milling* in dismissing its section 10(b) argument, the General Counsel's "post-hoc reliance" on *Fant Milling* cannot be considered. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168–69, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962). We find this contention unpersuasive. The ALJ recognized City Cab's section 10(b) argument, then held that under applicable law section 10(b) did not render the complaint defective as the charges filed served as a sufficient basis for the complaint. The Board explicitly affirmed this aspect of the ALJ's decision. As is indicated by our opinion here, this represents an accurate statement of the law, and is supported by the *Fant Milling* decision. The Board asserts this same position before us and we uphold the Board's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, supra* at 168–69, 83 S.Ct. at 245–46.

International Guards Union of America, Local 69 v. NLRB

789 F.2d 1465 (10th Cir.), May 1, 1986--270 NLRB 380

On petition to review Board Order

Before BARRETT and MOORE, Circuit Judges, and CHILSON *, District Judge

1465

CHILSON, Senior District Judge: This is an appeal by the Appellant ("the Union") from a Decision and Order of the Appellee, National Labor Relations Board ("the Board"), entered on April 30, 1984.

Mason & Hanger-Silas Mason Co., Inc. intervened and is referred to herein as the "employer."

STATEMENT OF THE CASE

For many years prior to and since this action, scientific research important to the national security of the United States was conducted at the Los Alamos National Laboratories located at Los

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* Honorable Hatfield Chilson, Senior Judge, United States District Court for the District of Colorado, sitting by designation.

Alamos, New Mexico. Prior to October 1981, the security of the laboratories and their operations was provided by federal employees.

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In 1981, the United States contracted with Mason & Hanger-Silas Mason Co., Inc. ("the Company") to provide the security functions for the laboratories. The Company took over the guarding duties in October 1981 with a guard force consisting of former federal employees who had been guards at the facilities and some new hires.

The Company was and is contractually obligated to provide guard service 24 hours a day, 7 days a week.

In December 1981, a representation election was held which resulted in the Union's certification as a bargaining representative of the guard employees. After prolonged negotiations, a bargaining agreement between the Company and the Union was entered into on February 9, 1983.

In the meantime, two cases were filed by the Union charging the Company with unfair labor practices.

The first case, No. 28-C.A.-6944, was filed by the Union in June 1982, alleging Larry Romero was unlawfully warned by the employer on May 7, 1982, for advising employees on his shift to disregard Company rules hwich required the employees to pick up their weapons and otherwise get ready for formation prior to 3:00 P.M. in order to be ready for duty by 3:06 P.M.

Larry Romero had been a guard at Los Alamos since 1973. When the Company took over the guarding functions in October 1981, Romero became an employee of the Company and Vice President of the Union.

On November 9, 1982, pursuant to an informal settlement agreement approved by the Regional Director, the Company notified Romero in writing that the May 7 warning was being removed from its files.

The second case, No. 28-C.A.-7255, was filed by the Union on December 23, 1982, alleging that the Company violated Section 8(a)(1)(3) and (4) of the National Labor Relations Act by terminating the employment of Union members Romero and Demecio Gonzalez in December 1982, for their refusal to work overtime. As previously noted, the Company was contractually obligated to provide guard service 24 hours a day, 7 days a week.

In May 1982, the Company's Chief of Security, Everhart, learned that a guard station had been closed because no volunteer could be found to replace an absent guard. Everhart, in May 1982, circulated a memo to shift commanders and the Union President, Vaszuez, stating:

> Station Manning
>
> Under no circumstances will a station be closed due to shortage of personnel.
>
> In the event it is not possible to obtain personnel for voluntary overtime, either from the concerned Company's call list or doubling from the preceding company, the junior Inspector from the concerned Company will be called and directed to work.
>
> Refusal to work directed overtime may have the most serious consequences, to and including termination.

In February 1983, the Regional Director vacated his approval of the settlement agreement in Case No. 28-C.A.-6944 and issued a consolidated complaint based on the May 7 warning to Romero and the December discharge of Romero and Gonzalez.

The two consolidated cases were heard by Administrative Judge David G. Heilbrun, acting as trial examiner, in August 1983.

On December 30, 1983, the Judge issued his decision in which he concluded:

> 1. By discriminatorily discharging Larry Romero on December 22 because of his support for the Union, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and ordered Romero's reinstatement and other relief.
>
> 2. By discriminatorily issuing a written warning to Larry Romero on May 7 Respondent has further violated Section 8(a)(1) and (3) and ordered the Company to remove from its files any reference to the warning.

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> 3. General Counsel has failed to prove that Respondent unlawfully discharged Demecio Gonzalez.
>
> 4. General Counsel failed to prove that Respondent unilaterally changed its established procedure for the overtime manning of vacant posts.

The Company filed exceptions to Conclusions 1 and 2 of the Administrative Law Judge and sought review thereof by the National Labor Relations Board.

After its review, the Board, on April 30, 1984, entered its decision concluding:

> We conclude that the General Counsel has not proven by a preponderance of the evidence that the Respondent discharged Romero in violation of Section 8(a)(3) and (1). Further, because the Respondent has not been shown to have committed any unfair labor practices since the November 1982 settlement agreement concerning the 7 May warning, we find it appropriate to reinstate that settlement agreement. Accordingly, without reaching the merits of the alleged unlawful warning, we shall reinstate the settlement agreement and dismiss the complaint in its entirety.

The Board then entered an Order dismissing the Complaint and reinstating the settlement agreement in Case No. 28–C.A.–6944.

The Union appealed the Board's Decision and Order to this Court.

The guidelines for this Court's review of the Board's Findings and Conclusions are well established by the following decisions of this Circuit.

In *S.A. Healy Company, Petitioner, v. National Labor Relations Board, Respondent,* 435 F.2d 314, at 316, this Court stated:

> "The Trial Examiner acts for the Board in making initial findings and conclusions; however, the Board is the final determinator of the elements of the charge before it and is not bound by the Examiner's findings. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Rocky Mountain Natural Gas Co. v. N.L.R.B.,* 326 F.2d 949 (10th Cir.1964); *N.L.R.B. v. Sapulpa Typographical Union,* 321 F.2d 771 (10th Cir.1963)."

In *Pennypower Shopping News, Inc., Petitioner v. National Labor Relations Board, Respondent,* 726 F.2d 626, at page 629 it is stated:

> "The Board's factual findings are entitled to acceptance by a reviewing court so long as they are supported by substantial evidence in the record considered as a whole. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The standard of review is not altered simply because the administrative law judge and the Board have reached contrary conclusions. *U.S. Soil Conditioning v. N.L.R.B.,* 606 F.2d 940, 945 (10th Cir.1979). We must still start with the findings made by the Board and accept them if they are supported by substantial evidence. *N.L.R.B. v. Pacific Grinding Wheel Co.,* 572 F.2d 1343, 1347 (9th Cir.1978)."

In *National Labor Relations Board, Petitioner v. Montgomery Ward & Co., Respondent,* 554 F.2d 996, at 999, it is stated:

> "In *N.L.R.B. v. Central Machine and Tool Company,* 429 F.2d 1127 (10th Cir.1970), *cert. denied,* 401 U.S. 909, 91 S.Ct. 870, 27 L.Ed.2d 807 (1971), we stated the standard of our review:
>
> > . . . Our review is limited to searching the record to see if there is substantial evidence to support the fact findings. 29 U.S.C. § 160(e). We do not sit as a super trial examiner, and do not weigh the credibility of one witness against another nor do we search for contradictory inferences . . . 429 F.2d at 1129.
>
> See also: *N.L.R.B. v. Dover Corporation, Norris Division,* 535 F.2d 1205 (10th Cir.1976), U.S. Appeal Pending; *N.L.R.B. v. Okla-Inn,* 488 F.2d 498 (10th Cir.1973); *N.L.R.B. v. Gold Spot Dairy, Inc.,* 417 F.2d 761 (10th Cir.1969)."

In *National Labor Relations Board, Petitioner, v. Western Bank and Office Supply Company,* 283 F.2d 603, at 605, this Court stated:

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> "The Act proscribes the right to hire and fire only when it is employed as a discriminatory device. Discrimination may not be inferred from the fact that the discharged employee was a union member. The purpose or motivation of the employer is controlling, and the presence or lack of anti-union background is pertinent in a determination thereof."

We have reviewed the Decision of the Administrative Judge and the Decision and Orders of the Board in the light of the law as above set forth and the evidence.

Romero's Discharge

As to the Judge's Conclusion No. 1, that Romero was discriminatorily discharged because of his support of the Union, the Judge stated: "The issue is close, however, on balance I cannot avoid inferring respondent was resentful enough that when the opportunity presented itself, a discriminatory discharge was visited on Romero." (Page 7, Judge's Decision).

On review of the same evidence as that before the Judge, the Board found:

> On 5 December, which was the first of Romero's 2 days off that week, the Respondent needed two employees to work overtime in order to have a full complement on the C shift. About 2:20 P.M. the Respondent's desk officer, Lieutenant Schmahl, began making telephone calls to employees on the "day off" list, starting from the top of the list. Romero, who was number seven on the list that day, was the first one reached by Schmahl. Schmahl told Romero that he was needed for overtime, but Romero responded that he was leaving for Colorado. Schmahl then asked Romero if he was refusing to work overtime and Romero said, "I guess I am refusing." On 7 December Romero was called in to the Respondent's office where he was asked why he had refused the overtime. Romero explained that he had to go to Colorado to help out a friend whose car had broken down. The Respondent informed Romero that it would investigate the matter and, if it were determined that Romero had been insubordinate, he would be terminated. On 22 December, Romero was notified that his reason for refusing the overtime was not sufficient, and therefore he was being terminated for willful disobedience and insubordination. (Board's Decision, pages 3 and 4.).

The Board concluded:

> "Contrary to the Judge, we find the evidence insufficient to establish that the Respondent discharged Romero because of his support for the Union. . . ." (Page 4, Board's Opinion).

We find the Board's conclusion is supported by substantial evidence and the Board's conclusion is hereby affirmed.

Judge's Conclusion No. 2

The Judge in his Decision of December 30, 1983, concluded that the Company violated Section 8(a)(1) and (3) by discriminatorily issuing a written warning to Larry Romero on May 7, 1982, and ordered the Company to "remove from its files any reference to the written warning and notify Larry Romero in writing that this has been done and that evidence of this discipline will not be used against him in any future way." (Pages 7 and 8, Judge's Decision).

With respect to the May 7 warning, the Board made the following findings:

> Romero worked on "Company C," or the C shift, which began at 3 p.m. Pursuant to company policy, employees had to line up "at formation" 6 minutes after the start of their shift.

According to Romero, employees started to pick up their weapons and otherwise get ready for formation prior to 3 p.m. in order to be ready by 3:06 p.m. On 6 May 1982, just prior to the start of the C shift, Romero advised employees in the gunroom that they should not be performing job tasks before 3 p.m. and asked them to wait until 3 p.m. Romero repeated this advice shortly before 3 p.m. in the parking lot 7 May. Apparently, a

sufficient number of employees listened to Romero so as to result in formation being delayed. On 7 May the Respondent issued a written warning to Romero for "interference with the work of others," which the Respondent repeated orally to Romero at a grievance meeting 19 May. The respondent also issued warnings to at least 10 other employees for being late to formation, but these were rescinded after the employees agreed not to engage in such conduct again.

On 15 June the Union filed an amended charge in Case 28–C.A.–6944 alleging, inter alia, that the Respondent took disciplinary action against Romero because he engaged in protected concerted activities. An 8(a)(1) and (3) complaint based on the warnings was issued 2 July. On 9 November, pursuant to an informal settlement agreement approved by the Regional Director, the Respondent notified Romero in writing that the 7 May warning was being removed from its files.

On 11 February, 1983, the Regional Director vacated his approval of the settlement agreement in Case 28–C.A.–6944, set aside the settlement agreement, and issued a consolidated complaint based, inter alia, on the 7 May warning and the 22 December discharge.

The Court finds that the Regional Director's action in attempting to set aside the settlement agreement in Case 28–C.A.–6944 was an attempt to reintroduce the issue of the May 7 warning which had been settled on November 9, 1982.

The Board concluded:

> Based on all of the foregoing we conclude that the general counsel has not proven by a preponderance of the evidence that the Respondent discharged Romero in violation of § 8(a)(3)(1). Further, because the Respondent has not been shown to have committed any unfair labor practices since the November 1982 settlement agreement concerning the 7 May warning, we find it appropriate to reinstate that settlement agreement. Accordingly, without reaching the merits of the alleged unlawful warning, we shall reinstate the settlement agreement and dismiss the complaint in its entirety.

The Board then entered the following order:

> "The complaint is dismissed and the settlement agreement in Case 28-C.A.-6944 is reinstated."

The Court finds that the findings and orders of the Board are supported by substantial evidence and the Court hereby AFFIRMS the decision and orders of the National Labor Relations Board and dismisses this appeal.

Financial Institution Employees of America, Local No. 1182 Chartered by United Food and Commercial Workers International Union, AFL-CIO v. NLRB

788 F.2d 1411 (9th Cir.), May 5, 1986

Order remanding for further proceedings

Before WRIGHT, PREGERSON, and FERGUSON, Circuit Judges

1412

ORDER

This matter is remanded for any necessary further proceedings in light of the recent opinion of the Supreme Court of the United States in *NLRB v. Financial Institution Employees of America, Local 1182,* —— U.S. ——, 106 S.Ct. 1007, 1013, 89 L.Ed.2d 151 (1986).

International Brotherhood of Electrical Workers, Local 387, AFL-CIO v. NLRB

788 F.2d 1412 (9th Cir.), May 6, 1986—273 NLRB 1757

On petition to review Board Order

Before BROWNING, Chief Judge, and SNEED and HUG, Circuit Judges

1413

PER CURIAM: IBEW Local 387 petitions for review of a decision of the National Labor Relations Board holding that the Arizona Public Service Company did not violate the National Labor Relations Act by disciplining eight employees for participating in a sympathy strike. The Board found the strike prohibited by a broad no-strike provision in the collective bargaining agreement. We reverse and remand for further proceedings.

A collective bargaining relationship has existed between the Arizona Public Service Company and the union since 1945. The collective bargaining agreement involved in these proceedings was effective from April 1, 1982 to April 1, 1984.

Article I, Section 2 of the agreement contains a broad no-strike pledge relating to work stoppages authorized by the union. It recognizes the right of the company to discipline employees engaging in unauthorized work stoppages, subject to the union's right to invoke the grievance/arbitration procedure contained in Article VII. The no-strike clause does not, on its face, indicate whether it encompasses sympathy strikes, i.e., refusals to cross stranger picket lines. [1]

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[1] Article 1, Section 2 provides in full:

During the term of this Agreement, and during any period of time while negotiations are in progress between the parties hereto for the extension or renewal of this Agreement, the Union agrees on behalf of itself and each of its members that there will be no authorized concerted failure to report to work, cessation or interruption of work, slowdown, strike, boycott, or any other type of organized interference, coercive or otherwise, with the Company's business.

The Company agrees, as part of the consideration of this Agreement, that neither the Union, its officers, representatives, or members shall be liable for damages for unauthorized stoppages, strikes, intentional slowdowns, or suspensions of work in the Company's service, if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action that it has not authorized the stoppage, strike, slowdown, or suspension of work;

(b) Copies of the notice described in (a) above are posted immediately by the Union on the bulletin board;

(c) The Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employees who engage in any unauthorized stoppage, strike, intentional slowdown, or suspension of work, subject to the Union's right to present a grievance on such disci-

Continued

The dispute arose during construction of the Flagstaff City Complex. The Arizona District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America were picketing one of the building contractors at the jobsite. It became necessary to de-energize and remove an overhead power line. A crew of ten company employees, members of the union, was dispatched to do the work. The crew was confronted by a Carpenters picket line. Eight members of the crew refused to cross the line.

The company ordered these crew members suspended for five days. The next day, however, the carpenters agreed to remove the pickets temporarily, and the company lifted the suspension so the crew could finish the job. The union later notified the company in writing that the union had not authorized the work stoppage, and posted notices in compliance with Article I, Section 2(b) of the agreement. After the job was completed, the company issued a three day suspension to the employees who had refused to cross the picket line.

The union filed unfair labor practice charges, claiming the suspension violated sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3) (1982). The Administrative Law Judge ruled in favor of the union, holding the no-strike clause did not waive the statutory right of employees to engage in sympathy strikes. In so ruling, he applied the then-current Board rule that such a waiver would not be implied solely from a broad no-strike clause, citing *Operating Engineers, Local 18 (Davis-McKee, Inc.)*, 238 N.L.R.B. 652 (1978). Looking to extrinsic evidence of the meaning of the no-strike clause, the Administrative Law Judge found the bargaining history did not reveal a clear understanding that the no-strike clause covered sympathy strikes.

The company filed exceptions. The Board reversed, relying upon its intervening decision in *Indianapolis Power & Light Co.*, 273 N.L.R.B. No. 211 (Jan. 31, 1985), which overruled *Davis-McKee* and established the rule that, absent extrinsic evidence that the parties intended otherwise, a general no-strike clause waives the employee's right to engage in sympathy strikes. The Board held the no-strike clause in the contract in this case waived the right and authorized the company to take disciplinary action. *Arizona Public Service Co.*, 273 N.L.R.B. No. 210 (Feb. 5, 1985).

The union challenges the Board's decision on two grounds: (1) the Board's new rule that a general no-strike clause is presumed to waive the employee's right to engage in sympathy strikes is inconsistent with the National Labor Relations Act and Supreme Court authority; and (2) even if valid, the rule was not properly applied in this case. We agree with the second ground; we do not reach the first.

The Board and the union agree that the right to engage in a sympathy strike is guaranteed by section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982), and that it may be waived by a collective bargaining agreement if the waiver is "clear and unmistakable." *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1364 (9th Cir.1981).

Whether the contract waives the employees' right to strike "turns upon the proper interpretation of the particular contract before us. Like other contracts, it must be read as a whole and in light of the law relating to it when made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956). Other relevant considerations include the bargaining history, the context in which the contract was negotiated, the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning. *See Southern California Edison Co.*, 646 F.2d at 1365–66; *United States Steel Corp. v. NLRB*, 711 F.2d 772, 778–79 (7th Cir.1983); *W-I Canteen Service, Inc. v. NLRB*, 606 F.2d 738, 743, 746–47 (7th Cir.1979); *News Union v. NLRB*, 393 F.2d 673, 677–78 (D.C.Cir.1968).

These principles applied before and after the Board changed the presumption arising from a broad no-strike clause. The presumption itself is not a substantive rule. The parties' intent governs; the presumption is only an interpretative aid in seeking out that intent. The Board recognized these principles, but failed to apply them.

The Administrative Law Judge examined the existing law, concluding that

> [i]n the Board's view, broad no-strike clauses, without more, are insufficient to establish waiver

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pline in accordance with Article VII of this Agreement in cases in which an issue of fact exists as to whether or not any particular employee has engaged in, participated in, or encouraged any such violation.

> of the right to engage in sympathy strikes. Rather, any waiver of the right to engage in a sympathy strike may be found only "in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language,"

(quoting *Davis-McKee, Inc.*, 238 N.L.R.B. at 652).[2] The Administrative Law Judge noted the contract language did not expressly include sympathy strikes. He therefore examined the language of the bargaining agreement as a whole, the history, and past practices of the union and company to determine whether a waiver of the right should be implied.

The Administrative Law Judge concluded that the no-strike provision "clearly [was] posed as the *quid pro quo* for recourse to a grievance procedure," and that the latter did not apply to the dispute resulting in the employees' sympathy strike.

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He reviewed the testimony relating to the negotiations for the 1982–84 agreement. The company's negotiators proposed changes in the wording of Article I, Section 2, to make it clear that any work stoppage, including a sympathy strike, was prohibited. The union rejected the proposal and it was withdrawn. The parties disagreed as to the motives of the parties in offering and rejecting the proposal. The Administrative Law Judge expressly credited the testimony of the union witnesses over that of company witnesses and concluded, "[T]here has never been an understanding or agreement between Respondent and the Union that the language of Article I, Section 2 encompassed sympathy strikes."

The Administrative Law Judge examined past practices of the company and the union in detail, and stated, "It is clear from the record that, prior to the incident giving rise to this case, no bargaining unit employee was ever disciplined by the Respondent for having engaged in a sympathy strike by refusing to cross another union's picket line to perform work for Respondent." He held,

> The only positive conclusion that may be drawn from past practice is that the Respondent has maintained a general policy of deferring service in the face of stranger picket lines, and of enlisting the services of the Union in obtaining removal of the pickets so that its employees would perform work at premises where disputes existed between other unions and employers.

The Administrative Law Judge concluded:

> In sum, I conclude that Respondent's attempt to broaden the no-strike clause to cover "sympathy strikes" was not successful. The collective-bargaining agreement does not prohibit unit employees from honoring picket lines of other unions, and the evidence fails to establish that the parties had a clear understanding when they executed the last contract that it barred sympathy strikes. The contract is a complex document that obviously was not written by amateurs. If the parties had intended that sympathy strikes should be included within the prohibition of Article I, Section 2, they could have said so in clear unequivocal terms. Instead, the Respondent has sought to include it by amending Article I, Section 2 during the last two negotiation terms.

In contrast, in its decision the Board simply quoted the no-strike clause and the union's July 29 letter stating it had not authorized the sympathy strike, and concluded, "Thus, by the terms of the parties' contract, and consistent with the Union's letter, the Respondent 'has the right to take disciplinary action' against the eight employees. Accordingly, we find that the Respondent did not violate the Act by suspending the eight employees for 3 days." *Arizona Public Service Co.*, 273 N.L.R.B. No. 210, slip op. at 3–4 (Feb. 5, 1985) (footnote omitted).

The Board did not discuss the actual intent of the parties. The Board noted the overruling of *Davis-McKee* by *Indianapolis Power & Light Co.*, issued contemporaneously, but did not discuss the impact upon the meaning of the contract of the *Davis-McKee* rule, which was "the law relating to it when last ratified prior to the incidents at issue," *Southern California Edison Co.*, 646 F.2d at 1365. It was surely relevant to the interpretation of the broad no-strike clause that the law when it was entered into was that such a clause would not create a presumption of waiver of the right to engage in sympathy strikes.

The Board also failed to consider the other terms of the contract, the bargaining history, or the past practices of the parties. Instead the court treated *Indianapolis Power & Light Co.* as establishing an irrebuttable presumption that a broad no-strike clause barred sympathy strikes. It is clear from the face of the *Indianapolis* opinion itself that the new rule did no more than shift the burden of proving whether a broad no-strike clause was intended to encompass sympathy strikes. *See Indianapolis Power & Light Co.*, 273 N.L.R.B. No.

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[2] The parties disagree as to how long the *Davis-McKee* rule had been in effect. It is undisputed, however, that the rule was effective when the 1982–84 agreement was entered into and when the events at issue transpired.

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211, slip op. at 3. Where, as here, substantial evidence was available regarding a relevant change in the law in light of which the clause was negotiated, other provisions of the contract, the negotiations relating to the clause, and the parties' conduct under it, the rule itself requires that the Board consider that evidence.

REVERSED AND REMANDED.

Action Automotive, Inc. v. NLRB

794 F.2d 213 (6th Cir.), May 13, 1986—262 NLRB 423

On petition to review Board Order

Before LIVELY, Chief Judge, JONES, Circuit Judge, and RUBIN, District Judge *

213

The above case was originally before this Court on a petition filed by Action Automotive, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on 24 June 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said order. On 30 September 1983, this Court entered its judgment denying enforcement of the Board's Order. 717 F.2d 1033 (1983). Thereafter, on 24 February 1984, the Board filed a petition for a writ of certiorari with the U.S. Supreme Court, which was granted on 14 May 1984. On 19 February 1985, the Supreme Court issued its Decision reversing the judgment of this Court. 469 U.S. 490, 105 S.Ct. 984, 83 L.Ed.2d 986 (1985). On 15 April 1985, a certified copy of the Supreme Court's Judgment was mailed to this Court.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the Court that this Court's Judgment of 30 September 1983, be vacated.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the Board's Order issued against Petitioner is enforced and that Petitioner, its officers, agents, successors, and assigns, shall abide by and perform the directions of the Board contained in said order.

NLRB v. Auburn Foundry, Inc.

791 F.2d 619 (7th Cir.), May 30, 1986—274 NLRB 1317

On petition to enforce Board Order

Before POSNER, FLAUM, and EASTERBROOK, Circuit Judges

620

FLAUM, Circuit Judge: This appeal presents a single narrowly defined issue for this court's review: whether this court should refrain from enforcing an NLRB order mandating reinstatement where the employer claims to have evidence, unavailable at the time of the hearing before the Board, which allegedly undermines the basis for reinstatement. It is the position of the NLRB that as a general matter this type of order be enforced with any "new" evidence relating to the details or present appropriateness of the remedy being left to the post-enforcement compliance or contempt proceedings. We find that, while the grant of appellate jurisdiction in section 10 of the NLRB (29 U.S.C. § 160(e)) empowering us to remand to the Board in cases of newly discovered evidence precludes wholesale adoption of the NLRB's position, Auburn Foundry has presented no justification for not granting the prayer for enforcement in this case.

I.

The factual setting of this appeal is straight-forward. In May 1982 an administrative law judge determined, after conducting a hearing, that Auburn Foundry had committed an unfair labor practice by discriminatorily discharging a number of employees for their activities during the course of a strike against the company. As a remedy the ALJ recommended that the employees be reinstated and awarded back pay. The case was immediately transferred to the Board in front of which Auburn objected to the reinstatement remedy only as applied to those employees who had been permanently replaced during the strike. Among the discharged employees who had been permanently replaced was George Sanchez.

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* The Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

While the case was still pending before the Board, Auburn entered into a settlement agreement providing for the establishment of a priority hiring system for the discharged employees. Due to a clerical error George Sanchez's name did not appear on the list. But for this omission Sanchez should have been rehired on September 14, 1983. In November of 1983, two months after he should have returned to work at the foundry, Sanchez was arrested for selling drugs to an undercover police officer. As a result of his activities during his period of unemployment, Sanchez spent the next six months as a prison inmate.

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In March 1985, almost three years after first hearing the case and a year after Sanchez's release from prison, the NLRB affirmed the ALJ and ordered reinstatement and back pay for all the aggrieved employees including Sanchez. There is no evidence that during the year and a half period between the arrest and the Board decision Auburn made any effort to notify the NLRB of the change in Sanchez's circumstances. Nor does the record reveal any attempt by Auburn to petition the NLRB for any form of post-order relief on the basis of new evidence. Auburn responded to the decision by entering into a dialogue with the local compliance officer concerning the need for reinstatement and back pay for Sanchez. Auburn has taken the position that Sanchez's arrest and subsequent conviction terminated his right to reinstatement and limited his entitlement to back pay to the period between the date he should have been rehired and the date of the arrest.

The administrative structure that provided the context for this drama is viewed by the NLRB, according to the representations of its counsel, as composed of two distinct proceedings: the unfair labor practice proceeding where the appropriate remedy is determined and the compliance proceeding where any fine-tuning concerning the remedy can take place. In essence the NLRB appears to view the procedures before the Board as "quasi-judicial" while compliance can be viewed as classically administrative. Pursuant to this interpretation of the administrative structure the order of the Board is the final adjudicatory decision concerning the merits and the appropriateness of the remedy. It is this decision that this court must review *based upon the record before the Board.* Once the enforceability of the Board's order has been determined by the judicial system actual enforcement is left to the regional director who may, upon request of the employer, conduct a compliance hearing to structure the specific details of relief, including consideration of changes necessitated by subsequent developments. The only way to obtain judicial review of such a hearing, or more importantly the decision to deny such a hearing, is for the employer to refuse to comply followed by NLRB-initiated contempt proceedings.

Auburn contends that the process, as described by the NLRB, does not comport with a concept of fairness and cannot be justified on any legitimate grounds. According to Auburn there is no justification for this court to lend the full weight of law to an order of the Board when the court is aware of facts that potentially preclude the remedy prescribed by the Board and when the NLRB has no affirmative duty to consider these facts following this court's decision, thus forcing the employer to seek review through contempt. Auburn asserts that the NLRB's asserted justification, that completing compliance prior to seeking enforcement could result in inefficiencies since potentially lengthy remedial fine-tuning would occur without the benefit of a final decision on the correctness of the Board's holding on the underlying merits, is a sham in light of the NLRB's failure to uniformly follow this practice, *see NLRB v. Jacob E. Decker and Sons,* 569 F.2d 357, 366 (5th Cir.1978), and the fact that the NLRB's argument ignores the countervailing expense of seeking court review of an order that ultimately will not be enforced.

II.

This is not the first time this exact issue has been before an appellate court. Auburn can point to the Fifth Circuit's decision in *Decker, supra,* and an unpublished decision of this court as two instances in which appellate courts have refused to enforce

Board orders where the NLRB acknowledged that additional proceedings regarding the appropriateness of the remedy were required. The bulk of cases, however, approve the Board's practice of seeking enforcement of the order to fix liability and to subsequently deal with factual matters that go to the details of remedy. *See,*

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e.g., NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103, 105-106 (7th Cir.), *cert. denied,* 419 U.S. 834, 95 S.Ct. 60, 42 L.Ed.2d 60 (1974); *NLRB v. Trinity Valley Iron & Steel Co.* 290 F.2d 47, 48 (5th Cir.1961); *Wallace Corp. v. NLRB,* 159 F.2d 952, 954–55 (4th Cir.1947); *NLRB v. New York Merchandise Co.,* 134 F.2d 949, 952 (2d Cir.1943).

The parties attempt to portray this case as one involving a circuit split in which this court, based upon its evaluation of the competing policy considerations, must choose to affiliate with one side or the other. This is not, however, the reality of this case. This is a case not about competing policies, but about the power of appellate courts: under what circumstances is this court empowered to deny enforcement and remand to the Board on the basis of evidence that was not presented before the Board. This is not a matter which the NLRB, through its administrative structure, can totally control. The scope of appellate review of an agency proceeding is determined by Congress.

Appellate review of Board hearings is provided for in section 10(e) of the NLRB, 29 U.S.C. § 160(e), which provides in pertinent part that:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. *If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board,* its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.

(emphasis added). This provision does not distinguish new "material" evidence relating to the remedy ordered from that which relates to the merits, thus precluding the adoption of the NLRB's position that all new evidence relating to the appropriateness of the remedy be deferred to compliance proceedings. An appellate court has the authority, should it choose to use it, to order the Board to review "new facts" that impact on whether the remedy ordered should be enforced. It is important at this juncture to distinguish between claims that go to the need for the remedy at all as opposed to those that go to the specific details of an appropriate remedy. Obviously, materiality of evidence must be determined with reference to the scope of the proceedings before the NLRB. An appellate court cannot declare "material" factual matters which under Board procedures are irrelevant. Thus, we would not listen to arguments concerning the details of a back pay award. *See Nathanson v. NLRB,* 344 U.S. 25, 29, 73 S.Ct. 80, 83, 97 L.Ed. 23 (1952). *See also* 29 CFR 101.16 (the NLRB has established post-decision proceedings for back pay but not for reinstatement). There is, however, nothing in the statute that prevents a court, as did the Fifth Circuit in *Decker,* from refusing to enforce a Board order where there is unconsidered evidence that may be material to the need for *any* sanctions or remedies. Here Auburn asserts that it has evidence which completely moots the remedy mandated by the Board. [1] Since the Act does not man-

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date that we leave employers in this context to the vagaries of compliance, and, possibly, contempt, the NLRB cannot force us to do so either.

There are, however, two limitations in section 10(e), one of which precludes Auburn's request for a denial of enforcement. The Act requires any evidence not presented to the Board to be material and excusably unavailable before the Board. Auburn was aware of Sanchez's conviction in 1983, which was subsequent to the Board hearing but two years prior to a final decision. Auburn has not claimed that it was unable during that period to draw the Board's attention to the conviction through some form of written submission. There is no evidence in the record concerning Board procedure with regard to new developments in the period between hearing and decision. If no procedure exists it was Auburn's responsibility to establish that. Additionally, there is no indication in the record that following the Board decision Auburn made any attempt to reopen or request reconsideration. On these facts we cannot hold that Sanchez's conviction was evidence that Auburn could not have attempted to present before the Board. It was Auburn that initially chose to pursue the subsequent developments through compliance. Having done so it must live with that decision.

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[1] Were this court to uniformly adopt the position that all evidence relating to the remedy ordered is beyond our jurisdiction then, in those cases where the evidence may effectively preclude remedial relief, we would be essentially issuing opinions in moot cases. It is difficult to see how judicial or administrative efficiency is served by judicial approval of Board action in cases in which subsequent administrative proceedings may, based on evidence that could be presented to the agency prior to judicial proceedings, render the whole matter nothing more than a statement of wrongdoing unaccompanied by a remedy. The Board asserts that the only issue in the unfair labor practice proceeding is whether there was a violation. It appears, however, that the agency routinely goes beyond determining a violation and decides upon an appropriate remedy. Thus any evidence relating to the appropriateness of the remedy, as opposed to the details of enforcement, should be before the Board when it orders a type of relief.

Since no objection is made to the merits of the Board's decision the order is enforced.

NLRB v. Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Copartnership d/b/a Balsam Village Management Company

792 F.2d 29 (2d Cir.), May 30, 1986; cert. denied November 3, 1986—273 NLRB 410

On petition to enforce Board Order

Before Meskill, Newman and Kearse, Circuit Judges

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Kearse, Circuit Judge: Petitioner National Labor Relations Board (the "Board") seeks enforcement of its order issued on December 14, 1984, finding principally that respondents Eli Gordon, Gerald Tillinger, Seymour Tillinger, and their partnership, Balsam Village Management Company (collectively the "Company"), had committed unfair labor practices in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 158(a)(1) and (3) (1982), by threatening to discharge and discharging three Company employees for their pursuit of union membership. The Board order required the Company principally to cease and desist from inter-

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fering with its employees' statutory rights and to bargain with Local 32B-32J, Service Employees International Union, AFL-CIO (the "Union"), as the bargaining representative of its employees in an appropriate unit. In opposition to the petition for enforcement, the Company contends principally that the Board's finding that it engaged in unfair labor practices should be overturned and that, in light of 100% employee turnover in the bargaining unit, a bargaining order is inappropriate. We reject both contentions and grant the petition for enforcement.

I. BACKGROUND

Prior to February 1983, the Company employed a three-person maintenance crew, consisting of Carlos Casal, Mario Aguila, and Daniel Santos, for the care of a 45-building apartment complex operated by the Company. Each of the three had been employed by the Company for a number of years without any substantial complaint as to their performance. According to the testimony of these employees, which was expressly credited by the Board's Administrative Law Judge ("ALJ"), the following events occurred in early 1983.

A. *The Events*

In January 1983, Casal, Aguila, and Santos joined the Union and signed cards authorizing the Union to represent them in collective bargaining. The Union mailed receipts for the employees' initiation fees to Casal at the Company's office, mistakenly believing this to be Casal's home address. The receipts, in an envelope showing the Union's name and return address and bearing the words "ENCLOSE YOUR UNION BOOK! DO NOT SEND CASH" in capital letters, arrived at the Company's office not later than January 27, or 28, when Casal saw the envelope on Gerald Tillinger's desk.

The envelope was not given to Casal until Wednesday, February 2. On February 4, Casal was summoned to a meeting with Gerald Tillinger and Gordon and was told that the Company could not afford unions. Casal was instructed to try to persuade Aguila and Santos to leave the Union. When

Casal replied that Aguila and Santos would not renounce the Union, Gordon instructed him to tell them that unless they renounced the Union "they will lose their jobs. They have families to support and I'm sure they don't want to lose their jobs. . . . [E]xplain to them that there will be no job if they join the Union." Gordon also told Casal that if Casal did not cooperate and get them out of the Union, the Company would have to "accept" Casal's "resignation."

Casal conveyed Gordon's message to Aguila and Santos, both of whom told Casal they would remain in the Union. When Casal relayed this response to Gordon and added that he too would remain in the Union, Gordon told Casal, "if you're going to stick to the union, . . . then I accept your resignation also." He continued to urge Casal to renounce the Union himself and to persuade the other two to renounce it also. Later that afternoon, when Aguila and Santos went to the Company office to pick up their pay checks, they were discharged—told by Gordon that their jobs were being eliminated.

The Company's version of these events, presented principally by Gordon, was that Gordon told Casal that Aguila and Santos would be discharged because the Company did not need employees to do cleaning, and that because of this, Casal resigned. Gerald Tillinger, who, according to both sides, was present during the pertinent events, did not testify. The ALJ found Gordon to be "a poor quality witness."

On February 8, the discharged employees began picketing the Company's premises. On February 25, Gordon approached them on the sidewalk and told them that they could return to their jobs if they renounced the Union. They continued to picket until mid-April. In the meantime, the Union sent the Company a request to meet and bargain; the Company did not respond. The Company proceeded to hire six persons to perform the work of the discharged employees. One was hired in February, two in early April, and the others in June and August. None of the replacements was a union member.

On June 8, the Company offered reinstatement to Casal, Aguila, and Santos. All declined.

B. *The Board's Order*

Unfair labor practice charges were filed by the Union, and a complaint was issued by the Board's Acting Regional Director. Following a hearing, the ALJ found the facts as set forth above and concluded that the Company had violated §§ 8(a)(1) and (3) of the Act by threatening to discharge the three employees unless they renounced their support for the Union and by discharging them because of their union membership. He found that the Company had violated §§ 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. He recommended that the Company be ordered (1) to make the discharged employees whole, (2) to cease and desist from interfering with employees' exercise of their statutory rights, and (3) to bargain with the Union upon request.

In a Decision and Order dated December 14, 1984 ("Board Decision"), the Board unanimously agreed with the ALJ that the Company had violated §§ 8(a)(1) and (3) of the Act and adopted the ALJ's first two recommendations. With one member dissenting, the Board concluded that these violations warranted the issuance of a "*Gissel*" order, *see NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), requiring the Company to bargain with the Union. The Company was ordered principally to cease interfering with employees' exercise of their statutory rights, and to bargain with the Union. The Board petitions for enforcement of this order.

II. DISCUSSION

In opposition to the Board's petition for enforcement of its order, the Company contends principally (1) that the finding that the Company unlawfully threatened or discharged the three workers was unwarranted, and (2) that a bargaining order was improper. We find no merit in either contention, and we enforce the order.

The Company's challenge to the findings that it engaged in unfair labor practices by threatening to discharge and discharging Casal, Aguila, and Santos because of their adherence to the Union need not detain us long. The Board's findings that an employer has committed unfair labor practices in violation of the Act are entitled to affirmance on review if they are reasonable and supported by substantial evidence in the record as a whole. *Uni-*

versal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *NLRB v. Pace Oldsmobile, Inc.,* 681 F.2d 99, 100 (2d Cir.1982) (per curiam) *("Pace I").* When its findings are based on the ALJ's assessment of the credibility of the witnesses, they will not be "overturned unless they are 'hopelessly incredible' or they 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.'" *NLRB v. J. Coty Messenger Service, Inc.,* 763 F.2d 92, 96 (2d Cir.1985) (quoting *NLRB v. American Geri-Care, Inc.,* 697 F.2d 56, 60 (2d Cir.1982), *cert. denied,* 461 U.S. 906, 103 S.Ct. 1876, 76 L.Ed.2d 807 (1983)).

In the present case, the employees testified to the events as described in Part I above. Their testimony, which was supported by the timing and sequence of events not in substantial dispute, was neither inherently incredible nor disputed by any documentary evidence, and it was expressly credited by the ALJ. The contrary testimony by Gordon, discredited by the ALJ, and the Company's office manager was insufficient to require the ALJ to disbelieve the versions of the events testified to by Casal, Aguila, and Santos. In light of all the testimony, there was plainly substantial evidence in the record to support the Board's findings that the Company threatened to and did discharge its three maintenance employees on account of their union membership.

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The Company argues that a bargaining order is nonetheless inappropriate principally on the grounds that (1) the Board did not adequately articulate its basis for issuing a *Gissel* bargaining order, and (2) there has been 100% turnover in the maintenance staff, with none of the new employees having expressed an interest in the Union, and that this turnover was caused by the discharged employees' rejection of the Company's offers of reinstatement. These arguments have no merit.

Under *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547, the Board has discretion to order an employer to bargain with a union not theretofore recognized by the employer if the Board reasonably concludes that serious unfair labor practices by the employer have made it unlikely that a representation election can be conducted free of the taint of those practices. Because a *Gissel*-type bargaining order may impose on the employees a union they have not actually chosen to represent them, we require that such an order be entered "'[o]nly where there is a substantial danger that employees will be inhibited by the employer's conduct from adhering to the union,'" *NLRB v. Pace Oldsmobile, Inc.,* 739 F.2d 108, 110 (2d Cir.1984) *("Pace II")* (quoting *J.J. Newberry Co. v. NLRB,* 645 F.2d 148, 154 (2d Cir.1981)), and "'only when the Board demonstrates that an election is unlikely to reflect the uncoerced preference of the bargaining unit,'" *Pace II,* 739 F.2d at 110 (quoting *NLRB v. Marion Rohr Corp.,* 714 F.2d 228, 230 (2d Cir.1983)). Fundamental intrusions into employee rights—"'hallmark' violations"—"will support the issuance of a bargaining order unless some significant mitigating circumstance exists." *NLRB v. Jamaica Towing Inc.,* 632 F.2d 208, 212 (2d Cir.1980). Threats of discharge of union adherents are hallmark violations, *id.* at 212–13; employee turnover may be a mitigating circumstance, *NLRB v. Windsor Industries, Inc.,* 730 F.2d 860, 867 (2d Cir.1984).

Further, we have refused to enforce *Gissel* bargaining orders in cases where the Board has not set forth findings and analysis that support the imposition of such an order. *See, e.g., Pace II,* 739 F.2d at 110–12; *NLRB v. Heads & Threads Co.,* 724 F.2d 282, 289 (2d Cir.1983); *Pace I,* 681 F.2d at 101–02. We consider it sufficient, however, if the ALJ has provided such findings and analysis and the Board has indicated its adoption of them. *See NLRB v. Windsor Industries, Inc.,* 730 F.2d at 866; *NLRB v. Horizon Air Services, Inc.,* 761 F.2d 22, 24 n. 1 (1st Cir.1985); *Kenworth Trucks of Philadelphia, Inc. v. NLRB,* 580 F.2d 55, 62–63 (3d Cir.1978). All of the requirements for enforcement of a *Gissel* order have been met here.

The rationale for the present order was spelled out in the Board's decision principally in its adoption of the ALJ's decision. The ALJ noted, *inter alia,* that at no time had the Company challenged the status or authority of the Union to represent the employees, that it had deliberately flouted the Act for the express purpose of avoiding its statutory bargaining obligation, and that its actions had a continuing "restraintful [*sic*] and coercive" effect after the discharge of the old employees and the hiring of the new. The Board adopted the ALJ's findings and reasoning, elaborating as follows:

> For the reasons the judge stated, we agree that a *Gissel* bargaining order is clearly warranted to

> remedy the Respondent's unfair labor practices, which the judge aptly described as the "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation." We also agree with the judge's rejection of the Respondent's argument that a bargaining order should be denied because all three discriminatees declined reinstatement, and thus there has been substantial "employee turnover." As the judge pointed out, the Respondent's contention has "a hollow ring" because the "employee turnover" in this case was a direct and obvious product of the Respondent's own unlawful conduct.

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Board Decision at 1–2 (footnotes omitted). This sufficed to explicate the Board's decision to issue a *Gissel* bargaining order.

We find no abuse of discretion in the conclusions of the Board and the ALJ that such an order was appropriate. The Company's threats to discharge Aguila and Santos if they did not repudiate the Union, its threat to discharge Casal if he did not persuade them to do so and did not renounce the Union himself, and its discharge of the men upon their refusals, were plainly "hallmark" violations. The fact that the Company's maintenance work force has had a 100% turnover is not, in the circumstances of this case, a mitigating factor. First, the fact that there has been such turnover does not necessarily mean that a fair election could now be held. Three of the six new employees were hired while the discharged employees were picketing the Company. The new employees presumably are thus aware of the employer's past treatment of its employees who chose to be represented by a union, and the Board was well within the bounds of discretion to view that history as making the likelihood of an untainted election remote.

More important, the 100% turnover here is not a factor that mitigates against a bargaining order because the turnover was caused by the very unfair labor practices sought to be remedied. It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge of all of the members of the bargaining unit.

Finally, we reject the Company's contention that responsibility for the 100% turnover should be placed on the discharged employees and not on the Company on the premise the employees were offered, and declined, reinstatement. There was no meaningful offer of reinstatement here. Gordon's first "offer" to the discharged employees was conditioned upon their renunciation of the Union. It plainly could not alleviate the unlawfulness of the discharge, which was likewise bottomed on the employees' refusal to renounce the Union. The June 1983 offers of reinstatement, made more than four months after the employees were discharged, were so belated that the Board was justified in not construing them as a good faith attempt to rehire these men. The Company knew the men had families to support; it had cited this fact in initially threatening discharge. It was reasonable to expect that they could not wait four months before seeking alternative employment. Further, by the time these offers were made, the Company had already hired three persons to replace the three discharged employees. Accordingly, the purported offers of reinstatement did not constitute a mitigating circumstance sufficient to prevent issuance of a bargaining order.

We have considered all of respondents' arguments in opposition to the petition for enforcement and have found them to be without merit.

CONCLUSION

The Board's order of December 14, 1984, is in all respects enforced.

NLRB v. KDFW-TV, Inc. a Division of Times Mirror Corp.

790 F.2d 1273 (5th Cir.), June 6, 1986—274 NLRB 1014

On petition to enforce Board Order

Before WISDOM, REAVLEY, and JOHNSON, Circuit Judges

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JOHNSON, Circuit Judge: The National Labor Relations Board ("Board") has applied to this Court for enforcement of an unfair labor practice order issued by the Board against KDFW-TV, Inc. The sole issue raised by the Board's application is whether certain KDFW employees are "supervisors" within section 2(11) of the National Labor Relations Act ("Act") and thus exempt from inclusion in a collective bargaining unit. The Board found that they are not supervisors. We conclude that substantial evidence exists to support the Board's findings. The unfair labor practice order issued by the Board is therefore enforced.

I. BACKGROUND

KDFW is a network affiliated television station broadcasting in the Dallas/Fort Worth area. The station carries network television programs and produces live newscasts. These newscasts are presented five times daily during the week and twice on Saturday and Sunday respectively. Production of live news broadcasts at KDFW is the responsibility of both the News and Programming Departments.

The News Department which consists of eighty-one employees is principally responsible for gathering and developing news events for live and taped broadcasts. The News Department is headed by a news director. The Department employs four producers and one associate producer. Each producer reports directly to an executive producer who in turn reports to the **1276** news director. The News Department also employs three assignment editors who report to a coverage manager.

The Programming Department is principally concerned with the technical aspects of producing telecasts. The Programming Department is headed by a production director. The Programming Department employs five directors. Each director reports to the production manager who in turn reports to the production director. The heads of these two departments, the news director and production director, each report directly to the general manager of KDFW.

On March 14, 1984, the American Federation of Television and Radio Artists (AFTRA) filed a representation petition with the Board's Fort Worth Regional Office. In its petition, AFTRA sought certification as the bargaining representative of a unit of KDFW employees which included, in part, directors, producers, assignment editors, and associate producers.

On April 3, 1984, the Board conducted a hearing concerning the composition of an appropriate bargaining unit. KDFW insisted that producers, directors, assignment editors and associate producers were supervisors, hence exempt from inclusion in any bargaining unit under section 2(11) of the Act. On April 20, 1984, the Regional Director issued a decision and direction of election in which he ruled that the above KDFW employees are not supervisors. KDFW appealed the Regional Director's decision to the Board. On July 11, 1984, the Board denied KDFW's request for review.

Meanwhile, the election directed by the Regional Director was held. A majority of votes from the bargaining unit favored AFTRA and on July 24, 1984, the Regional Director certified AFTRA as the exclusive bargaining representative of a unit of KDFW employees which included KDFW directors, producers, assignment editors and associate producers in addition to a number of other KDFW job classifications. Thereafter, KDFW refused to either bargain with AFTRA or to furnish AFTRA with information concerning employees in the bargaining unit.

Consequently, on September 4, 1984, an unfair labor practice charge was filed against KDFW. In response, the Board issued a decision and order holding KDFW guilty of violating section 8(a)(5) and (1) of the Act.[1] The Board now seeks this Court's enforcement of that order. KDFW, in turn, seeks to overturn the Board's determination that KDFW's directors, producers, associate producers, and assignment editors are not supervisory personnel.

II. DISCUSSION

At the outset, we note that a reviewing court should pay substantial deference to the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963). Particular deference must be given to the Board's findings concerning "the aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor" under section 2(11) of the Act. *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 145

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[1] Section 8(a)(5) provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(a)(5). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this Title. . . ." 29 U.S.C. § 158(a)(1).

(5th Cir.1967). This deference is necessary because of the infinite and subtle gradations of authority which determine who, as a practical matter, falls within the statutory definition of "supervisor." *GAF Corp. v. NLRB,* 524 F.2d 492, 494 (5th Cir.1975) (*quoting NLRB v. Swift & Co.,* 292 F.2d 561, 563 (1st Cir.1961)). Consequently, this Circuit has repeatedly declined to merely second-guess the Board concerning an employee's status under section 2(11). *See, e.g., NLRB v. San Antonio Portland Cement Co.,* 611 F.2d 1148 (5th Cir.), *cert. denied,* 449 U.S. 844, 101 S.Ct. 127, 66 L.Ed.2d 53 (1980); *NLRB v. Houston Natural Gas Corp.,* 478 F.2d 467 (5th Cir.), *cert. denied,* 414 U.S. 1067, 94 S.Ct. 575, 38 L.Ed.2d 472 (1973). The Board's determination regarding supervisory status must be upheld if supported by "substantial evidence" on the record as a whole, and if the Board's application of the statutory definition of supervisor has a reasonable basis in law. *GAF Corp. v. NLRB,* 524 F.2d 492, 495 (5th Cir.1975).

Supervisors are excluded from the Act's coverage by 29 U.S.C. § 152(3). In excluding supervisors, Congress sought to distinguish management personnel from protected employees. This distinction was thought necessary to avoid the possibility that fraternal union feelings would tend to impair a supervisor's ability to apply his employer's policy to subordinates according to the employer's best interests. *See Beasley v. Food Fair of North Carolina,* 416 U.S. 653, 660, 94 S.Ct. 2023, 2027, 40 L.Ed.2d 443 (1974) (discussing the legislative history of the 1947 Taft-Hartley amendments to the Act). Section 2(11) of the Act defines "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Section 2(11) is to be read in the disjunctive, with the existence of any one of the statutory powers sufficient to confer supervisory status. Section 2(11) also requires, however, that a "supervisor" must exercise independent judgment "with respect to one of the enumerated functions under the statute, and not with respect of some other aspect of the individual's work." *NLRB v. Harmon Industries, Inc.,* 565 F.2d 1047, 1049 (8th Cir.1977).

The record supports the Board's determination that KDFW directors, producers, associate producers and assignment editors lack authority over personnel matters including hiring, firing, evaluation, and discipline of employees. KDFW contends, however, that each of the four disputed job classifications has authority to "responsibly direct" and "assign" other employees and must exercise "independent judgment" in doing so.

The record clearly indicates that producers, associate producers, directors and assignment editors "direct" other employees. Each of the four KDFW news producers is assigned to produce a specific newscast program each day. The producer who is responsible for the content of a given newscast, prepares a "format" for each newscast listing the stories to be covered and their order of presentation. The producer is required to coordinate and direct the activities of a number of skilled personnel including reporters, photographers, writers, anchors and editors.

The associate producer's function is similar to, although separate from, the producer's. The associate producer is responsible for graphics, visuals, and setting up "live remotes." In carrying out these responsibilities, the associate producer is required to coordinate and direct the activities of a number of technical personnel including telemation operators and members of "remote crews." The associate producer is also required to act as producer in a producer's absence.

In contrast to producers, the five KDFW directors are not responsible for the content of the newscast, but rather the manner in which it is presented. The directors serve as "conductors" who "orchestrate the execution" of the program. Record Vol. II at 77. The directors coordinate and instruct a technical crew which includes camera operators, a stage manager and various engineers and technicians.

The three assignment editors work under the direction of a coverage manager. The

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coverage manager ordinarily makes out a roster of stories and a preliminary assignment sheet. The assignment editors relay these assignments to reporters and photographers. The assignment editor can change an assignment, although he or she usually consults the coverage manager before making a change.

While each of the disputed classifications is clearly authorized to direct co-workers, for that direction to be supervisory under the Act it must be "responsible." "To be responsible is to be answerable for the discharge of a duty or obligation." *Marine Yankee Atomic, etc. v. NLRB,* 624 F.2d 347, 361 (1st Cir.1980) (*quoting Ohio Power Co. v. NLRB,* 176 F.2d 385, 387 (6th Cir.), *cert. denied,* 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553 (1949)); *see also Kaiser Engineers v. NLRB,* 538 F.2d 1379, 1383 (9th Cir.1976); *NLRB v. Fullerton Publishing Co.,* 283 F.2d 545 (9th Cir.1960). In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is "held fully accountable and responsible for the performance and work product of the employees" he directs. *Marine Yankee,* 624 F.2d at 361. Thus, in *NLRB v. Adam & Eve Cosmetics, Inc.,* 567 F.2d 723, 727 (7th Cir.1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his department.

In the instant case, the Regional Director found that KDFW directors, producers, associate producers, and assignment editors do not "responsibly direct" other employees. After carefully reviewing the record, we conclude that this finding is supported by substantial evidence in the record. The Regional Director could have reasonably concluded that the disputed classifications "do not function as supervisors, but are part of an integrated production team, each member of which is independently capable of executing his assignment." *Westinghouse Broadcasting Inc.,* 215 N.L.R.B. 123 (1974) (concluding that television station director-producers in that case were not "supervisors").

No evidence in the record suggests that producers, directors, or assignment editors are responsible for the performance of the skilled technicians and professionals they direct. Both producers and associate producers are responsible only for their own performance in planning a particular broadcast and in coordinating the efforts of other workers to produce a quality broadcast. Unlike the producers found to be supervisors in *Hearst Broadcasting Co.,* 267 N.L.R.B. 326, 327 (1983), the KDFW producers have no role in hiring, evaluating, and reprimanding the employees they direct. Moreover, unlike the producers in *Hearst,* there is evidence that KDFW producers are not told they are supervisors nor are their co-workers so informed. *See Westinghouse Broadcasting Co., Inc. v. NLRB,* 503 F.2d 1055 (2d Cir.1974) (affirming Board finding that television producer-directors are not supervisors).

Similarly, substantial evidence supports the Board's conclusion that KDFW directors are not supervisors. "The direction and issuance of stage instructions [by directors] is not a reflection of supervisory authority to responsibly direct other employees." *Westinghouse Broadcasting Co.,* 216 N.L.R.B. 327, 329 (1975). Such directions are routine technical or aesthetically motivated commands executed by technical personnel already acquainted with the production plan. *Id.* The directors do not participate in hiring, evaluating, assigning, rewarding or reprimanding these technicians and are not responsible for the technician's performances. *Compare WTAR Radio-TV Corp.,* 168 N.L.R.B. 976, 978 (1967). Rather, the record suggests that KDFW directors are responsible only for their own performance in orchestrating a particular broadcast. *See Meredith Corp. v. NLRB,* 679 F.2d 1332, 1342 (10th Cir.1982) (findings that television directors, both in commercial and newscast production, were not supervisors supported by substantial evidence); *see also Taft Broadcasting Co.,* 226 N.L.R.B. 540 (1976) (television director's authority and direction of employees was more artistic than supervisory); *Golden West Broadcasters,* 215 N.L.R.B. 760 (1974) (staff directors at a television station were not supervisors but rather functioned as part of an integrated production team).

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Finally, the Regional Director could have properly found that the assignment editors are not supervisors but rather serve primarily as a conduit for those decisions already made by the coverage manager. To the extent the assignment editor is required to change an existing assignment, the editor ordinarily attempts to consult with the coverage manager. When the coverage manager is unavailable, the assignment editor will make assignments. However, those assignments can be subsequently overruled by the coverage manager. Those assignments made by the assignment editors are generally routine and based on the availability of personnel. Moreover, unlike the assignment editors found to be supervisors in *Taft Broadcasting Company,* 226 N.L.R.B. 540 (1976), the KDFW assignment editors lack authority to effectively evaluate and discharge co-workers. *See American Federation of Television and Radio Artists v. Storer Broadcasting,* 745 F.2d 392, 397 (6th Cir.1984) (substantial evidence supported determination that assignment editors were not supervisors).

KDFW contends that the Board's decision effectively means that the station is unsupervised during the evenings and weekends since directors, producers and assignment editors are the highest ranking employees on duty during those periods. KDFW concludes that such a result is unacceptable and that the Board therefore erred in holding that these employees are not supervisors. We disagree. Evidence in the record indicates that both the news director and program director are generally available for consultation on the weekends and in the evenings. Moreover, many decisions regarding the after hours operation of the station are made during the weekdays. Finally, we note that the Board could reasonably conclude that the highly skilled technical personnel employed by KDFW do not require constant or close supervision. *See Westinghouse Broadcasting Co.,* 215 N.L.R.B. 123 (1974).

III. CONCLUSION

For the foregoing reasons, we conclude that substantial evidence supports the Board's conclusion that KDFW producers, associate producers, assignment editors, and directors are not supervisors under section 2(11) of the Act. The unfair labor practice order issued by the Board is therefore enforced.

International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, Local No. 111 v. NLRB

792 F.2d 241 (D.C. Cir.), June 10, 1986—274

NLRB 742

On petitions to review and cross-application for enforcement of Board Order

Before SCALIA and SILBERMAN, Circuit Judges, and WRIGHT, Senior Circuit Judge

Opinion for the Court filed by Circuit Judge SCALIA

Opinion concurring in part and dissenting in part filed by Circuit Judge SILBERMAN

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SCALIA, Circuit Judge: Section 8(b)(1)(A) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(1)(A) (1982), makes it an unfair

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labor practice for unions to coerce employees in the exercise of their right to refrain from union activity. Section 8(b)(2), 29 U.S.C. § 158(b)(2), makes it an unfair labor practice for unions to attempt to cause employers to discriminate among employees in order to encourage union membership. Petitioner ("Local 111") seeks review of the Board's ruling that it violated § 8(b)(1)(A) by forcing non-Local workers to cease working; and that it violated § 8(b)(2) both by the indirect coercion to fire non-Local workers which the union-forced absences would produce, and by direct requests that the employer lay off non-Local workers and replace them with Local members. The issues presented are whether the Board's findings of unfair labor practices are supported by substantial evidence, and, if so, whether the Board acted unlawfully in ordering Local 111 to compensate non-Local workers for wages lost as a result of yielding to the union pressure to refrain from work but not as a result of any action taken by the employer at the union's instance.

I

The stipulated facts in the present case were as follows: Local 111, an affiliate of the International Association of Bridge, Structural and Ornamental Iron Workers ("IABSOIW"), was the collective bargaining representative for iron workers employed by Northern States Steel Builders, Inc. ("NSSB") at the Louisa Generating Station project in Muscatine, Iowa. As of January 1, 1982, NSSB employed twenty iron workers on the project, only three of whom were members of Local 111. The remaining seventeen were "travelers," *i.e.*, members of other locals affiliated with the IABSOIW. Travelers are required by the IABSOIW constitution to pay "travel service dues" of $2.50 per week to the local in whose jurisdiction they work, to pay monthly union dues to their home local, and to have available for inspection receipts establishing that they have done so.

Between January 11 and January 29, 1982, Local 111 refused to accept properly tendered travel service dues from certain of the travelers working on the Louisa project. On January 18, Local 111's Steward told travelers that the Local was not forbidding them to work, but that travelers whose travel service dues had not been accepted would be subject to internal union charges if they worked. The next day, NSSB's Superintendent told all of the iron workers that NSSB had work for them and would like them to perform it, but that NSSB understood there was a dispute between the travelers and Local 111 and would not lay off travelers who did not work. On January 20, Local 111's Steward said that no internal union charges would be preferred against travelers who worked; but five days later he told ten travelers that if they worked they would be subject to internal union charges.

On January 28, the day after one of the travelers filed an unfair labor practice charge with the Board, Local 111 received a telegram from the IABSOIW directing it to accept travel service dues. Local 111 then informed the travelers that it would accept travel service dues from those who could document their payment of monthly dues to their home local. All but one traveler, Sylvan Hoiness, provided the necessary documentation by February 1. On January 29, Hoiness asked Local 111 to call his home local to confirm that he had paid his monthly dues. Local 111 refused. On February 2, Hoiness proffered a telegram indicating that he had wired payment of his monthly dues to his home local. Local 111 did not accept the telegram as verification, and again refused to call Hoiness's home local. On February 3, Hoiness went back to work for NSSB even though Local 111 refused to accept his tendered travel service dues and threatened to prefer internal union charges against him if he worked. No charges were ever brought, however, and on February 22 Hoiness's home local called Local 111 to confirm that Hoiness had paid his monthly dues. Local 111 thereafter accepted Hoiness's tender of travel service dues.

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During the January 11–29 period when travel service dues were being rejected, the following additional events occurred: On January 11 and again on January 29, Local 111's Business Manager asked NSSB's Superintendent to hire Local members. Both times, the Superintendent refused, saying that NSSB needed no additional workers. On a number of occasions, Local 111's Steward asked the Superintendent to give him a "layoff list" of NSSB iron workers. The Superintendent responded that NSSB had no such list and did not intend to lay off any of its iron workers. On January 13, Local 111's Business Manager asked certain travelers to quit so that unemployed Local members could replace them. The Business Manager also told two of the travelers that he would ask NSSB to lay off travelers so that they would be eligible for unemployment compensation.

The unfair labor practice complaint that is the subject of this appeal was issued by the Director of Board Region 33 on February 23, 1982. The parties submitted the case on a stipulated record, and on March 6, 1985 the Board issued its Decision and Order. *International Association of Bridge, Structural & Ornamental Iron Workers, Local No. 111 (Northern States Steel Builders, Inc.)*, 274 N.L.R.B. No. 110. The Board found that Local 111 had violated § 8(b)(1)(A) of the NLRA by refusing to accept properly tendered travel service dues and attempting to coerce travelers to quit so that Local members could replace them. The Board also found that Local 111 had violated § 8(b)(2) of the NLRA, by attempting to prevent travelers from working in order to pressure NSSB to replace them with Local members, and by repeatedly asking NSSB to draw up "layoff lists" and to hire Local members even though it was apparent that NSSB had no plans to lay off current employees or hire new workers. In addition to issuing a cease-and-desist order and requiring the posting of notices, the Board ordered Local 111 to pay the lost wages of the travelers who missed work as a result of Local 111's unfair labor practices.

Pursuant to 29 U.S.C. § 160(f) (1982), Local 111 filed the present petition for review, challenging the Board's findings that it had engaged in unfair labor practices and the Board's order that it compensate travelers for lost pay. The Board filed a cross-application for enforcement of its order. *See* 29 U.S.C. § 160(e); FED.R.APP.P. 15(b).

II

Although the Board found that Local 111 violated § 8(b)(1)(A) in a number of ways, Local 111 contests only the violation based on its refusal to accept Sylvan Hoiness's tender of travel service dues from January 29, 1982 until February 22, 1982. It is uncontested that Hoiness did not have a receipt from his home local indicating that he had paid his monthly dues, as was required by the IABSOIW constitution. The Board held, however, that Local 111's refusal to accept the alternative verification offered by Hoiness was an unfair labor practice, because in comparable cases Local 111 had waived strict enforcement of the verification requirement and had declined to do so here merely because it wished to secure Hoiness's job for one of its members. Local 111 attacks this holding on the ground that, although it had waived the verification requirement on occasion, it had never done so in circumstances comparable to those of this case.

It was stipulated that during some periods Local 111 did not consistently require travelers to verify payment of dues to their home locals. Moreover, when Local 111 did require verification, it frequently accepted telephone calls from home locals as sufficient. Finally, on occasion Local 111 temporarily waived the dues-payment requirement for travelers who had financial emergencies. Although the union accurately notes the absence of evidence that it had ever made (rather than received) a telephone call or accepted a telegram to verify dues payment, there is a difference between comparability and identity, and only the former is needed. We have no basis for disturbing the Board's judgment that Local 111's behavior toward Hoiness was an improperly motivated deviation from what had otherwise been lenient enforcement of the verification requirement. *See* 29 U.S.C. § 160(f) (Board's findings are conclusive if supported by substantial evidence on the record considered as a whole). Since Local 111 did not dispute that such a deviation, if shown, would constitute an unfair labor practice, we must affirm the Board on this issue.

III

The Board concluded that Local 111 committed two separate violations of § 8(b)(2), one indirect and one direct. The indirect violation consisted of some of the same acts that constituted the § 8(b)(1)(A) violation, namely Local 111's effort to make the travelers miss work, which the Board concluded was designed to force NSSB to replace them with Local members. The direct § 8(b)(2) violation consisted of the union's repeated requests that NSSB draw up "layoff lists" and hire Local members, which under the circumstances constituted, in the Board's view, requests to dismiss the travelers.

Local 111 objects to the former—the separate violation of "indirect coercion" of the employer through pressure on the travelers—on the ground that it was neither included in the General Counsel's complaint nor litigated by the parties, and thus cannot properly be found. *See NLRB v. Blake Construction Co.,* 663 F.2d 272 (D.C.Cir.1981). The Board responds that all of the factual elements necessary to sustain the "indirect coercion" theory were included in the complaint and supported by the stipulation; that Local 111 therefore had adequate notice of, and opportunity to litigate, the theory; and that Local 111 has not suggested that it was in any way prejudiced by failure to set forth the theory explicitly in the complaint. We think these responses inadequate. *Blake Construction* forbids the Board to "make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." 663 F.2d at 279. It is clear that the "indirect coercion" violation was not charged in the complaint, which, in specifying with great precision the conduct alleged to violate § 8(b)(2), made no mention of Local 111's behavior toward the travelers or of the indirect effect of that behavior on NSSB. Since the Board does not contend that the "indirect coercion" violation was actually litigated at any point during the course of the abbreviated proceedings before the Board, the finding of that violation cannot be reconciled with the requirements of *Blake Construction.*

As to the second § 8(b)(2) violation, Local 111 argues that the record does not support the Board's conclusion that the union's direct dealings with NSSB were efforts to cause NSSB to discriminate against the travelers. It is true that, viewed in isolation, Local 111's repeated requests for the hiring of Local members or for the preparation of "layoff lists" could be thought innocuous. But when they are viewed in light of the fact that there was no reason to believe that NSSB had any reason either to hire or (except for union-procured absences) to fire; when it is considered that the two requests are inconsistent except as an invitation to fire some workers in order to hire others; and when there is added to all this the background of dispute between the travelers and Local 111, we see no reason to doubt the Board's judgment that these requests were efforts to cause NSSB to replace the travelers with Local members. Local 111 also contends that in two decisions the Board has declined to find a § 8(b)(2) violation on the basis of evidence stronger than that present in this case. *See IBEW, Local 71 (Wagner-Smith Co.),* 223 N.L.R.B. 1155 (1976) *("Wagner-Smith Co."); International Association of Heat & Frost Insulators, Local 84 (Edward R. Hart Co.),* 146 N.L.R.B. 660 (1964) *("Edward R. Hart Co.").* Assuming without deciding that a sufficiently egregious disparity in fact-finding, even with respect to a case more than twenty years old, would require us to set the Board's determination aside, we agree

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with the Board that the evidence of violation in the two cases was less substantial than here. In both of them the allegedly unlawful union actions were significantly less extensive than the pattern evident in the present case. *See Wagner-Smith Co.,* 223 N.L.R.B. at 1156–57; *Edward R. Hart Co.,* 146 N.L.R.B. at 661. Moreover, in one of them it was doubtful whether the union had any improper intent at all. *Wagner-Smith Co.,* 223 N.L.R.B. at 1157.

IV

Local 111's last objection is to the scope of the Board's remedial order. After the General Counsel asked the Board to order Local 111 to compensate travelers for lost wages, the union, in a sixteen-page section of its brief before the Board, vigorously disputed the appropriateness of such an order, making essentially the following arguments:

(1) Even if it is true that Local 111 *attempted* to cause NSSB to discriminate against the travelers, it did not succeed. The Board has held, in *In re United Furniture Workers (Colonial Hardwood Flooring Co.),* 84 N.L.R.B. 563, 565–66 (1949) *("Colonial Hardwood"),* that it lacks statutory authority to order unions to pay lost wages unless they are attributable to union-procured employer discrimination. Although the Board has in some cases relied on policy rather than statutory grounds to justify its rule against awarding back pay absent employer discrimination, *see, e.g., Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.),* 202 N.L.R.B. 399, 399–400 (1973) *("Lock Joint Pipe & Co."); International Union of Operating Engineers, Local 513 (Long Construction Co.),* 145 N.L.R.B. 554, 555–56 (1963) *("Long Construction Co."),* the Board has never expressly disavowed, and therefore remains bound by, the conclusion that it lacks statutory authority to award back pay in the circumstances of this case.

(2) Even if the Board can properly treat the *Colonial Hardwood* rule as based solely on policy, that change in justification has never been explicitly linked to a change in the scope of the rule. Thus, the Board is foreclosed from awarding back pay even if *Colonial Hardwood* is taken to be justified solely on policy grounds.

(3) Although some of the cases in which the *Colonial Hardwood* rule was described as policy-based involved strike or picket violence, *see, e.g., Lock Joint Pipe & Co.; Long Construction Co.,* and thus some of the policy justifications advanced for the rule in those cases were applicable only in those circumstances, the Board has never stated that the rule was limited to those circumstances, and has frequently applied the rule in other circumstances. *See, e.g., Tower Hotel Co.,* 250 N.L.R.B. 99, 101–02 (1980); *Bricklayers, Local 6,* 185 N.L.R.B. 756, 762 (1970), *enf'd mem.,* 447 F.2d 484 (5th Cir.1971) (per curiam); *Edward R. Hart Co.,* 146 N.L.R.B. at 661–62.

(4) It would be arbitrary and capricious for the Board to limit the rule to cases involving strike or picket violence, since to do so would encourage unions to engage in such violence in order to avoid liability for back pay.

(5) Although the Board has deviated from the per se *Colonial Hardwood* rule in one case, *Sachs Electric Co.,* 248 N.L.R.B. 669 (1980), *enf'd in*

relevant part sub nom. NLRB v. IBEW, Local 453, 668 F.2d 991, 995 (8th Cir.1982), it gave no explanation for doing so, and the question of the appropriateness of that deviation does not appear to have been pressed by the union involved. Moreover, *Sachs* is distinguishable from the instant case in a number of respects.

In its Decision and Order, the Board ordered Local 111 to pay the travelers' lost wages, without mentioning, much less responding to, these arguments against its authority to do so. In this petition for review, Local 111 renews its arguments and adds the charge that the Board's failure to address them violated that provision of the Administrative Procedure Act ("APA") which requires agencies to include in their adjudicatory decisions a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A) (1982).

In their brief, counsel for the Board—perhaps emulating their client's pauciloquy—did not address Local 111's APA argument, contenting themselves with making the responses to the union's substantive points which the Board could have (but did not) set forth. For example, counsel cited a number of additional cases in which the Board ordered unions to pay lost wages to victims of their unfair labor practices even though no employer discrimination occurred—although in none of these cases did the Board explain the apparent inconsistency with the *Colonial Hardwood* rule. *See IBEW, Local 175 (Duncan Electric Co.),* 269 N.L.R.B. 691, 691, 695 (1984), *enf'd,* 760 F.2d 714 (6th Cir.1985); *Local 282, International Brotherhood of Teamsters (Transit-Mix Concrete Corp.),* 267 N.L.R.B. 1130, 1131 (1983), *enf'd,* 740 F.2d 141 (2d Cir.1984); *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 119 (Kamtech, Inc.),* 264 N.L.R.B. 688, 694–95 (1982) *("Kamtech, Inc."), enf'd mem.,* 715 F.2d 578 (11th Cir.1983); *System Council T-6, IBEW,* 236 N.L.R.B. 1209, 1209–10 (1978), *enf'd,* 599 F.2d 5 (1st Cir.1979); *IBEW, Local 309 (R. Dron Electrical Co.),* 212 N.L.R.B. 409, 416 (1974) *("R. Dron Electrical Co.").* Counsel also correctly noted that this court has held that it is within the Board's statutory authority to order a union to pay for lost wages even in the absence of employer discrimination. *See Warehouse Union, Local 860 v. NLRB,* 652 F.2d 1022, 1025–26 (D.C.Cir.1981).

Without reciting the rest of Board counsel's substantive justifications, and without pausing to parse the facts of the many individual cases, suffice it to say that it may be possible to view the Board's caselaw as an unexplained evolution from *Colonial Hardware* to what Board counsel urge was (at the time this case was decided) the NLRB rule, that back pay will always be awarded to those whose loss of work was the result of unfair labor practices directed against them by unions, unless the unfair labor practices occurred in connection with strike or picket violence; but that it is also possible to view the case-law the way counsel for Local 111 suggest, as a lesser (though equally unexplained) evolution, to a rule that back pay will never be awarded against unions in the absence of union-secured employer discrimination except in failure-of-representation cases and cases in which a union operating an exclusive hiring hall discriminates or threatens to discriminate with respect to future referrals. (Neither theory succeeds in readily explaining *all* the recent cases. *See Tower Hotel Co.,* 250 N.L.R.B. at 101–02 (seemingly incompatible with Board counsel's theory); *Kamtech, Inc.,* 264 N.L.R.B. at 694–95 (seemingly incompatible with union counsel's theory); *System Council T-6, IBEW,* 236 N.L.R.B. at 1210 (same); *R. Dron Electrical Co.,* 212 N.L.R.B. at 416 (same).) Had the Board itself explained its prior cases as Board counsel has, we might well find its decision a rational one. But that does not suffice. The purpose of the APA requirement that there be included in the agency's decision the "conclusions, and the reasons or basis therefor, on all the material issues of . . . law" is only secondarily to enable reviewing courts to discern irrationality. Its primary purpose is to impose a discipline upon the agency itself, assuring that it has undergone a process of reasoned decision-making rather than haphazardly reached a result that could (on one or another basis of analysis) be sustained. To achieve that primary purpose, counsel's "post hoc rationalization" of why the agency could have come out the way it did will not suffice. *See, e.g., Investment Co. Institute v. Camp,* 401 U.S. 617, 628, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971). Of course, where the legal issue raised is insubstantial—where, for example, despite the litigant's claim there is no apparent conflict in earlier agency cases, or the precise nature of and reasons for subsequent departures from earlier cases are clear—

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the issue would not be considered "material" within the meaning of the APA, or the failure to address it would come within the APA's exemption for harmless error, 5 U.S.C. § 706 (1982). But that cannot remotely be considered the case here. In the circumstances of this case, we think it was unquestionably incumbent upon the Board to explain why it did not consider its decision a departure from the principles established in its prior cases, or why it considered a departure appropriate.[*]

The case must therefore be remanded to the Board for further explanation of why, in the light of its prior caselaw, it decided to award lost wages against the union. In the process of developing that explanation it is of course free to decide that its initial determination on this point was in error.

* * * * * *

Local 111's petition for review is denied as to the Board's finding that Local 111 violated § 8(b)(1)(A) of the NLRA by attempting to force travelers to stop work so that they would be replaced by Local members; denied as to the Board's finding that Local 111 violated § 8(b)(2) of the NLRA by directly attempting to cause NSSB to lay off travelers; granted as to the Board's finding that Local 111 violated § 8(b)(2) by using pressure on the travelers to indirectly coerce NSSB; and granted as to the Board's order that Local 111 compensate travelers for back pay lost as a result of those violations. The Board's cross-application for enforcement is granted except as to the backpay order, which is vacated and remanded to the Board for further proceedings consistent with this opinion, and the § 8(b)(2) violation premised on indirect coercion, as to which enforcement is denied.

So ordered.

SILBERMAN, Circuit Judge, concurring in part and dissenting in part: I concur in all parts of the majority opinion except Part IV, which rejects the Board's remedial order. I would also concur in that portion of the opinion—since I share the majority's concern about the Board's puzzling treatment over the years of the issue whether backpay can or should be awarded for Section 8(b)(1)(A) violations[1]—if I did not feel bound by *Warehouse Union, Local 860 v. NLRB,* 652 F.2d 1022 (D.C.Cir.1981).

Like the case before us now, *Warehouse Union* involved a Section 8(b)(1)(A) violation, there predicated on a breach of the duty of fair representation. I believe this case presents even *stronger* grounds than did *Warehouse Union* for a backpay remedy against the union. In *Warehouse Union,* the Board found that a union violated Section 8(b)(1)(A) by failing to advise clerical employees whom it represented of the employer's threat to eliminate all jobs in a particular clerical unit if the union insisted on a wage increase for the clericals equal to that demanded for the warehousemen. The employer agreed to the wage increase for the clericals, and after a postponement of several months (secured by the union) eliminated the clerical jobs.

Although twelve of the thirteen clericals were women, the Board refused to find that the union acted with a discriminatory motive. The Board nevertheless found a

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Section 8(b)(1)(A) violation. This court affirmed, reasoning that the union's failure to inform the clericals of the employer's threat breached its duty to those it represented even in the absence of a hostile motive.

Regarding the remedy, the Administrative Law Judge, whose opinion the Board adopted, said:

> It is recognized that an 8(b)(2) violation is not alleged. It is further recognized that the record

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[*] The partial dissent believes that our action in this Part IV of our opinion is precluded by *Warehouse Union, Local 860 v. NLRB, supra,* which upheld a back-pay award. Perhaps that circuit precedent would prevent our holding that the Board has no authority to award back pay in the circumstances of this case. What we hold, however, is not that the Board has no authority, but that it violated 5 U.S.C. § 557(c)(3)(A) by failing to provide the union with an explanation of the apparent inconsistency between its decision to exercise the authority in the present case and its decisions to refrain from exercising the authority in earlier cases. Even if the facts of *Warehouse Union* were on all fours with the present case (which they are not, since they included failure of representation, a distinction that Local 111 suggests is significant), the Board's failure to provide explanation was not considered in that opinion.

[1] The Board found both Section 8(b)(1)(A) and Section 8(b)(2) violations. It predicated its backpay order on both, but the employees' loss of wages stems only from the Section 8(b)(1)(A) violation because the employer refused to cooperate with the union.

> does not show *a direct causal relationship between Respondent's 8(b)(1)(A) violation and the loss of jobs suffered by clerical employees.* Finally, there is no way to know whether, had they been given by Respondent the information they were entitled to, the clerical employees would have adopted an all-or-nothing bargaining position, although such is most unlikely and unnatural. Nonetheless, those employees were entitled to make their own decision, and they were deprived of that right by Respondent's knowledgeable silence. Under such circumstances, the employees' plight was Respondent's intentional creation, and *equity demands* that Respondent remedy that dereliction. Consequently, it will be recommended that Respondent make whole all SB-4 clerical employees who lost their jobs on October 15, 1977, as a result of Respondent's unfair labor practices.

Warehouse Union, Local 860 (The Emporium), 236 N.L.R.B. 844, 851 (1978) (footnote omitted; emphasis added).

On appeal, this court summarily rejected the union's contention that the Board exceeded its remedial powers by awarding backpay against the union: "The Board is vested with broad remedial powers and our review is limited. A remedy may be overturned 'only if the relief ordered "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the purpose of the act." ' " 652 F.2d at 1025-26 (citations omitted). Here, by contrast, we uphold the NLRB's finding of a Section 8(b)(2) violation as well as a Section 8(b)(1)(A) violation, in which there was shown a hostile motive and a direct causal link between the union's Section 8(b)(1)(A) violation and the loss of employment. The result in this case follows *a fortiori* from *Warehouse Union.* Having enforced a backpay remedy predicated solely on a fair representation violation in *Warehouse Union,* we no longer write on a clean slate. Since I believe a prior opinion of this court controls the disposition of this case, I am obliged to dissent as to the majority's rejection of the Board's remedy. [2]

Production Workers Union of Chicago and Vicinity, Local 707, et al. v. NLRB

793 F.2d 323 (D.C. Cir.), June 13, 1986; rehearing denied August 8, 1986—273 NLRB 1178

On petition to review Board Order

Before GINSBURG, SCALIA and BUCKLEY, Circuit Judges

Opinion for the Court filed by Circuit Judge GINSBURG

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GINSBURG, Circuit Judge: This case calls upon us to decide whether Section 8(b)(4) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(b)(4)—which for decades has been dubbed the "secondary boycott provision" in scores of judicial opinions, administrative decisions, law review articles, treatises, casebooks, and law school classrooms—prohibits union involvement in all picketing by or on behalf of independent contractors, even picketing that is not secondary because not directed against a neutral third party. The Production Workers Union of Chicago and Vicinity, Local 707 (Union) seeks review of a National Labor Relations Board (NLRB or Board) order concluding that the Union violated Section 8(b)(4) by helping certain independent contractors picket their general contractor for better contractual terms.

Without considering whether the general contractor was a neutral third party, the Board held that Section 8(b)(4) proscribes

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labor organization participation in all picketing by independent contractors. We hold that in so ruling, the Board has attempted to enlarge the office of Section 8(b)(4) without statutory authority or caselaw support. It was the express intent of Congress, as authoritative precedent observes and affirms, to confine the "secondary boycott provision" to the protection of "unoffending [entities] from pressures and controversies not their own." *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

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[2] That being said, I should add that I have strong misgivings about the soundness of *Warehouse Union.* Indeed, I share the view expressed by counsel for petitioner at oral argument, *i.e.,* that *Warehouse Union* seriously jeopardizes a union's ability to negotiate on behalf of those it represents. But until reversed *en banc,* that case remains the law of the Circuit.

I. BACKGROUND

Intervenors Checker Taxi Company (Checker) and Yellow Taxi Company (Yellow) are the principal cab companies operating in Chicago, Illinois; together, they own approximately 80% of all the cabs licensed to operate in that city. Before 1975, these companies employed commissioned drivers, who were statutory employees under the Act and were collectively represented by Local 777 of the Seafarers International Union. In 1975, however, Checker and Yellow began to replace these commissioned drivers with drivers who lease cabs from the cab companies. This court held that these leased cab drivers (LCDs) are not statutory employees and that the cab companies are therefore under no legal obligation to bargain with them. *See Local 777, Seafarers International Union v. NLRB,* 603 F.2d 862 (D.C.Cir.1978). Today, Yellow and Checker use an overwhelming majority of LCDs rather than commissioned drivers.

After our *Seafarers* opinion, LCDs became dissatisfied with what they regarded as increasingly onerous lease terms. Eventually, they began to organize in hopes that the cab companies would voluntarily agree to deal collectively with them. By early July 1980, the leader of the drivers seeking better lease terms, Reverend Joseph Jerry McAfee, had enlisted about 1200 fellow LCDs. He then consulted with the Union to gain the benefit of its expertise in labor organization and collective representation; by early August, the Leased Taxicab Division of Local 707 of the Production Workers Union had been created. On August 7, the LCDs dissatisfied with the terms of their leases met and decided to attempt negotiations with the cab companies; they further determined, if the companies refused to negotiate, to stop work and picket. On August 8, the Union wrote to Yellow and Checker requesting the companies to recognize and deal with the Division. The cab companies refused and have consistently maintained that they will never recognize the Division.

On August 12, the LCDs and some Union officials began to picket garages of the cab companies. Yellow and Checker maintain two types of garages: one type houses only cabs driven by LCDs; the other houses cabs driven by commissioned drivers. Except for one brief incident, the LCDs confined their picketing to the garages that housed only vehicles operated by LCDs. The exceptional incident occurred at the very beginning of the picketing, early on the morning of August 12, when the LCDs began to picket Yellow Cab's South Indiana Avenue garage. An official of the Seafarers Union soon arrived and explained that only commissioned drivers worked at that garage. Once informed that the garage was for commissioned drivers, the LCDs left immediately. The whole incident lasted less than thirty minutes.

In September, Yellow and Checker filed unfair labor practice charges against the Union under Section 8(b)(4).[1] The NLRB Administrative Law Judge (ALJ) assigned to the case conducted a hearing, and on March 9, 1981, he issued a decision and order dismissing the complaint. The ALJ held that the LCDs' picketing fell entirely outside the ambit of the Act because it involved no employer-employee relationship or a labor union acting *qua* labor union (as opposed to acting *qua* advisor to the LCDs); hence the cab companies' charges failed to present a labor dispute falling within the NLRB's subject-matter jurisdiction. *See Production Workers Union of Chicago and Vicinity, Local 707,* Case Nos. 13–CC–1159 and 13–CC–1160 (Mar. 9, 1981), Joint Appendix (J.A.) at 18, 28–31 *(ALJ Opinion).*

On December 18, 1984—after a delay of over three and one-half years—a three-member panel, to whom the NLRB had delegated the decision, rejected the ALJ's view of the case. The panel's opinion first concludes that the unfair labor practice complaint does fall within the NLRA's domain because it was brought against a statutory labor organization. Passing to the merits, the opinion initially acknowledges that the standard case Section

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[1] The cab companies brought several actions in other tribunals at about the same time. First, they sued in Illinois state court, alleging that the Union's picketing violated the Illinois Antitrust Act and Illinois tort law. The trial court denied the companies' motion for a preliminary injunction, and the appellate court affirmed. *See Yellow Cab Company v. Production Workers Union of Chicago and Vicinity, Local 707,* 92 Ill.App.3d 355, 48 Ill.Dec. 153, 416 N.E.2d 48 (Ill.App.Ct. 1980). Second, the companies sued in federal district court, again seeking a preliminary injunction, this time under Section 10(l) of the Act, 29 U.S.C. § 160(l), alleging, as they do here, that the picketing violated Section 8(b)(4). The district court denied the preliminary injunction motion, reasoning that the LCDs "are tantamount to being employees of" Yellow and Checker, thus their picketing was "for a primary object." *See Crawford v. Production Workers Union of Chicago and Vicinity, Local 707,* No. 80 C–4819, slip op. at 5 (N.D.Ill. Dec. 11, 1980). Finally, the cab companies commenced an action against the Union for damages under Section 303 of the Act, 29 U.S.C. § 187. That case is still pending. *Checker Taxi Co. v. National Production Workers Union,* No. 80 C–6573 (N.D. Ill.).

8(b)(4) addresses, as illustrated in the legislative history, is one "in which the union's activity is directed toward a neutral employer in order to pressure another employer whose employees the union seeks to represent or benefit." The matter at hand, the opinion concedes, "is clearly not" such a case.

But Section 8(b)(4) is an intentionally broad provision, the opinion continues; and although the term "secondary boycott" is "generally used as a shorthand reference to the conduct forbidden by" the section, such a broadly drafted provision should not be limited by a term that nowhere actually occurs in the statute. Instead, interpretation should be guided by the purposes animating the provision. Since the LCDs are not statutory employees, the opinion maintains, their picketing does not advance one of the section's primary purposes: promoting the right of labor organizations to bring pressure to bear on offending employers in labor disputes. The panel therefore demanded "strong indication" that Section 8(b)(4)'s express permission of "primary picketing" includes picketing in aid of independent contractors. The opinion concludes, on the contrary, that "no [such] implication [exists] in either the legislative history or case precedent." Based on this conclusion, the panel ordered the Union to cease and desist from picketing and to post notices of the Board's decision. *See Production Workers Union of Chicago and Vicinity, Local 707,* 723 N.L.R.B. No. 148 at 5–11 (Dec. 14, 1984) *(Production Workers).*

II. JURISDICTION

The Union argues, and the ALJ agreed, that the NLRB lacks adjudicatory authority in this case because it involves no statutory employees and therefore entails no labor dispute within the ambit of Section 2(9) of the Act, 29 U.S.C. § 152(9). *See* Final Brief of the Production Workers Union, *et al.,* at 28–30; *ALJ Opinion,* J.A. at 28–32. The law of this circuit is clear, however, that Section 2(9) does not circumscribe the Board's jurisdiction; rather, it merely defines the term "labor dispute" as it appears elsewhere in the statute. The Board's task was not "to pause at the threshold to identify a conventional labor dispute"; it was instead, "to measure the union's conduct against specific provisions of the Act defining unfair labor practices." *Soft Drink Workers Union Local 812 v. NLRB,* 657 F.2d 1252, 1258 (D.C.Cir.1980). We therefore uphold the Board's ruling that it had jurisdiction to consider whether the Union's picketing violated Section 8(b)(4).

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III. THE MERITS

We reject, however, the central premise of the NLRB's order. The Board erroneously concluded that Section 8(b)(4) prohibits union involvement in all picketing by or on behalf of independent contractors. Rather, that section prohibits only "secondary activity": union attempts to involve neutral third parties in disputes not their own. *See, e.g., National Woodwork Manufacturers Association v. NLRB (National Woodwork),* 386 U.S. 612, 624–26, 87 S.Ct. 1250, 1257–58, 18 L.Ed.2d 357 (1967); *United Scenic Artists, Local 829 v. NLRB,* 762 F.2d 1027, 1032–33 (D.C.Cir.1985). The provision would therefore bar the Union-aided picketing at issue only if the picketing were directed against a neutral third party in this dispute. [2]

A. *The Board's Opinion*

Section 8(b)(4), stripped to its relevant essentials, provides that it shall be an unfair labor practice for a union (i) to induce an employee to refuse to work or (ii) to threaten, coerce or restrain any person, if an object of the behavior described in (i) or (ii) is "(B) forcing or requiring any person to cease doing business with any other person . . . Provided that nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The NLRB concluded in the present case that the Union's picketing of the LCD garages was an attempt to coerce the other LCDs to cease doing business with Yellow and Checker and so was a violation of Section 8(b)(4)(ii)(B). The Board also concluded the Union's picketing of the South Indiana garage, which housed only vehicles operated by commissioned drivers, was an attempt to induce those employees to stop work, with the object to require them to cease doing business with the cab companies in violation of Section 8(b)(4)(ii)(B). *See Production Workers* at 10.

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[2] In a recent case with almost identical underlying facts, the Regional Director of the NLRB petitioned the Northern District of California for a preliminary injunction against picketing by independent contractors. The Regional Director argued, as does the NLRB here, that Section 8(b)(4) bans union participation in all picketing on behalf of independent contractors. In reasoning very similar to that adopted in this opinion, the court denied the petition. *See Scott v. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County,* 633 F.Supp. 121 (N.D.Cal.1985). The Ninth Circuit has since issued an unadorned order granting the Regional Director's motion for an injunction pending an expedited appeal, and thereafter an order with consent of counsel staying the appeal until April 30, 1986, or the issuance of this opinion. *See Scott v. Local No. 70,* No. 85–2753 (9th Cir.Nov. 11, 1985) (order granting injunction pending appeal) and (9th Cir.Feb. 6, 1986) (order staying appeal).

We need not tarry over the Board's determination that the picketing was an attempt to cause the LCDs and the commissioned drivers to stop doing business with Yellow and Checker;[3] even so characterized, the picketing was "primary" under the Section 8(b)(4) proviso that nothing in the section makes primary picketing unlawful. We vacate and remand the Board's order on that account.

The Board's opinion recognizes that the proviso makes only secondary activity unlawful. *Id.* at 9. It also acknowledges that Section 8(b)(4) is usually dubbed the "secondary boycott provision" and that a secondary boycott is the use of pressure on a neutral, third party in order to gain objectives in a dispute with a different, primary party. Stressing that the term "secondary boycott" appears nowhere in the statutory language, however, the Board maintains that the provision may reach behavior that is not technically a secondary boycott—although presumably the proscribed behavior

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must still be secondary activity. *Id.* at 6–7. The Board's opinion does not essay an explanation of this distinction between a "secondary boycott" and the presumably broader category of "secondary activity."[4] It does, however, conclude without elaboration and with reference only to two miscited NLRB opinions, *see infra* at 330, that secondary activity includes all picketing on behalf of independent contractors. *Id.* at 9. The Board-tendered blanket rule would thus ban union involvement in picketing by independent contractors not only against neutral parties but also against parties, such as Yellow and Checker, who are directly and intimately involved in the underlying dispute.

Over the years since the adoption of Section 8(b)(4) in 1947, the NLRB has handled a great number of cases delineating the labels "neutral" and "secondary boycott,"[5] but the Board has never before suggested, to the court's knowledge, that Section 8(b)(4) prohibits union participation in picketing against a party regardless of that party's involvement in the underlying issue. We recognize that an agency may change its interpretation of a statute entrusted to its administration, and that when the intent of Congress is unclear courts must uphold the agency's interpretation if it is based on a "reasonable accommodation of conflicting policies." *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 2781–83, 81 L.Ed.2d 694 (1984). When the intent of Congress is clear, however, the court must give effect to the intent of Congress regardless of the agency's opinion. *Id.* at 2781–82. *See Securities Industry Association v. Board of Governors of the Federal Reserve System,* 468 U.S. 137, 104 S.Ct. 2979, 2983–92, 82 L.Ed.2d 107 (1984) (holding agency's interpretation of statute inconsistent with congressional intent).

We find the intent of Congress on this issue, as described by definitive, repeated, and unambiguous Supreme Court precedent, altogether clear: Section 8(b)(4) was designed to prohibit only pressure brought to bear on "a third person who is wholly unconcerned in the disagreement," whether that pressure is called a "secondary boycott" or "secondary activity." 93 Cong. Rec. 4198 (1947) (remarks by Senator Taft on Section 8(b)(4)). Moreover, even if the intent of Congress were less than pellucid, the Board's conclusion that Section 8(b)(4) prohibits all union-aided picketing by independent contractors, we believe, would scarcely qualify as a "reasonable accommodation" of the section's policies.

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[3] We note a reservation, however, about the Board's conclusion that the picketing at the South Indiana garage was an attempt to cause the commissioned drivers to stop work. The Board seems to acknowledge, as the ALJ found, that the Union believed that the South Indiana garage housed only LCD-operated vehicles. The Board maintains, however, that the Union should have discovered in advance that the garage housed only cabs operated by commissioned drivers. *See Production Workers* at 10. Because we vacate and remand the Board's order on another ground, we do not address this matter.

[4] As noted, the Board apparently believes that a secondary boycott is pressure on a neutral third party, but that secondary activity includes some unspecified class of behavior, including all picketing in aid of independent contractors, that may or may not be directed against a neutral party. As we will explain, *see infra* at 328–330, we find this distinction between a "boycott" and "activity" irrelevant because the quality that makes behavior secondary—whether it be labelled a secondary, boycott or secondary activity—is that it is directed against a neutral party. Moreover, we see no basis in the meaning of the words "boycott" and "picketing" that would account for such differential treatment, for picketing is usually just a means to promote a boycott: "A 'boycott' is a refusal to deal, whether by an employer or a customer (or, more rarely, a seller); a 'strike'—a refusal to work—is then a variety of boycott; 'picketing' is ordinarily an attempt, by means of patrolling at a site with a message of some kind on the picket sign, to instigate a boycott on the part of those seeing the picket." Lesnick, *The Gravamen of the Secondary Boycott,* 62 COL.L.REV. 1363, 1364 n. 5 (1962). Virtually by definition, then, secondary picketing is picketing initiated to prompt a secondary boycott against a neutral party.

[5] *See generally* R. DERESHINSKY, A. BERKOWITZ, P. MISCIMARRA, THE NLRB AND SECONDARY BOYCOTTS (1981).

B. *The Legislative Meaning of "Secondary"*

As originally enacted in 1947 as part of the Taft-Hartley Act, Section 8(b)(4) did not contain the proviso limiting the section's prohibition to non-primary activity. *See* ch. 120, 61 Stat. 140 (1947). The legislative history of the section, however, securely indicates that Congress intended the provision to prohibit only secondary pressure—pressure against neutrals. The Conference

Report accompanying the Act specified that the section does not prohibit "the primary strike for recognition." As the Board itself appeared to acknowledge, *see Production Workers* at 6, the report also lists as examples of prohibited conduct only classic secondary boycotts, pressure against a neutral party. H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 (1947), *reprinted in* I Legislative History of the Labor Management Relations Act, 1947 at 505–547 (hereinafter cited as LMRA History). Senator Taft's comments on the floor of the Senate are even more explicit. Noting that under the Norris-LaGuardia Act secondary boycotts had been wholly lawful, the senator explained: "All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 Cong.Rec. 4198 (1947).

According to this unequivocal legislative history, then, the quality that makes behavior secondary is that it fits the common law definition of secondary boycotts. The classic definition, often quoted by the Supreme Court in connection with Section 8(b)(4), is by Learned Hand: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers v. NLRB,* 181 F.2d 34, 37 (2d Cir.1950); *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 388, 89 S.Ct. 1109, 1121, 22 L.Ed.2d 344 (1969); *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB,* 366 U.S. 667, 672, 81 S.Ct. 1285, 1288–89, 6 L.Ed.2d 592 (1960). Professor Cox has incisively expressed the concept: "Historically, a boycott is a refusal to have dealings with an offending person. . . . The element of 'secondary activity' is introduced when there is a refusal to have dealings with one who has dealings with the offending person. . . . Thus, there are two employers in every secondary boycott resulting from a labor dispute." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN.L. REV. 257, 271 (1959). Similarly, the Supreme Court has observed that although the concept "secondary boycott" has "chameleon-like qualities," all common-law commentators "agreed upon its central aspect: pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork,* 386 U.S. at 623, 87 S.Ct. at 1257; *see also* Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 YALE L.J. 341, 364 (1938).

From its earliest constructions of Section 8(b)(4), the Supreme Court has adopted this interpretation. In *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), the Court recognized that the original language of the provision would bar virtually all union involvement in picketing, even that specifically protected by other provisions of the Act. The Court therefore looked instead to the purposes of the provision, observing that the section "often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections,'" and citing Senator Taft's remark, quoted above, that the provision does no more than make secondary boycotts illegal. *Id.* at 686, 71 S.Ct. at 950. Finally, the Court described the policy behind this prohibition as "shielding unoffending employers and others from pressures in controversies not their own." *Id.* at 692, 71 S.Ct. at 953. For the *Denver Building* Court, then, the quality that makes pressure "secondary" was the same as that reflected in the legislative history: it is brought against a third party not involved in the underlying dispute.

In the 1959 Landrum-Griffin Act, the Congress then sitting gave its implicit imprimatur to the Supreme Court's interpretation by inserting the proviso of present Section 8(b)(4) that explicitly protects primary activity. Since that time, as in the years before, the caselaw has universally and unambiguously held that Congress intended Section 8(b)(4) to protect only neutral parties—and not even all neutrals—from coercion in disputes not their own. *See, e.g., NLRB v. Local 825, International Union of Operating Engineers,* 400

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U.S. 297, 302–03, 91 S.Ct. 402, 406, 27 L.Ed.2d 398 (1971); *National Woodwork,* 386 U.S. at 623–24, 626–28, 87 S.Ct. at 1257, 1258–59; *Local 1976, United Brotherhood of Carpenters v. NLRB,* 357 U.S. 93, 98, 100, 78 S.Ct. 1011, 1015, 1016, 2 L.Ed.2d 1186 (1958); *United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL–CIO v. NLRB,* 762 F.2d 1027, 1033 (D.C.Cir.1985); *Local Union 501, International Brotherhood of Electrical Workers, AFL–CIO v. NLRB,* 756 F.2d 888, 893 (D.C.Cir.1985). The Supreme Court has also repeatedly cited as controlling upon judicial interpretation Senator Taft's remark that Section 8(b)(4) does no more than make secondary boycotts unlawful. *See, e.g., National Woodwork,* 386 U.S. at 624, 87 S.Ct. at 1257; *NLRB v. International Rice Milling Co.,* 381 U.S. 665, 673–74 n. 8, 71 S.Ct. 961, 965–66 n. 8, 95 L.Ed. 1277 (1951); *see also* Levin, *"Wholly Unconcerned": The Scope and Meaning of the Ally Doctrine Under Section 8(b)(4) of the NLRA,* 119 U.PA.L.REV. 283, 283 & n. 3 (1970). Moreover, the Court has repeatedly described Congress' purpose in Section 8(b)(4) as protecting "unoffending employers," "the helpless victims of quarrels that do not concern them at all." [6] *See, e.g., Edward J. Debartolo Corp. v. NLRB,* 463 U.S. 147, 103 S.Ct. 2926, 2932, 77 L.Ed.2d 535 (1983); *International Longshoremen's Association, AFL–CIO v. Allied International, Inc.,* 456 U.S. 212, 223 n. 20, 225, 102 S.Ct. 1656, 1663 n. 20, 1664, 72 L.Ed.2d 21 (1982) *(ILA); National Woodwork,* 386 U.S. at 626–27, 87 S.Ct. at 1258–59.

Thus, we find Congress' intent plain and not subject to genuine dispute: secondary activity under Section 8(b)(4)(B) refers only to pressure on a neutral third party. In contrast to the array of authority supporting this construction of the section, the NLRB offers no apposite authority for its conclusion that secondary activity includes all picketing "on behalf of independent contractors." The NLRB panel opinion relies on two categories of cases. First, by way of background, the panel relies on the Supreme Court's opinion in *ILA,* 456 U.S. at 225, 102 S.Ct. at 1664, for the atmospheric proposition that Section 8(b)(4) is "intentionally broad." *Production Workers* at 5, 7. The cited portion of that opinion, however, explains that the provision's proscription is broad only in that it reaches many forms of secondary boycotts, politically as well as economically motivated ones: "The prohibition was drafted broadly to protect neutral parties, 'the helpless victims of quarrels that do not concern them at all.' [citation omitted]. . . . Recognizing that '[i]llegal boycotts take many forms,' [citation omitted], Congress intended its prohibition to reach broadly." *ILA,* 456 U.S. at 225, 102 S.Ct. at 1664. The *ILA* opinion at no point even intimates that the prohibition is so broad as to reach pressure against non-neutral parties.

Next, the Board panel's opinion inappositely cites two NLRB orders for the proposition that secondary activity includes all picketing on behalf of independent contractors. *See Production Workers* at 9 & n. 23 *(citing Local 814, Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Bros.),* 208 N.L.R.B. 184 (1974); *Local 221, Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 222 N.L.R.B. 423 (1976)). These orders, however, involve not picketing on *behalf* of independent contractors but *against* neutral independent contractors. In both, unionized employees of trucking companies attempted to force independent owner-operators—neutral third parties in the dispute between employees and employers—to join the union. The Board correctly held in both cases that such pressure against a neutral violates Section 8(b)(4).

Here on appeal, the NLRB relies principally and inappositely on *NLRB v. Denver Building and Construction Trades Council, supra.* In that case, the Court and the Board found only that a secondary boycott occurred when a union picketed a neutral

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general contractor in order to cause the general to terminate its contract with the nonunion subcontractor with whom the union's dispute lay. *See id.* at 686–89, 71 S.Ct. at 950–51. Again, the defining feature of "secondary" activity for the Court was that the activity trained pressure against a neutral third party, the general contractor. All of the other cases cited by the Board also fit this pattern. Neither in its brief nor in its order has the NLRB adduced a single case or shred of legislative history supporting the notion that pressure directed against a party who is not neutral can be secondary. [7]

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[6] This latter phrase originally appeared in the House Report accompanying the Taft-Hartley Act. *See* H.R.REP. No. 245, 80th Cong., 1st Sess. 23 (1947), *reprinted in* LMRA History at 314.

Thus, we harbor no doubt on the critical inquiry in this case: the Board misapprehended Congress' specific intent in concluding that Section 8(b)(4) prohibits union involvement in all picketing by independent contractors. The order under review is therefore invalid. *See Chevron,* 104 S.Ct. at 2781–82 & n. 9.

C. *Accommodation of Statutory Purposes*

If congressional intent were less clear, so that room remained for agency elucidation, we would nonetheless find the Board's definition of "secondary" erroneous. The Supreme Court has instructed us that, absent specific guidance from Congress, the agency's interpretation of a law it administers need only be "based on a permissible construction," one that reflects a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 2782, 2783. This standard, we have stated, requires a reviewing court to determine whether the "interpretation [advanced by the agency] is arguably consistent with the underlying statutory scheme in a substantive sense" and whether the agency's consideration of the issue is adequately reasoned. *Rettig v. Pension Benefit Guaranty Corporation,* 744 F.2d 133, 151 (D.C.Cir.1984). Even under this relatively deferential or relaxed standard, we could not accept as rational the Board's interpretation of Section 8(b)(4)'s compass.

The Board's opinion states that to determine what conduct Section 8(b)(4) proscribes, a tribunal should examine "the problem to which the legislation was addressed." The Board panel then sets out the "dual Congressional objectives" underlying Section 8(b)(4): "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes"; and "shielding unoffending employers and other from pressures in controversies not their own." *Production Workers* at 7 (quoting *Denver Building,* 341 U.S. at 692, 71 S.Ct. at 953). Next, the opinion notes that assisting independent contractors to picket would not help labor organizations apply pressure to offending employers because no employers or employees would be involved. For this reason, the Board panel declared, the "equations are not balanced in [the Union's] favor." *Id.* at 8. Therefore, for the Union to succeed, the Board required some "strong indication" in caselaw or legislative history that Congress intended "primary" activity to include picketing on behalf of independent contractors. The Board then conclusorily announced that it could find no such indication.

As we have seen, the caselaw and legislative history in fact contain extraordinarily "strong indication" that Congress intended "primary activity" to include all picketing against non-neutral parties, whether by independent contractors or by anyone else, and the panel's failure to find this indication is inexplicable. Aside from this blindspot, moreover, the Board's view that the

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policy "equations" are "balanced" against the Union appears to us both unreasoned and not in line with the precise policies underlying Section 8(b)(4). The Board has entirely ignored the consideration that its order will not advance either of the purposes that it accurately ascribes to the section. The Board panel tells us that assisting independent contractors to picket will not help labor unions to pressure offending employers. But the panel fails to notice as well that forbidding union aid to independent contractors who picket non-neutrals will in no way help to shield neutrals from pressure in controversies not their own. Thus, the Board's whole "balance" metaphor is misplaced, for the "dual Congressional objectives" simply are not in tension in this case.

The Board panel also refers to the general policies of the NLRA, which the Board's opinion describes as promoting "the full flow of commerce," on the one hand, and preserving "the rights of labor to organize," on the other. *Production Workers* at 7. According to the Board, assisting independent contractors to picket would have a "deleterious effect on commerce" but would not help labor to organize because the LCDs are not statutory employees. So, again, the "equations are not balanced in [the Union's] favor." *Id.* at 8.

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[7] Most of the parties' arguments center around whether an independent contractor who has a contract with the party with whom the picketers have a dispute is automatically a neutral. Some precedent in this circuit indicates that such a party is not automatically neutral. *See Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 v. NLRB,* 429 F.2d 747 (D.C.Cir.1970). We do not reach that issue, however, because the factual situation before us is different: we have in this case not picketing by employees against a third party related only by contract to the employer of the picketers, but picketing by independent contractors against the very party with whom they have a dispute.

As the Board itself conceded and we have detailed, however, Congress specified more particular policies for Section 8(b)(4) than simply the background policies of the Act. The Board relies on Section 1 of the Act, 29 U.S.C. § 151 ("Findings and Declaration of Policy"), for its conclusion that Congress sought to promote the flow of commerce. That provision explains that Congress sought to speed the flow of commerce in two specific ways: first by protecting the rights of employees to organize and bargain collectively; and second by prohibiting "certain practices" by unions—*i.e.*, unfair labor practices—that burden commerce. Thus, the Act seeks to aid commerce not by setting up the Board as grand diviner of what will serve that end, but in specific ways through specific provisions with their own specific policies.

This congressional focus on embedding policy in specific provisions is especially keen as regards prohibitions on peaceful picketing, as the Supreme Court has explained: "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw picketing unless 'there is the clearest indication in the legislative history,' [citation omitted], that Congress intended to do so as regards the particular ends of the picketing under review." *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 62–63, 84 S.Ct. 1063, 1066, 12 L.Ed.2d 129 (1962); *see NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639,* 362 U.S. 274, 284, 80 S.Ct. 706, 712, 4 L.Ed.2d 710 (1960).

As we have already explained, the Board has drawn our attention to no indication in the legislative history of Section 8(b)(4), much less the "clearest indication," that Congress' specific policy regarding secondary activity encompassed prohibition of union involvement in all picketing by independent contractors. Instead, the Board's flawed analysis yielded the contrary and insensible demand that the Union produce "strong indication" that Congress' policy would not abide blanket exclusion of unions from all engagement in picketing by independent contractors. The Board's position, we conclude, does not withstand the test of reasoned decisionmaking.

IV. Conclusion

We hold that the NLRB applied the wrong standard to determine whether the Union's picketing violated Section 8(b)(4), the secondary boycott provision of the NLRA. We therefore remand this case to the Board so that it may apply the correct standard: the section does not exclude union involvement in all picketing by indepen-

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dent contractors; rather, its proscription is limited to picketing against neutral parties.

We offer one further clarification to aid the Board in its task. The Board has argued before us that Yellow and Checker are in fact neutrals because a neutral is anyone not involved in a dispute between employers and employees. Under this analysis, the cab companies are neutrals because their dispute with the LCDs is not one between employers and employees. *See* Brief for the NLRB at 13–14 n. 5. This stilted interpretation is not the one Congress intended. Nor is it one the Board conceived at the time it rendered its opinion. Then, the Board recognized "clearly" that the factual situation in this case is not one in which the union's activity is directed toward a neutral. *See Production Workers* at 6. As we have already explained, *see supra* at 11–14, a neutral is a third party "wholly unconcerned" in a dispute between two other parties. Yellow and Checker are not at all neutral in this sense; the LCDs' dispute over contract terms lies precisely and only with the cab companies.

In short, then, "we perceive no basis for the Board's decision" because the Board has not "been able to cite any legal authority to support [its] strained new view on the meaning of" secondary activity under Section 8(b)(4). *Teamsters Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB,* 788 F.2d 27, 32 (D.C.Cir.1986) (referring to the Board's recent construction of the term "bargaining impasse" under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5)). Congress and the courts long ago clearly established that Section 8(b)(4) bars only pressure against neutrals, and the Board has adduced no remotely tenable argument for its breath-takingly novel interpretation of the provision.[8]

For the reasons stated, we vacate the Board's order and remand this case to the NLRB for proceedings consistent with this opinion.

It is so ordered.

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[8] Our decision does not address, and therefore leaves open, the question whether the union's activity at issue here violates another provision of the Act or is illegal under some other state or federal law. *See supra* 325–326 n. 1 (describing pending proceedings in other fora).

Universidad Central De Bayaman v. NLRB

793 F.2d 383 (1st Cir.), Opinion en banc June 13, 1986—273 NLRB 1110

On petition to review Board Order

Before COFFIN, ALDRICH and TORRUELLA, Circuit Judges

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COFFIN, Circuit Judge: Universidad Central de Bayamon petitions for review of a National Labor Relations Board decision finding violations of the National Labor Relations Act and requiring the University to enter into collective bargaining with the union elected to represent full-time teachers at the University. The University contends that, because it is an institution under the control of a religious order, NLRB jurisdiction would produce excessive entanglement between government and religion in violation of the First Amendment's free exercise and establishment clauses. The Board cross-petitions for enforcement of the order, and the Union de Profesores Universitarios, charging party before the Board, intervenes. For reasons stated below, we find that the Board properly asserted jurisdiction over the University and that such jurisdiction does not violate the First Amendment.

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I. FACTS

The Universidad Central de Bayamon is a private, nonprofit university governed by a Board of Trustees, the majority of whom must be and are members of the Dominican Order. The University describes itself as a "Catholic-oriented civil institution," which has as its objective "that of providing a humanistic education at an academic level." The University's full-time faculty includes approximately 49 lay teachers and 4 or 5 priests. There is no requirement that the lay faculty be of the Catholic faith, although most are Catholic. The University "welcomes students of all denominations and faiths".

On October 30, 1979, the Union de Profesores Universitarios (the "Union") filed a representation petition with the Board, seeking certification as the bargaining representative of all full-time teaching personnel at the University. The University opposed the petition, in part on the grounds that the Board's assertion of jurisdiction would constitute an impermissible entanglement between government and religion. The Board's Regional Director rejected the University's position, finding that the University's aim of providing a " 'humanistic education at an academic level' " was "entirely secular." The University's request for review of the Regional Director's decision was denied by the Board as raising "no substantial issues warranting review."

In a ballot election, the vote of the faculty was 41 to 9 in favor of representation by the Union and the Union was certified on February 7, 1980. Standing by its belief that the Board had improperly asserted jurisdiction, the University refused to bargain with the Union. In May and July of 1980, the University promulgated new requirements regarding faculty credentials without notifying or bargaining with the Union. Six professors were discharged in May and two professors were discharged in July for failing to meet the new requirements. Because of the University's refusal to bargain, the Union struck the University in September 1980, but returned to work unconditionally in November 1980. Fifteen striking employees were not reinstated by the University.

The Union brought unfair labor practices proceedings in 1980 and 1981, complaining of the University's refusal to bargain, its unilateral changes in employment conditions, and its failure to reinstate the strikers. Hearings were held before an administrative law judge in March 1982 and March 1983. The ALJ found the University had not adduced any new evidence concerning its religious character that would justify overturning the Regional Director's decision regarding the Board's jurisdiction and that no impermissible entanglement between government and religion would occur as the result of such jurisdiction.[1] In December 1984, a three member panel of the NLRB affirmed the ALJ's finding that jurisdiction over the University was proper because its "academic mission is secular".[2] The Board ordered the University to bargain collectively with the Union upon request, to rescind the unilateral changes upon request of the Union, and to offer those employees discharged or denied rein-

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statement full and immediate reinstatement to their former positions.

II. FIRST AMENDMENT CLAIM

The University contends that the Supreme Court decision in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), requires us to find that the NLRB has no jurisdiction over a religiously affiliated institution such as the University. In *Catholic Bishop,* the Supreme Court held that the exercise of NLRB jurisdiction over lay teachers in two Roman Catholic parochial schools presented a "significant risk" of infringing the establishment clause of the First Amendment and therefore, absent an affirmative intention of Congress, the Court would not interpret the National Labor Relations Act as conferring such jurisdiction. 440 U.S. at 501–09, 99 S.Ct. at 1319–23. The University argues that allowing NLRB jurisdiction over a religiously affiliated university would create a similar risk of violating both the establishment and free exercise clauses of the First Amendment. Because we find that the religious nature of the University is significantly different from that of the Catholic secondary schools at issue in *Catholic Bishop,* and because we find that NLRB involvement with the University will be circumscribed in important ways, we conclude that NLRB jurisdiction over the University will not create a significant risk of violating either the establishment or free exercise clause. We therefore decline to extend the holding of *Catholic Bishop* to the University in this case, and hold that the jurisdiction assumed on the authority of the National Labor Relations Act is proper.

A. *Establishment Clause*

To determine whether application of the National Labor Relations Act to the University presents a significant risk of violating the establishment clause, we apply the three-part test set out by the Supreme Court: (1) the statute must have a secular purpose; (2) the statute's primary effect must neither advance nor inhibit religion; and (3) the statute must not foster excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

There is no doubt in this case that NLRB jurisdiction meets the requirements of having a secular purpose and effect.[3] In determining whether it also meets the standard of not fostering excessive entanglement between government and religion, however, we must look at several related factors: the character and purpose of the institution affected, the nature of the activity engaged in or mandated by the government, and the resulting relationship between government and the religious organization. *Lemon v. Kurtzman,* 403 U.S. at 615, 91 S.Ct. at 2112.

1. Nature of the Institution

In *Catholic Bishop,* the Supreme Court found a significant risk of entanglement by focusing primarily on the nature and purpose of the institutions affected. According to the Court, the holding in *Catholic Bishop* was premised on the "critical and unique role of the teacher in fulfilling the mission of a church-operated school". 440 U.S. at 501, 99 S.Ct. at 1319. The Supreme Court noted that the schools in *Catholic Bishop* were similar to those at issue in *Lemon v. Kurtzman;* in both cases, "[r]eligious authority necessarily pervades the school system". 440 U.S. at 501, 99 S.Ct. at 1319 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 617, 91 S.Ct. 2105, 2113, 29 L.Ed.2d 745 (1971). In *Lemon* and its progeny, the "key role" played by teachers in religious elementary and secondary schools was "the predicate for [the Court's]

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[1] The ALJ did conclude that the University was not required to bargain with the Union concerning any terms and conditions relating to the Center for Dominican Studies in the Carribbean ("CEDOC"). CEDOC is a two-year course of study leading to a Master of Divinity degree in Theology. The primary objective of the program is the formation of candidates for the priesthood. CEDOC has its own board, its own admissions committee and hires and pays for its own professors. The ALJ found that the exercise of NLRB jurisdiction over CEDOC would be improper because of the pervasively religious character of the program.

[2] The panel also affirmed that jurisdiction over CEDOC would not be proper.

[3] As the Ninth Circuit has noted: "The purpose of the National Labor Relations Act is clearly secular—to minimize industrial strife burdening interstate commerce by protecting employees' rights to organize and bargain collectively. *NLRB v. Jones & Laughlin,* 301 U.S. 1, 42–43, 57 S.Ct. 615, 626–27, 81 L.Ed. 893 (1937). And the Act's primary effect is to require collective bargaining and reduce labor disruptions, rather than to promote or deter acceptance of the Catholic faith." *St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436, 1441 (9th Cir.1983).

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conclusions" that governmental aid to such schools creates an impermissible entanglement between government and religion. *Catholic Bishop,* 440 U.S. at 501, 99 S.Ct. at 1319. In *Catholic Bishop,* the Court found that Board jurisdiction over faculty-administration relationships in schools permeated with a religious mission would similarly create a significant risk of entanglement. *Catholic Bishop,* 440 U.S. at 502-03, 99 S.Ct. at 1319-20.

The Central Bayamon University differs significantly from the secondary schools at issue in *Catholic Bishop.* There is no doubt that the University is a religiously affiliated school and that religion is a facet of the school's existence. The University was founded by the Dominican Order in 1961 and was incorporated as a non-profit association in 1964 by three Dominican priests. The University is governed by a Board of Trustees, the majority of whom must be and are members of the Dominican Order. The President of the University, who has broad powers and authority, similarly must be a member of the Dominican Order. The University defines itself in its bylaws and school bulletin as a "Catholic-oriented" institution, requires its students to take one course in theology and three in philosophy, and it offers regular masses in a church adjoining the campus.

Despite these religious aspects, however, the University's religious character is significantly less dominant than that of religious elementary and secondary schools. The University defines its objective as the provision of a "humanistic education at an academic level" and has an open admissions policy, recruiting applicants of all creeds. Hiring of faculty personnel is made on the basis of ability and experience; University bylaws require only that applicants "possess the appropriate academic degrees, be of a sound moral character and show traits of pedagogical qualities". The University does not require any religious observance on the part of its lay faculty and guarantees them full academic freedom. Since 1970, apart from receiving government funds, *see* n. 7, *infra,* the University has been financially self sufficient.

Although the University offers masses at a church adjoining the campus, attendance by students is optional. The one required theology course, Analysis of Biblical History and Literature, is taught by both lay and religious faculty and focuses on an historical and literary analysis of Biblical texts. The teachers are not required to follow a specified religious analysis. The three required philosophy courses—ethics, logic, and the philosophy of man—cover a wide variety of thinkers, including religious and atheist writers.

Painting, as we are required to do, a "general picture of the institution, composed of many elements", *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 758, 96 S.Ct. 2337, 2350, 49 L.Ed.2d 179 (1976), we find that the University meets the picture of an "institution with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education". *Tilton v. Richardson,* 403 U.S. 672, 687, 91 S.Ct. 2091, 2100, 29 L.Ed.2d 790 (1971). The mandatory theology and philosophy courses "only supplement a curriculum covering 'the spectrum of a liberal arts program' " and are taught "in an atmosphere of intellectual freedom". *Roemer,* 426 U.S. at 755-57, 96 S.Ct. at 2349-50. The "central purpose" of the faculty is not "the inculcation of religious values" in the student body, *Cuesnongle v. Ramos,* 713 F.2d 881, 883 (1st Cir.1983) (finding Central University of Bayamon to be less pervasively religious than a parochial school), but is rather to provide a high quality academic education. Thus, as with other religiously affiliated universities analyzed by the Supreme Court, *see Roemer,* 426 U.S. at 755-59, 96 S.Ct. at 2349-51; *Hunt v. McNair,* 413 U.S. 734, 743-44, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973); *Tilton,* 403 U.S. at 685-89, 91 S.Ct. at 2099-2101, we find that "religious indoctrination is not a substantial purpose or activ-

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ity" of the University. *Tilton,* 403 U.S. at 687, 91 S.Ct. at 2100.[4]

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[4] The characteristics of religiously affiliated colleges such as the University stand in strong contrast to those of elementary and secondary

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The fact that the Dominican Order controls a majority of the University's Board of Trustees does not change our analysis. In *Tilton,* 403 U.S. at 686–87, 91 S.Ct. at 2099–2100, the four colleges were admittedly governed by Catholic religious organizations, and in *Hunt,* 413 U.S. at 743–44, 93 S.Ct. at 2874, the college was wholly controlled by the South Carolina Baptist Convention. *See also, Roemer,* 426 U.S. at 758–59, n. 21, 96 S.Ct. at 2350–51, n. 21 (even where religious organization wholly controls a college, the college may still be found not to be "pervasively sectarian"). Thus, although we have little difficulty in accepting that the statement by the Archbishop of San Juan that the University was "not a Catholic university" merely reflected a power struggle between the Dominican Order and the Catholic hierarchy over control of the University, we do not find the issue to be of overwhelming importance. Even accepting that the Dominican Order, a clearly religious organization, controls the University, we find that the "general picture" of the University remains one of a more secular, rather than sectarian, university. [5]

We also note that it is precisely because the University is similar in character to the colleges in *Tilton, Roemer,* and *Hunt* that it is able to receive governmental aid. [6] Although the fact that the University is eligible for federal aid is not dispositive of the *Catholic Bishop* inquiry, *see infra* p. 911, it is relevant to the analysis of the institution's religious nature. Indeed, the Supreme Court in *Catholic Bishop* referred to the aid-to-school cases in its analysis of the risk of entanglement that could ensue between the religious parochial schools and the government. *Catholic Bishop,* 440 U.S. at 501–04, 99 S.Ct. at 1319–20.

Based on our review of the record, we affirm our earlier ruling that the University is distinctly different from a religious elementary or secondary school. *Cuesnongle v. Ramos,* 713 F.2d 881, 883 (1st Cir.1983). A religious mission does not pervade the entire University system, with teachers playing a key role in the transmission of a particular religious faith to the student body. Thus, the very premise on

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which *Catholic Bishop* was based—that a significant risk of entanglement existed because of the unique role played by teachers in secondary schools—is conspicuously absent here. We therefore decline to extend the holding of *Catholic Bishop* to the University simply on the basis of the University's religious character. Further, we do not find that the jurisdiction subsequently conferred would create an impermissible entanglement between government and religion because of the University's religious nature.

2. *Nature of NLRB Activity*

The fact that the University is not identical to a parochial school does not, however, end our inquiry. As we noted above, whether governmental activity engenders excessive entanglement with religion is the result of several related elements; apart from the character and purpose of the institution affected, we also look at the nature of the activity engaged in or mandated by the government, and the resulting relationship between government and the religious organization. *Lemon,* 403 U.S. at 615, 91 S.Ct. at 2112. In *Catholic Bishop,* the nature of

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schools. The Supreme Court has noted that "'[t]he affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age'". *Tilton,* 403 U.S. at 686–87, 91 S.Ct. at 2099–2100 (quoting *Walz v. Tax Commission,* 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L.Ed.2d 697 (1970)). These "parochial schools involve substantial religious activity and purpose", *Lemon,* 403 U.S. at 616, 91 S.Ct. at 2113, and indeed their "*raison d'etre* . . . is the propagation of a religious faith". *Lemon,* 403 U.S. at 628, 91 S.Ct. at 2118 (Douglas, J., concurring).

[5] We also find that the ALJ did not commit reversible error when he excluded some evidence regarding the official designation of the University as a "Catholic" institution, subject to the supervision of the Holy See. First, the ALJ did reopen the hearing specifically to hear evidence regarding the relationship between the University and the Catholic hierarchy, and only certain additional documents, offered during the hearing, were excluded. Second, even if all the requested evidence had been admitted, we do not see how it would have changed the ultimate conclusion. The excluded evidence was offered to prove that the University was indeed a "Catholic" institution, subject to the supervision of a religious organization. But the issue of control is simply one factor in the analysis of impermissible entanglement. Indeed, we reach our conclusion on the assumption that some religious organization—be it the Dominican Order or the Catholic Church—does control the University. This case is, therefore, quite different from *Burns Electronic Security Services, Inc. v. NLRB,* 624 F.2d 403 (2d Cir.1980), relied on by petitioner. In *Burns,* the court found that "unusual circumstances" merited the conclusion that the ALJ should have accepted new evidence at the unfair labor practices proceeding. These circumstances included the fact that the requested evidence was dispositive of a critical issue in the unit certification question and the record compiled at the original representation hearing was clearly deficient. *Burns,* 624 F.2d at 408–10.

[6] From 1977 to 1978, the University received various federal grants totaling $5,042,298, of which $350,000 was direct aid to the University. From 1980 to 1983, the University received $3,750,000 in federal grants, seventy-five percent of which was student aid and $425,000 of which was direct institutional assistance.

the schools was so pervasively religious that the Court easily found a strong likelihood of entanglement. It is possible, however, that even in only partially sectarian institutions, a significant risk of entanglement could exist if the governmental activity involved was such that it directly affected the particular religious facets of the institution. We conclude, however, that NLRB involvement with the University would not be of the kind that would create an impermissible entanglement between government and religion.

First, the Board will become involved with the University only at the point that an unfair labor practice charge is filed. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 53, 74 S.Ct. 323, 342, 98 L.Ed. 455 (1954) (without a charge, the Board has no authority to issue a complaint); *NLRB v. Vernitron Electrical Components,* 548 F.2d 24, 27 (1st Cir.1977) (Board can only proceed when charge is filed and employer named as respondent). After the filing of a complaint, the Board does have broad authority to make a full and complete investigation. *NLRB v. Fant Milling Co.,* 360 U.S. 301, 308, 79 S.Ct. 1179, 1183, 3 L.Ed.2d 1243 (1959). But the Board does not have *carte blanche* to expand the charge as it wills; it is limited to " 'practices which are related to those alleged in the charge and which grow out of them' ". *Id.,* quoting *National Licorice Co. v. NLRB,* 309 U.S. 350, 369, 60 S.Ct. 569, 579, 84 L.Ed. 799 (1940).

This activity on the part of the Board is quite different from the continuous auditing surveillance feared by the Supreme Court in *Lemon,* 403 U.S. at 619, 91 S.Ct. at 2114. ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these [government] restrictions are obeyed and the First Amendment otherwise respected.") This restricted involvement of a labor board has been recognized by other courts. In *Catholic High School Ass'n v. Culvert,* the Second Circuit held that New York State labor board jurisdiction over Catholic parochial schools would not create excessive entanglement between the religious schools and the government. Among other factors, the court noted that "the State Board's supervision over the collective bargaining process is neither comprehensive nor continuing". 753 F.2d 1161, 1167 (2nd Cir.1985). The Ninth Circuit, in holding that the NLRB had jurisdiction over a religiously affiliated hospital, explained that "Board jurisdiction will produce only incidental intrusion by requiring examination of [the hospital's] actions and conduct only with respect to specific charges which may be filed in the limited area of collective bargaining and labor relations". *St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436, 1442 (9th Cir.1983). [7]

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Second, many of the unfair labor practices that will be presented to the Board will be entirely secular. For example, in the case before us, there is no assertion by the University that the promulgation of new academic requirements or the denial of reinstatement for the strikers was motivated by any religious considerations. Similarly, among the University's list of the various potential union demands that could implicate religious concerns, there are a number that are sufficiently secular to be a legitimate subject of union bargaining, with any relevant religious considerations taken into account when necessary. For example, the union could indeed bargain for contract provisions requiring that layoffs of clerical and lay faculty be implemented in some form of a seniority order or could bargain for contract rules requiring that course assignments be made on the basis of faculty preference, with seniority to govern in the event of competing preferences. The University, on its part, in maintaining its position on mandatory subjects of bargaining, would be free to take into account any religious concerns it may have. *See NLRB v. Salvation Army of Massachusetts Dorchester Day Care Center,* 763 F.2d 1, 8 & n. 9 (1st Cir.1985). [8]

Finally, in a case where a union bargaining demand or a Board order would truly interfere with the University's religious freedom, the University is free to refuse to bargain with the union or to comply with the order, and to test its position before us. The fact that the University's religious character is not sufficient to insulate it from Board jurisdiction does not mean that it has completely lost the shield of the First Amendment. *See Newspaper Guild v. NLRB,* 636 F.2d 550 (D.C.Cir.1980) (although newspaper is not immune from NLRB jurisdiction merely because it is an agency of the press, certain of its activities are legitimately within the zone of First Amendment protection and must be protected in NLRB orders). The University lists a number of union demands that could potentially interfere with the University's admittedly religious facets.[9] We take quite seriously the University's concern that certain union demands could potentially interfere with its religious character. We expect, however, that the NLRB will also consider these claims seriously and will ensure that its orders are shaped so as to pass constitutional muster. For example, one of the University's main concerns appears to revolve around limitations on its freedom to discharge faculty for religious reasons. The law is clear, however, that even a discharge based in part on protected union activity will not be considered an unfair labor practice if the employer can show that the individual would have been discharged in any event for a non-union reason. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). Such a reason could certainly be one based on religious considerations. Thus, the Board may not find that the University has engaged in an unfair labor practice if the University shows it has discharged an employee for religious reasons. *See Catholic High*

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[7] In cases analyzing the application of Title VII to religious institutions, courts have similarly found that the authority of the Equal Employment Opportunity Commission to engage in a wide-ranging investigation of a college's hiring practice does not result in "on-going interference with the college's religious practices." *EEOC v. Mississippi College,* 626 F.2d 477, 488 (5th Cir.1980), *cert. denied,* 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981). The Fifth Circuit came to this conclusion regarding a college whose purpose was to "provide a college education in an atmosphere saturated with Christian ideals," and whose character was found by the court to be "pervasively sectarian." *Id.* at 479, 487.

[8] Although we have discussed the nature of the University's religious character in a separate section, it is useful to note that it is largely due to the fact that the University is not a pervasively sectarian institution that many of the employment issues affecting its faculty will be exclusively or primarily secular.

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School Ass'n v. Culvert, 753 F.2d at 1168–69.

Both in determining whether the University has engaged in an unfair labor practice, and in fashioning a remedial order, *see Passaic Daily News v. NLRB,* 736 F.2d 1543, 1556–59 (D.C.Cir.1984) (court ordered Board remedy tailored to accommodate newspaper's First Amendment rights), the Board is constitutionally required to consider and accommodate the University's legitimate First Amendment rights. In any instance in which the University feels the Board has failed, and that its First Amendment rights have indeed been violated, we stand ready to hear that claim.

Thus, given the form of NLRB jurisdiction over the University, and the safeguards that accompany that involvement, we do not find that a significant risk of entanglement between government and religion will occur as the result of this type of governmental involvement with a religiously affiliated institution. Jurisdiction may therefore be assumed under the National Labor Relations Act, and such jurisdiction is constitutional.

B. *Free Exercise Claim*

The University argues that allowing Board jurisdiction would create a significant risk of violating the free exercise clause of the First Amendment. According to the University, this violation would occur through the immediate, symbolic invasion of church autonomy, through Board decisions that will impede the University's free exercise of religion, and through the "chilling effect" that will result from the University's knowledge that religiously motivated decisions will be subject to review by the Board.

To determine whether a statutory enactment would violate the free exercise clause, the Supreme Court has examined: (1) the extent to which a statute actually burdens the exercise of a religious belief, *Tony and Susan Alamo Foundation v. Secretary of Labor,* ––– U.S. –––, 105 S.Ct. 1953, 1963, 85 L.Ed.2d 278 (1985); (2) the existence of a compelling state interest to justify the burden on religious beliefs; and (3) the extent to which an exemption from the statute would impede the objective sought to be advanced by the statute. *U.S. v. Lee,* 455 U.S. 252, 257–59, 102 S.Ct. 1051, 1055–56, 71 L.Ed.2d 127 (1982); *Wisconsin v. Yoder,* 406 U.S. 205, 220–21, 92 S.Ct. 1526, 1535–36, 32 L.Ed.2d 15 (1972); *EEOC v. Mississippi College,* 626 F.2d 477, 486 (5th Cir.1980).

Allowing NLRB jurisdiction over the University would have only a limited effect, if any, on the University's direct exercise of its religious beliefs. The University does not claim that Catholic doctrine forbids collective bargaining or requires it to engage in unfair labor practices. *See St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436,

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[9] Examples of potential union demands include: elimination of the faculty regulation subjecting teachers to dismissal for "personal behavior" inconsistent with University standards, such as the procuring or urging the procurement of an abortion; defining the "offenses to Christian morality" for which tenure may be rescinded; demands that faculty members have the "right" to urge, publish, and disseminate views critical of Catholic doctrine; and demands that biology teachers have the "right" to refuse to teach creation theory.

1442–43 (9th Cir.1983). There is no evidence that NLRB jurisdiction meets the required standard of having a "coercive effect" on the practice of religion on the part of any members of the University. *See Abington School District v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963).

The University is concerned, however, that its religious freedom could be "chilled" because of the very existence of Board review. This concern is quite possibly overrated by the University because, as discussed above, the Board is required to be sensitive to and to accommodate the University's religious concerns. However, to the extent that NLRB jurisdiction may create an incidental burden on religion, we find that it is justified by a compelling state interest. There is a compelling government interest in minimizing economic disruptions caused by labor unrest. *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 42, 57 S.Ct. 615, 626, 81 L.Ed. 893 (1937). This interest clearly extends to universities. In affirming Board jurisdiction over private, nonprofit educational institutions, we concurred in the Board's recognition that "universities affect commerce more than they once did, being now more involved in private commercial activity, and receiving extensive federal support". *NLRB v. Wentworth Institute,* 515 F.2d

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550, 554 (1st Cir.1975). Thus, even if Board jurisdiction has an incidental effect on the exercise of religion, this minimal intrusion is justified by the state's compelling interest in collective bargaining. *See Catholic High School Ass'n v. Culvert,* 753 F.2d 1161, 1171 (2nd Cir.1985) (minimal intrusion caused by "chilling" effect justified by New York State's interest in collective bargaining).

III. Inclusion of Dominican Priests in the Bargaining Unit

The University contends that the Board improperly included four or five Dominican priests in the unit of "all full-time faculty members". The University urges that the priests have a "community of interest" with their employer that diverge from those of other employees, and that inclusion of the priests in the bargaining unit would subject them to a "conflict of loyalties". It notes that, in similar cases, the Board has excluded members of a religious order from a bargaining unit. *Carroll Manor Nursing Home,* 202 N.L.R.B. 67, 68 (1973); *Seton Hill College,* 201 N.L.R.B. 1026, 1027 (1973).

We need not decide whether, not having raised this objection in the representation proceeding, the University may raise it now, or whether the priests actually have a community of interest with the University that is distinct from that of the other employees. An employer cannot avoid an obligation to bargain with respect to an entire unit of employees by arguing that some employees were improperly included, unless the inclusion of the contested employees would affect the unit's majority status. *See Walla Walla Union-Bulletin v. NLRB,* 631 F.2d 609, 614–15 (9th Cir.1980); *Glen Manor Home for Jewish Aged v. NLRB,* 474 F.2d 1145, 1150 (6th Cir.), *cert. denied,* 414 U.S. 826, 94 S.Ct. 130, 38 L.Ed.2d 59 (1973). Here, it appears that, at most, five priests were included in the unit. Because the union won by a vote of 41–9, we cannot find that the inclusion of those priests had an effect on the election outcome. The University is free to seek a unit clarification, pursuant to 29 C.F.R. § 102.60 (b), or may refuse to bargain over the rights of the contested employees so as to bring that particular question before the court. *See Walla-Walla Union Bulletin,* 631 F.2d at 615.

IV. Conclusion

The Board's jurisdiction over the religiously affiliated Central Bayamon University does not create a significant risk of violating the establishment or the free exercise clauses of the First Amendment. Jurisdiction over the University is therefore properly assumed under the National Labor Relations Act.

The University's petition for review is denied and the Board's order is enforced.

TORRUELLA, *Circuit Judge* (dissenting): Although the majority's well-reasoned opinion commands my highest respect, I am compelled to dissent because, to my view, it is contrary to the strict mandates of the First Amendment [1] and the explicit and implicit holdings of *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

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[1] U.S.Const., Amend. 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

I. *N.L.R.B. v. Catholic Bishop of Chicago*

In *Catholic Bishop* the Court was faced with the exercise of jurisdiction by the Board over lay teachers in certain high schools operated by the Catholic Church. Up to that time the Board standards permitted the assumption of jurisdiction over religiously sponsored organizations if they were merely religiously associated, as compared to where they were completely religious in nature, in which case the Board declined jurisdiction. In *Catholic Bishop* the Board assumed jurisdiction principally on the ground that the high schools in

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question, in addition to providing a Roman Catholic oriented education, also provided a traditional secular education and thus were not "completely religious" schools. *Catholic Bishop,* 440 U.S. at 494 n. 7, 99 S.Ct. at 1316 n. 7. The Court rejected the Board's exercise of jurisdiction over the high schools, basing its decision on statutory grounds but giving clear indication of the serious constitutional questions at issue. *Catholic Bishop, supra,* at 504, 99 S.Ct. at 1320.

Initially, in the context of what I am about to discuss, I believe that the key phrase used by the Court in *Catholic Bishop* is "church-operated school." *See* 440 U.S. at 501–504, 99 S.Ct. at 1319–20. *See also N.L.R.B. v. Bishop Ford Central Catholic High School,* 623 F.2d 818, 823 (2d Cir.1980) ("[t]he *Catholic Bishop* Court employed the term 'church operated' not in the restricted sense now seized upon by the Board, but rather as a convenient method of characterizing schools with a religious mission."). It is the existence of such an institution that brings into play the potential for conflict prohibited by the Religion Clauses. There should be no question but that Universidad Central de Bayamón (University) *is* a "church-operated school." To quote from the majority opinion:

> . . . There is no doubt that the University is a religiously affiliated school and that religion is a facet of the school's existence.

Op. at 909. The record shows a lot more, however.

The University is the creation of the Dominican Order, and is recognized by the Sacred Congregation for Catholic Education as a Dominican institution, affiliated with the Catholic Church. When founded in 1961 by the Order, it was in fact the Metropolitan San Juan Campus of Catholic University of Puerto Rico, which has its main campus in Ponce. One of its main objectives was, and is, the philosophical preparation of students.

In 1964, the Regional Vicar of the Dominican Order and two other Dominican priests incorporated Universidad Central de Bayamón as a non-profit association and transferred the campus to the Dominican Convent in Bayamón. Thereafter through 1970, several buildings were constructed by the Order on the Convent's grounds, for use by the University.

In 1970, by reason of an internal dispute between the Order and the Church's local hierarchy as to who would control the University, the University separated from Catholic University of Puerto Rico. In 1980 an agreement was reached between the Master General of the Order and the Archbishop of San Juan, [2] which acknowledged a pastoral connection between the University and the Archdiocese of San Juan, but reserved to the Dominican Order all matters relating to the religious orientation, educational philosophy, and internal discipline of the University.

The University is at the top of an integrated Catholic school system, owned and operated by the Dominican Order. As such, the University owns and operates two elementary and secondary schools. Those schools are governed by the Board of Trustees of the University. The President of the University, who is also the Regional Vicar of the Dominican Order, is their Chief Executive Officer. The principals of the schools report directly to the Vice President of the University.

In 1980, the University began operating a seminary called the Center for Dominican Studies in the Caribbean (CEDOC). In 1982 the University restructured CEDOC's program to provide for two years of study

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[2] "Agreement in Relation to the Catholicity of the Universidad Central de Bayamón." Among other things, the agreement provides:

> ARTICLE 5: THE UNIVERSIDAD CENTRAL DE BAYAMON hereby agrees, under the responsibility of the General Master of the Dominican Order, to create and maintain within its internal structure, some effective and appropriate organism that could exercise a self-reglamentation in the areas of FAITH, MORAL and DISCIPLINE.
>
> In the exercise of his right to oversee, the Bishop will call upon the right authorities of the Universidad Central de Bayamón. Should he be dissatisfied, he will then call upon the General Master of the Dominican Order.

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leading to a master's degree in theology. The program is open to any qualified student, lay or religious, but its primary objective is the preparation of candidates for priesthood. The CEDOC is both physically and academically a part of the University. Yet, the Board declined to exercise jurisdiction over CEDOC "because of the pervasively religious character of the program." At 908 n. 1. [3]

The University is governed by a self-perpetuating Board of Trustees, a majority of whom must be and are members of the Dominican Order. These include the Regional Vicar of the Order, the Prior of the Dominican Convent of Our Lady of the Rosary, and the President of the University. The executive committee of the University, which runs the University between meetings of the Board, is composed of five members, a majority of which must be members of the Dominican Order.

The board of trustees is composed of ten members, six of whom are members of the Dominican Order and all of whom are Roman Catholics. The Regional Vicar, Father Van Rooij, has been President of the University and Secretary of its board of trustees since 1970.

The president of the University must be a member of the Dominican Order. He appoints all University officials and employees, including deans, department heads and members of the faculty. He also grants tenure. He has the power to adopt the curricula and standards, policies and procedures of the University. He interprets the by-laws and all regulations, and his decisions in this regard are final.

The religious mission of the University as a "church operated school" is further accentuated by various of its constituting documents. The agreement with the Archbishop (see footnote 1) binds the University "to keep the faith of the Roman, [Apostolic] and Catholic Church, and a catholic education[al] philosophy." The by-laws of the University state that it is a "Catholic-oriented civil institution." The bulletin distributed to students indicates that the University is a "liberal arts institution denominationally affiliated with the Roman Catholic Church, and the Dominican Order," and that "B.C.U. is preeminently a Catholic oriented university." It also advises students that "[r]egular masses are held daily in the Catholic Church of the Dominican Order adjoining the campus."

All students, regardless of their course of study, are required to take at least three credits of theology and nine credits of philosophy in order to receive a degree. The required theology courses are normally taught by priests and the suggested text was prepared by a Dominican priest. The theology and philosophy courses are taught from a Catholic point of view, and their purpose is formative, rather than simply informative.

Most of the faculty members are Roman Catholics. All are apprised of their responsibility to adhere to the Catholic philosophy of the institution. That philosophy is applied in the selection and hiring of faculty members. In fact the hiring contract requires faculty members "[t]o know, respect and uphold the University's philosophy." The Faculty Regulations state that it "shall at all times put into practice [the University's] philosophy of being a Catholic-oriented institution." Among the causes for rescission of a faculty contract, or of tenure, are violations of the standards established by the University, "especially those pertaining to personal behavior" and "offenses to the Christian morality." Approximately 10% of the University's faculty are priests, who are included in the representation unit certified by the Board. This is significantly different from the situation in *Catholic Bishop,* where only lay teachers sought representation.

In my opinion, it is difficult to understand how the University's integrated educational system, which commences at the parochial school level, continues through

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high school into college, and ends with a religious graduate school, can be perceived as anything but a *church-operated school with a religious mission.* It would appear senseless to me for the University to have imposed all its religious requirements regarding, for example, the composition of its management, if promotion of the Catholic religion were not its objective. Granted that, perhaps when dealing with university-level students, a "softer sell" is possibly more effective than other approaches appropriate at the parochial school level, but that merely is a reflection of the University's proselytizing tactics, not a negation of its religious mission. To my view the evidence in this case is overwhelming that the University is "church operated" within the meaning of *Catholic Bishop.*

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[3] This last statement accentuates precisely one of the analytical flaws prevalent in the Board's reasoning, which error is adopted by the majority and which we shall discuss presently. *See infra,* page 909.

The Board and the majority [4] are still relying *sub silencio* on the "completely religious" versus "religiously associated" test rejected by the Court in *Catholic Bishop, supra,* 440 U.S. at 494 n. 7, 99 S.Ct. at 1316 n. 7. The *Catholic Bishop* standard is whether the school is a *church-operated school.* Once this threshold issue is passed, the reviewing court is then required to determine, again under *Catholic Bishop,* whether the Board's assumption of jurisdiction over the church-operated school presents a *significant risk* of infringing on Religion Clauses rights. *Id.* at 502, 99 S.Ct. at 1319.

II. The First Amendment and the Standard of Review

It may not be coincidental that the concepts embodied in the Religion Clauses are contained in the *first* clauses of the *First* Amendment. I make this asseveration conscious of the fact that state-church entanglement and freedom from religious persecution, the principal subject-matters of those clauses, were among the most important concerns in the list of evils sought to be guarded against by the Founding Fathers. [5] Indeed, the Supreme Court has indicated that these interests "plainly rank high in the scale of our national values." *Catholic Bishop,* 440 U.S. at 501, 99 S.Ct. at 1319.

The Religion Clauses forbid two quite different kinds of government encroachment upon religious freedom. The establishment clause bars a state from promoting religion or adopting a hostile attitude towards religion, *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The free exercise clause recognizes the right of every person to choose his own course in the pursuit of his religious beliefs, free from compulsion by governmental authority, which includes the right of nonbelief. *Johnson v. Board of County Commissioners,* 528 F.Supp. 919 (D.N.M. 1981). Notwithstanding this dichotomy, the Framers understood these two components to be compatible and mutually supportive. Thus, to the extent that these clauses reinforce one another, doctrines developed under one clause may also be relevant to the other. *See Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Walz v. Tax Commission,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *Surinach v. Pesquera de Busquets,* 604 F.2d 73, 79 (1st Cir.1979). *See also* Tribe, *supra* note 5, at 814–815, 834. There is sufficient overlapping of issues in the present case to allow for the joint discussion of the questions raised respecting both components of the Religion Clauses. *See Abington School District v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844 (1963); *Catholic Bishop of Chicago v. N.L.R.B.,* 559 F.2d 1112,

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1131 (7th Cir.1977), *aff'd,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

Two concepts are important in providing a framework for analysis of the rights established by the Religion Clauses. The first concept is the core ideal of religious autonomy. Tribe, *supra,* at 812. Clearly, without the right to conduct one's own affairs free from governmental influence, religious freedom and the concomitant rights guaranteed by the First Amendment would be meaningless. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy,* 81 Colum.L.Rev. 1373 (1981). The second concept concerns the fact that, almost inevitably, religious activity "is inherently associational, interposing the religious community or organization between the state and the individual believer." Tribe, *supra,* at 812. [6]

These two concepts interplay. In many situations individual religious rights are ultimately the ones affected notwithstanding that the questioned governmental action initially, or on its face, is directed at an organization, and even though its collective rights may also be in jeopardy. Laycock, *supra.* The net result of this interplay of rights is that, in many cases, although the issue is framed in terms of determining whether the autonomy of a religious organization has been breached by the governmental action, individual religious rights are also at issue. I believe that such is the present case. Although the questions before us primarily affect appellant as an organization, individual religious rights are also ultimately affected: those of the teachers, those of the students, those of the parents of the students, those of the religious members of the university community. The governmental action here challenged has a chilling effect on the exercise of individual religious rights also.

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[4] The approach is reflected in the statement found at page 910 of the opinion:

> Even accepting that the Dominican Order, a clearly religious organization, controls the University, we find that the "general picture" of the University remains one of a more secular, rather than sectarian, university.

The majority's footnote 5 is omitted, but should be read. *See also Cuesnongle v. Ramos,* 713 F.2d 883 (1st Cir.1983). (Central University of Bayamon less pervasively religious than a parochial school).

[5] *See generally* L. Tribe, *American Constitutional Law,* (1978); Novack, Rotunda & Young, *Constitutional Law* (2d ed.1983).

[6] I say "almost inevitably" because the "right to non-belief" also protected by the Religion Clauses, would less frequently involve formal association or organizations.

Underlying any analysis of whether challenged governmental conduct is violative of the Religion Clauses, whether involving individual or organizational rights or a combination of both, there are two fundamental principles: voluntarism, standing for the proposition "that Religion or this duty which we owe our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence," [7] and separatism, sometimes called the "nonentanglement" principle, which reflects James Madison's position that both religion and government can best achieve their high purposes if each is free from the other's influence. [8]

In testing for compliance with these principles, which ensure the autonomy of religious organizations (and ultimately of individuals as well), it is required that the challenged governmental action be at least justifiable in secular terms. Tribe, *supra,* at 835. Thus has evolved the three-pronged test proclaimed in *Lemon v. Kurtzman,* 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), requiring that the questioned governmental action have a secular purpose, a primarily secular effect, and an absence of excessive religious entanglement. Even if it can be shown that governmental action is not directed at a religious aspect of the organization's life, if the *essential effect* of this action is to influence the pursuit of a religious tradition, the action must be struck down. [9] Tribe, *supra,* at 839. The Supreme Court has expanded this requirement to demand that any non-secular effect be *remote, indirect and incidental,* thus compelling a high standard of review from the judiciary to determine whether this

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stringent rule has been met. *See Committee for Public Education v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Surinach, supra,* 604 F.2d at 79; Tribe, *supra,* at 840. *See also Buckley v. Valeo,* 424 U.S. 1, 64–65, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1974). This precept of stricter judicial review is also triggered by the presence of *administrative entanglement,* a notion that focuses on institutional interference with religion by the state and which comes into conflict with the core ideal of religious autonomy. Tribe, *supra,* at 866. *See also Committee for Public Education v. Nyquist, supra.*

In my opinion the Board's assumption of jurisdiction over appellant, as well as its subsequent actions, has a non-secular effect upon appellant that is *not* remote, indirect and incidental, and creates a significant risk of administrative entanglement between the state and the religious organizations.

III. The Entanglement and Non-Secular Effects

In determining whether a significant risk of entanglement exists, again we need not go much further than *Catholic Bishop.* There the Court said:

> Good intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by *the church operated schools* which we found unacceptable in *Lemon, Meek* [*v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217], and *Wolman* [*v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714].

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.

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[7] J. Madison, *Memorial and Remonstrance Against Religious Assessments,* quoted in *Walz v. Tax Commission, supra,* 397 U.S. at 719, 90 S.Ct. at 1437 (Douglas, J., dissenting).

[8] *See Walz v. Tax Commission, supra,* 397 U.S. at 668, 90 S.Ct. at 1411

[9] It will be struck down under the free exercise clause if the effect is negative (*e.g.,* inhibiting), and under the establishment clause if the effect is positive (*e.g.,* promotional).

> Moreover, it is already clear that the Board's action will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious missions. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.*
>
> The Board's exercise of jurisdiction will have at least one other impact on *church-operated schools.* The Board will be called upon to decide what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. *See* 29 U.S.C. § 158(d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment'."
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> The Pennsylvania Supreme Court aptly summarized the effect of mandatory bargaining when it observed that the "introduction of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the board, or conflicts with negotiators of unions. . . .
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> *The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. . . .*

440 U.S. at 501–504, 99 S.Ct. at 1319–20 (emphasis supplied, citations omitted).

The present case arises precisely "in the setting of mandatory collective bargaining," predicted by the Court in *Catholic Bishop* to bring about the prohibited entanglement. *Id.* In the present case the University unilaterally promulgated new requirements regarding faculty credentials without first notifying or bargaining with the Union, an action found by the Board to be contrary to Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) because it constitutes violation of the duty to bargain concerning a mandatory subject of bargaining. 29 U.S.C. § 158(d) ("terms and conditions of employment"). *See, e.g., N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed.2d 1 (1964). The Court in *Catholic Bishop* unambiguously found such action by the Board to constitute infringement of the First Amendment rights of the church-operated schools in question. Yet unexplainedly the majority goes on to rationalize the appropriateness of Board action, right out from under the protection afforded by the *Catholic Bishop* umbrella. According to the majority, *Catholic Bishop* is not implicated. First it states that the Board will only become involved after an unfair labor practice charge is filed, thus making unnecessary "continuous auditing surveillance" (Op. at 911). Next it claims that many of the charges will be entirely secular (slip op. at 14) and that where the University's religious freedom is truly involved it can refuse to bargain and test its position in court (*id.* at 912). Finally, the majority indicates that it "takes quite seriously the University's concern that certain union demands could potentially interfere with its religious character," but voices the unrealistic hope "that the N.L.R.B. will also consider these claims seriously and will ensure that its orders are shaped so as to pass constitutional muster" (*id.* at 913). I must confess to having some difficulty with the proposition that condemning the University to interminable *ad hoc* litigation, for the purpose of allowing it to conclude what are the boundaries of its religious freedom, is not "continuous auditing surveillance" or does not have a substantial chilling effect on the exercise of those freedoms by the University. This religious organization is constitutionally entitled to an autonomy that is inhibited by the Board's actions in this case. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Cases of Church Labor Relations and the Right to Church Autonomy, supra.*

This situation is particularly disconcerting in the light of the pronouncements of this court in *Surinach v. Pesquera de Busquets,* 604 F.2d 73, 75–76 (1st Cir.1979) (Coffin, C.J.), in striking down a mere questionnaire sent to all schools, including parochial schools, inquiring into tuition costs:

> It is not the obligation of the schools to prove as a precondition for relief at this time that this precise scenario [the possibility that a questionnaire might lead to an economic regulatory scheme], which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that the implementation of a regulation scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems.

(emphasis in original, footnotes omitted). The majority is now adopting the "trial run" posture rejected by this court in *Surinach* and by the Seventh Circuit in *Catholic Bishop. See Catholic Bishop of Chicago v. N.L.R.B.,* 559 F.2d 1112, 1126 (7th Cir.1977), *aff'd,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). It is in fact allowing "the very process of inquiry leading to findings and conclusions," condemned by the court in *Catholic Bishop,* as an "impinge[ment] on rights guaranteed by the Religion Clauses." *Catholic Bishop, supra,* 440 U.S. at 502, 99 S.Ct. at 1319.

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In my opinion the Seventh Circuit best stated the case in *Catholic Bishop:*

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.
>
> In sum, it is unrealistic to say that an employer which has to honor a bargaining order is not substantially inhibited in the manner in which it conducts its operations. This is true of all bargaining orders but on the general industrial and commercial scene sound policy considerations have upheld this imposition, inhibiting though it may be, which policy declarations are found at 29 U.S.C. §§ 141 and 151. We do not disagree with the soundness of the legislative policy determinations which have been consistently upheld by the courts. We only say that when that imposition conflicts with the Religion Clauses that the First Amendment protective wall should prevail.

559 F.2d at 1123–1124 (citations omitted). As that court went on to say, "these paradigmatic situations . . . are not merely fanciful horror tales devised by an employer who seeks to avoid labor board jurisdiction." *Id.* at 1125. Rather they are situations readily foreseeable in the practical world of labor relations.

Because the Board's assertion of jurisdiction over the appellant violates the First Amendment, I dissent. *See also Catholic High School Ass'n of Archdiocese v. Culvert,* 573 F.Supp. 1550 (S.D.N.Y.1983), *rev'd in part,* 753 F.2d 1161 (2d Cir.1985).

Breyer, Circuit Judge, with whom **Levin H. Campbell**, Chief Judge and **Torruella**, Circuit Judge, join: In *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), the Supreme Court, reading the National Labor

Relations Act in light of the First Amendment's Establishment Clause, held that the Labor Board lacked jurisdiction over "teachers in church-operated schools." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 507, 99 S.Ct. at 1322. The case before us involves, not secondary schools as in *Catholic Bishop,* but a college or university, called Universidad Central de Bayamon. The legal issue presented is whether *Catholic Bishop* applies to a church-operated college—a college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission. Given *Catholic Bishop*'s language and purposes, the risks of forbidden churchstate entanglement, and the existence of other, related limitations upon the Labor Board's jurisdiction over university teachers, three of us

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conclude that, as in *Catholic Bishop,* the Board lacks jurisdiction in the case before us. Three of us conclude the contrary. Since this court is equally divided, it cannot grant the Labor Board's request to enforce its order requiring the University to bargain with its faculty union.

I

Background

We can set forth the necessary procedural and factual background briefly. The University is located in Bayamon, Puerto Rico. Its full-time faculty formed a union, which sought certification as bargaining agent; the Board, after a hearing, called for a representation election; the union won the election; it was certified; and the University refused to bargain. At the resulting "unfair labor practice" proceeding, the University renewed its claims, *see* 29 U.S.C. §§ 159(d), 160(e)-(f), that its faculty fell outside the Board's statutory authority, *either* because the university was "church-controlled" (unregulated under *Catholic Bishop) or* because its faculty members, like those of most major university faculties, held various "management" prerogatives over appointments, schedules, and curriculum, thereby depriving them of Labor Act protection, *NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980). The Board's Administrative Law Judge rejected the latter claim on the ground that the faculty had virtually no administrative powers; it rejected the former claim on the basis of Board precedent that refused to apply *Catholic Bishop* to colleges that were neither church-controlled nor "pervasively sectarian." *College of Notre Dame,* 245 N.L.R.B. 386 (1979); *Barber-Scotia College,* 245 N.L.R.B. 406 (1979) (both citing *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), which distinguished colleges from secondary schools in the context of federal aid to education). On review, the Labor Board exempted the University's Catholic seminary from the ALJ's bargaining order; but, it affirmed the order in all other respects. It wrote in response to the University's *Catholic Bishop* claim:

> [T]he University is not owned, financed or controlled by the Dominican Order or by the Roman Catholic Church, and . . . the University's academic mission is secular.

A panel of this court, by a vote of 2-1, granted enforcement of the Board's order. The full court, however, vacated the panel's decision and reheard the case en banc, 28 U.S.C. § 46(c); Fed.R.App.P. 35(a), six members of the court sitting in light of the fact that a senior circuit judge was a member of the panel. 28 U.S.C. § 46(c). We are now evenly divided as to the proper outcome.

II

The Nature of the University

The Board's finding that the Catholic Church does not "control" the University is legally unsupportable; it lacks "substantial evidence" in the record. 5 U.S.C. § 706(2)(E). Rather, the record, as we read it, shows the following:

The University is a "Catholic-oriented" institution of higher learning founded by the Dominican Order of the Roman Catholic Church. The Dominicans provided substantial support, including gifts of land, buildings, scholarships and (perhaps) administrative salaries. Initially, the University was a branch of the Catholic University of Ponce; it awarded only two-year "associate's" degrees. Today, the University is independent of Catholic University and offers a four-year program. It is located on the grounds of the Dominican seminary in Bayamon, Puerto Rico. And, it is part of an integrated educational system that the Dominican Fathers maintain—a system that includes Catholic elementary and secondary schools, the University, and a seminary for priesthood candidates. The University itself consists of four undergraduate divisions—Humanities, Education, Business Administration, and Natural Sciences.

Administrative control of the University lies in the hands of members of the Domini-

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can Order. Under the University by-laws, the President of the University must be a Dominican priest. (Its current President is the Order's Regional Vicar, the highest official of the Order in Puerto Rico.) A majority of the Board of Trustees must be Dominican priests. A majority of the five-member executive committee (which acts for the Board between meetings) must be dominican priests. The Board of Trustees must include the Regional Vicar of the Dominican Order, the Prior of the Convent of Our Lady of the Rosary, and the University President—all Dominican priests. The Dominican Order in Puerto Rico is controlled by a seven-member body called the Council of the Regional Vicarate; five of its seven members are currently members of the University's Board of Trustees.

Moreover, the Administration, responsible to the Board and controlled by the President, exercises far greater authority than in most major universities over the specific detailed decisions that constitute university life. The Administrative Law Judge, in the section of his opinion explaining why the University's teachers do *not* exercise "managerial" authority, *see NLRB v. Yeshiva University, supra,* found that the President (i.e., the Regional Vicar of the Dominican Order) actively controls hiring, firing, promotion and tenure decisions. The Board and the President themselves decide all significant financial issues. The Administration, not the faculty, ultimately determines curriculum, class assignments, class size and workload. The Administrative Law Judge concluded:

> in weighing the totality of what the Respondent's professors do, it is certainly telling that most of their major contribution derives from the implementation of policy set by the president and board of trustees and from merely following orders. . . . [P]rofessors do not decide when courses will be scheduled. . . . [I]t was the administration which decided who shall be taught and not the faculty. . . . The faculty's views have not determined the size of the student body, the tuition to be charged, the location of a school, or anything related to the financial affairs of the University. . . . [T]he faculty plays no role in hiring, tenure, sabbaticals, termination, and promotion. . . . [E]ven in those areas where the faculty has contributed, recommendations have frequently been disregarded.

Although the University's primary mission is the provision of a "basically" secular education, the University also maintains a subsidiary religious mission—a mission described in an agreement between the Dominican Order, the Archbishop of San Juan and the Sacred Congregation of Catholic Education in Rome as follows:

> to keep the faith of the Roman, Apostolic and Catholic Church, and [keep] a catholic education philosophy, in light of the Christian Revelation and guided by the teachings of the Doctors of the Church, foremostly, Saint Thomas Aquinas, and with the impulse of the theological and spiritual patrimony of the Order of Saint Domingo of Guzman, which has originated the University.

The religious and secular missions of the University are not kept totally separate. The University holds itself out to students, faculty and community as a Catholic school. Its "University Bulletin" refers to its religious mission at least thirteen times in its thirty-four pages of text. Its faculty regulations allow discipline for "offenses to the Christian morality." It encourages attendance at Mass. It uses the parochial schools it operates on campus as "teaching laboratories" for education students. It requires all students to take four courses in theology and philosophy, the theology usually being taught by Dominican priests from a Dominican text, and the philosophy having a Catholic orientation. Dominican priests constitute about 10 percent of the faculty. And, the University operates a Catholic seminary on the campus.

Given this record, we conclude that the Dominican Order controls this University. We agree that the record adequately supports the Board's finding that the University's faculty does not play a managerial role in University affairs. We also are willing

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to describe the University, *in respect to its mission,* in the language of *Tilton v. Richardson,* 403 U.S. at 687, 91 S.Ct. at 2100, namely, as an:

> [institution] with admittedly religious functions but whose predominant higher education mission

> is to provide . . . students with a secular education.

And, in light of the Board's previous opinions, *see* p. 399, *supra,* we believe it is conscious Board policy not to apply *Catholic Bishop* to an educational institution so described. *See* Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 Duke Law J. 199; *cf. SEC v. Chenery Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Whether this kind of institution of higher education falls within the strictures of *Catholic Bishop* is, in our view, an important, likely recurring, question that calls for Supreme Court guidance.

III

Catholic Bishop

Those of us who conclude that a church-controlled college, such as Universidad Central de Bayamon, falls within the scope of *Catholic Bishop* rest our conclusion on four reasons. First, the language of *Catholic Bishop* itself does not distinguish colleges from primary and secondary schools. Rather, the Court there held:

> Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers. . . . Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

NLRB v. Catholic Bishop of Chicago, 440 U.S. at 506–07, 99 S.Ct. at 1322.

Second, the "statereligion entanglement" problems that underlay the Court's *Catholic Bishop* holding are present here in full force. For one thing, the *Catholic Bishop* Court feared that a teacher's filing of an unfair labor practice charge might well force the Board to decide the "good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 502, 99 S.Ct. at 1320. The teacher, for example, might claim that rules, regulations, promotions, hirings, and firings reflected an "anti-union animus," while the administrators might claim their actions were based upon religious reasons. *Id.; see* 29 U.S.C. § 158(a)(3); *Radio Officers' Union v. NLRB,* 347 U.S. 17, 45, 74 S.Ct. 323, 338, 98 L.Ed. 455 (1954).

This risk would seem as great in colleges as in secondary schools (particularly secondary schools that the Board, prior to *Catholic Bishop,* classified as "merely religiously associated." *See* p. 402, *infra.*) The Dominicans, for example, not only teach Christian ethics at the University, but also claim the right to dismiss teachers for "offenses to the Christian morality." One can imagine the University imposing sanctions upon faculty that relate, let us say, to counseling in the sensitive area of abortion; reviewing such sanctions would place the Board squarely in the position of determining what is "good faith" Dominican practice in respect to such counseling. Indeed, it is difficult to imagine secondary school examples that could not arise with equal ease in the college context.

Further, the Supreme Court in *Catholic Bishop* stated that it

> is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

NLRB v. Catholic Bishop of Chicago, 440 U.S. at 502, 99 S.Ct. at 1320. This kind of "entanglement"—arising out of the inquiry process itself—is well illustrated by an excerpt from the record in this case, an excerpt in which counsel questioned church officials about liturgies and about confidential communications among church officials. We have placed the excerpt in an appendix, where the reader can compare the excerpt with record excerpts that the Supreme Court quoted in *Catholic Bishop.* We find the two sets of excerpts strikingly similar. In any event, we can see no lesser risk in respect to "intrusive process" at the college, than at the primary or secondary levels of education. In fact, a university's secular mission may lead to more frequent, or more complex "unfair labor charges," requiring the Board to evaluate an allegedly religious motive.

Finally, the *Catholic Bishop* Court expressed concern about the scope of potentially entangling

Board inquiry, given the fact that the "terms and conditions of employment" of teachers—"mandatory subjects of bargaining"—in the context of "educational institutions" may concern the whole of school life, for "nearly everything that goes on in the school affects teachers and is therefore arguably a 'condition of employment.'" *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 502–03, 99 S.Ct. at 1320; *Springfield Education Association v. Springfield School District No. 19,* 24 Or.App. 751, 759, 547 P.2d 647, 650 (1976). *See also Pennsylvania Labor Relations Board v. State College Area School District,* 461 Pa. 494, 504, 337 A.2d 262, 267 (1975). It is difficult to see how this problem is any less serious at the college level. (Indeed, the need for "academic freedom" from certain teaching "burdens" might be asserted more strongly at the college level.) The college curriculum (including religious requirements), the manner of teaching (according to Christian principles), the teachers' obligations to counsel the students (and the moral or religious principles that underlie the counseling) would seem, as much as in the case of secondary schools, to be 'conditions of employment' that are 'mandatory subjects of bargaining.' Indeed, the record in this case suggests that some faculty on the University Senate's planning committee objected to teaching so many theology and philosophy courses.

One might reply that many of these *Catholic Bishop* concerns exist whenever a church runs a non-religious enterprise, such as a hospital or a farm. *See Tony and Susan Alamo Foundation v. Secretary of Labor,* —— U.S. ——, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) (church-run service stations, grocery stores, a hog farm and other enterprises). Yet, philosophical, theological and church-related moral issues would seem more likely to permeate the educational process (especially how or what students are taught or counseled) than the administration of farms or even hospitals. And, here, the inculcation of religious values is at least *one* purpose of the institution. Regardless, since the Labor Board's 'entanglement problems' here are roughly the same as at the secondary level, this argument is more properly aimed at *Catholic Bishop* itself, than at our application of it.

Third, to fail to apply *Catholic Bishop* here is to undercut that opinion's basic rationale and purpose. The Court there rejected the Labor Board's pre-existing distinction between "completely religious schools" and "merely religiously associated schools." In doing so, it sought to minimize the extent to which Labor Board inquiry (necessary to make the "completely/merely-associated" distinction) would itself entangle the Board in religious affairs. Under this rationale, therefore, we cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board 'entanglement' as they are administered. To order the Board to exclude priests from the bargaining unit; to approve its having separated the seminary from the rest of the school; to create special burden of proof rules; to promise that courts in the future will control the Board's efforts to examine religious matters, is to tread the path that *Catholic Bishop* forecloses. These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the

Supreme Court in *Catholic Bishop* sought to avoid.

Fourth, we do not believe that the cases on which the Labor Board relies, namely, *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Roemer v. Board of Public Works,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), are determinative. Those cases all involve government *aid* to education, and its promotion of religion. In that context, one might believe it easier to target financial aid to the secular aspects of a university's mission than to those of a secondary school. Regardless, in the context of Labor Board jurisdiction, the constitutional concern is one, not of state promotion, but of state interference through regulation. However one reasons about "financial aid," from a *regulatory* perspective we cannot find a significant difference between the secondary school (particularly the "merely religiously associated" secondary school) and the college or university. Unfair labor practice charges would seem as likely; the Board's likely scrutiny would seem at least as intense; the necessary distinctions between religious and labor matters would seem no easier to make; and whether one could readily "fence off" subjects of mandatory bargaining with a religious content would seem similarly in doubt.

At the same time, it is difficult to find any unusually strong interest arising out of the Labor Act itself that calls for jurisdiction here. As the Supreme Court observed in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 497, 99 S.Ct. at 1317, the Board's assertion of jurisdiction over nonprofit educational institutions is a relatively recent phenomenon. Moreover, in light of *NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856, there is no anomaly in the fact that a school may receive federal aid but its faculty cannot invoke Labor Act protection. *Yeshiva* means that many, if not most, university faculties fall outside the Act in any event, because the university affords them a degree of managerial autonomy. Hence, "federal aid without federal labor protection" is a common circumstance. Finally, the *Catholic Bishop* Court noted that

> the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act. S.Rep. No. 573, 74th Cong., 1st Sess., 7 (1935).

NLRB v. Catholic Bishop of Chicago, 440 U.S. at 504–05, 99 S.Ct. at 1321.

In sum, application of *Catholic Bishop* here poses no threat to the coherence of the Labor Act. And, *Catholic Bishop*'s language, reasoning, and purposes make it applicable here. For the reasons stated, enforcement of the Board's order is

Denied.

COFFIN, Circuit Judge, with whom BOWNES, Circuit Judge and BAILEY ALDRICH, Senior Circuit Judge, join: We incorporate by reference the original majority opinion, *supra* at 383–391 (subsequently withdrawn), and add the following comments to respond to the particular approach taken by our brothers in their en banc decision.

We do not tarry long over the argument that the term "church-operated schools" in *Catholic Bishop* implies all levels of educational institutions; the mere absence of the adjective "secondary" in that phrase does not tell us much. Although "school" to us suggests schooling prior to the university level, the language is at best ambiguous.

What really divides our two panels in this en banc consideration is our differing views of the Court's rationale in *Catholic Bishop.* Our brothers see no significant difference in the risks of statereligion entanglement between the parochial secondary schools at issue in *Catholic Bishop* and "*Tilton*"-type colleges, i.e., religiously controlled universities with a predominant mission of secular education. *Tilton v. Richardson,* 403 U.S. 672, 687, 91 S.Ct. 2091, 2100, 29 L.Ed.2d 790 (1971). In contrast, we read *Catholic Bishop*'s basic rationale

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as resting on the unique role that teachers in elementary and secondary schools play as servants of the Church in fulfilling the religious mission of the school. We view as critical the gap that separates the role of such teachers from the role of professors in a school such as Bayamon.

To review briefly the basis for our reading of *Catholic Bishop,* the Court noted that, in its recent decisions involving aid to parochial schools, it had "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop,* 440 U.S. at 501, 99 S.Ct. at 1319. It observed that, in the secondary schools before it, "[r]eligious authority necessarily pervades the school system," 440 U.S. at 501, 99 S.Ct. at 1319 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 617, 91 S.Ct. 2105, 2113, 29 L.Ed.2d 745 (1971)) and, as in the schools in *Lemon,* it could not "ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education." *Id.* Quoting from *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 17 (1975), the Court emphasized "the importance of the teacher's function in a church school: Whether the subject is "remedial reading," "advanced reading," or simply "reading". . . ." 440 U.S. at 501, 99 S.Ct. at 1319. It concluded its analysis by quoting Justice Douglas's remark in *Lemon* that "the *raison détre* of parochial schools is the propagation of a religious faith." 440 U.S. at 503, 99 S.Ct. at 1320.

It seems to us, therefore, that the Supreme Court was not concerned simply with general state regulation of a religious educational institution. Rather, its focus was particularly on the unique church-teacher relationship existing in parochial secondary schools. Indeed, the Court noted that its conclusion was based on the fact that the "church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." 440 U.S. at 504, 99 S.Ct. at 1320. Because the Court saw teachers in parochial schools as essentially servants of the Church in carrying out the religious missions of elementary and secondary schools, the Court could hold that the very *existence* of a union and mandatory bargaining in such schools would impermissibly violate this essential relationship between church and teacher. Teachers in the lower grades play such an integral role in inculcating their students with the school's religious doctrine, and play such an important role as religious models for their students, that the Supreme Court could well conclude that any state labor regulation would inevitably result in the entanglement of religion and government.

In order similarly to exempt Bayamon from NLRB jurisdiction, we deem the relevant inquiry to be whether teachers in that university play a role similar to that played by teachers in religious secondary schools. It is of critical importance to remind ourselves that we do not write on a clean slate when we engage in this analysis. On numerous occasions, the Supreme Court has stated that it perceives significant differences between church-operated elementary or secondary schools and church-operated colleges. The Court first drew this line in *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) and it has consistently adhered to it.

In *Tilton,* the Supreme Court upheld a grant of federal monies to church-affiliated universities, stating that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." 403 U.S. at 685, 91 S.Ct. at 2099. The Court observed that, in contrast to the complete control over students education sought in pre-college church schools, "[m]any church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." *Id. See also Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (college controlled by a religious organization is sufficiently secular to receive federal funds); *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (same). Just last term, in *Grand Rapids School District of the City of Grand Rapids v. Ball,* ––– U.S. –––, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), the Court noted that the elementary schools it was dealing with in that case were pervasively sectarian, and stated in a footnote: "The elementary and secondary schools in this case differ substantially from the colleges we refused to characterize as "pervasively sectarian" in *Roemer v. Maryland Public Works Board,* 426 U.S. at 755–59 [96 S.Ct. at 2349–51] . . . *Hunt v. McNair,* 413 U.S. 734 [93 S.Ct. 2868, 37 L.Ed.2d 923] (1973); *Tilton v. Richardson,* 403 U.S. 672 [91 S.Ct. 2091, 29 L.Ed.2d 790] (1971)." 105 S.Ct. at 3223, n. 6. *See also Aguilar v. Felton,* ––– U.S. –––, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985).

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From the record, it is clear to us, as it is to our brothers, that Bayamon resembles the church-affiliated colleges addressed by the Supreme Court in *Tilton, Hunt,* and *Roemer.* Indeed, looking specifically at the faculty at Bayamon, we observe that they are similar to the faculty at those church-affiliated universities, and indeed to faculty at most secular universities. Under Bayamon's bylaws, the only requirements for hiring a faculty member are that the candidate "possess the appropriate academic degrees, be of a sound moral character and show traits of pedagogical qualities." (A. 296) The faculty member's functions are described as: "teaching classes, giving and grading examinations, handing in grades on time, orienting the students, participating actively in the university life, doing research work and seeking his professional development, and any others assigned by the Academic Dean." (A. 296) These criteria for hiring a faculty person and these functions required of a professor are no different from those at most universities across the country.

It is true that under Bayamon faculty regulations a professor may be terminated for "offenses to the Christian morality." (A. 311) This rule is understandable in a university that is seeking to offer its secular education under religious auspices, but it is *not,* we think, sufficient to establish that the role and character of the faculty at Bayamon is similar to the "unique role" played by teachers in parochial elementary and secondary schools as described by the Supreme Court. In a university that prides itself on providing "a humanistic education at an academic level", (A. 286) teachers are not expected to provide the intense inculcative religious experience for their students that is the norm in a religious elementary or secondary school.

Our brothers argue that it is erroneous to rely on the distinction between religious secondary schools and "*Tilton*"-type universities as established in the aid-to-school cases. They argue that the basic constitutional concern in those cases was the "promotion of religion". *Supra* at 403. By contrast, they contend that the constitutional concern in the context of labor jurisdiction is "state interference through regulation". *Id.* Thus, "[f]rom a regulatory perspective", they can find no significant difference between religious secondary schools and universities. *Id.*

We contend that *Catholic Bishop* should not be read as speaking so broadly against state interference in all religiously-controlled educational institutions. Certainly, if the Court was generally concerned with state labor regulation of religious institutions, it would be equally concerned with NLRB jurisdiction over religious hospitals and social service organizations. Our brothers assert that the "philosophical, theological and church-related moral issues would seem more likely to permeate the educational process . . . than the administration of farms or even hospitals." *Supra* at 402. We are not so sure. One of the examples of a church-related moral issue presented by our brothers would arise when a university imposes sanctions on faculty members who counsel regarding abortions. *Supra* at 401. It seems to us that doctors and nurses in Catholic hospitals may similarly counsel patients regarding the availability of abortions—particularly in those religious hospitals that do not allow the performance of abortions. Sim-

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ilar situations could arise in other religious institutions. Yet, in the wake of *Catholic Bishop,* numerous courts of appeals have held that NLRB jurisdiction does extend to religiously affiliated hospitals and social service organizations. *See e.g., Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB,* 752 F.2d 345 (8th Cir.1985), *cert. denied,* ––– U.S. –––, 105 S.Ct. 3502, 87 L.Ed.2d 633 (1985); *Denver Post of the Volunteers of America v. NLRB,* 732 F.2d 769 (10th Cir.1984); *St. Elizabeth's Hospital v. NLRB,* 715 F.2d 1193 (7th Cir.1983); *St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436 (9th Cir.1982); *Tressler Lutheran Home for Children v. NLRB,* 677 F.2d 302 (3rd Cir.1982). These decisions are consistent with the rationale and purpose of *Catholic Bishop,* for such religiously affiliated institutions, like many religiously affiliated universities, do not pose the risk of entanglement that exists in pre-college schools where teachers play such an all-encompassing role.

Our brothers contend that, if we allow NLRB jurisdiction over a university such as Bayamon, the Board's inquiries will inevitably intrude into the religious doctrines of the university. *See supra* at 401–402. These concerns are largely speculative at the moment. Indeed, our brothers' example of an improper inquiry, *supra* at 11 (excerpt reprinted in appendix), is significantly flawed. The lawyer who, in this case, questioned church officials about liturgies was counsel for the *University,* not the Board. The questions were asked as part of counsel's extensive effort to rebut the statement of the Archbishop of San Juan that Bayamon was not a "Catholic" university, in the sense of owing fealty to the diocese—an issue deemed by the original panel to be essentially irrelevant as long as the University was controlled by some religious order. *See supra* at 387, n. 5. Further, if the Board does overstep its bounds, a court is always free to fashion a prophylactic rule similar to the one recently adopted by the Second Circuit in *Catholic High School Assoc. of Archdiocese of New York v. Culvert,* 753 F.2d 1161, 1168–69 (1985) (Board may not inquire into whether a religiously-based reason, given for a discharge, is truly part of church dogma; Board may only determine whether the reason is part of a "dual motive" for the discharge).

In sum, we believe that the differences that exist between the role of teachers in religious pre-college schools and the role of faculty at religious universities such as Bayamon mean that we should not extend the holding of *Catholic Bishop* to this case, unless virtually compelled to do so. Indeed, we believe the language, reasoning and purposes of *Catholic Bishop* guide us towards allowing NLRB jurisdiction over an institution "with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education". *Tilton v. Richardson,* 403 U.S. 672, 687, 91 S.Ct. 2091, 2100, 29 L.Ed.2d 790 (1981).

APPENDIX

The recorded testimony in this case of the Archbishop of San Juan, a Cardinal of the Catholic Church, reads:

Q. [By Mr. Garcia, University Counsel]: Your Eminence, if you know, how many liturgies are required at Universidad Central de Bayamon?

A. May I ask what will that prove?

Q. Well we are asking a question of Your Eminence that we hope you can answer. If you can't answer it just tell us you cannot.

A. Well I suppose they have liturgies, but I don't know how many.

Hearing Officer: If I may, Witness. If you know the answer you are instructed to answer. If not please state that you have no personal knowledge of whether there are any or whether they are required.

[Colloquy]

Q. Yes, Your Eminence, we would like to know in regards to the liturgies that may be required or may occur at Universidad Central de Bayamon, if you have

APPENDIX—Continued

any personal knowledge or if you have participated in any of them?

A. Well, first of all I don't know exactly the number of liturgies they may have at the University. I don't know exactly the number. Secondly, I don't remember having said Mass at the University itself, since it doesn't have a chapel as such. The Church nearby, which belongs to the parish; there I have said Mass. Now, I would like to add that I have said Mass in other institutions like jails and so forth and that doesn't make them Catholic.

* * * * *

Q. Do you remember if in or around November 1974 you met with President Vicente van Rooij and discussed the possibility that some of the persons working as his underlings in the administration could be fired or substituted by other persons?

A. I remember very well interceding for some priests who were bounced from the University. I disliked the way in which it was done, so I called Father Vicente and I told him my great displeasure at the way these priests had been treated.

Q. Do you remember if in or around January of 1975 you sent communications to Rome regarding your desire to have a closer and more effective power over Universidad Central de Bayamon?

A. That I have done several times. Definitely.

Q. Do you remember if in or around February, 1975 you also sent letters to Rome regarding the functions of Father Vincente van Rooij as president of the University and Maria Molinero as vice president of the University and regarding other persons in the administration of the University?

A. I may have in the same sense that I said I have certain perogatives with the priests of the Archdiocese. I may have done it. I don't remember exactly as I did it, but I may have. He is a priest of the Archdiocese, Father Vicente.

The testimony of Monsignor O'Donnell cited in the Appendix in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507–08, 99 S.Ct. 1313, 1322–23, 59 L.Ed.2d 1313 (1979), reads as follows:

Q. [by Hearing Officer] Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A. I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q. I believed you defined it before, is that correct, when you first testified?

A. I am not sure. Let me try briefly to do it again, okay?

Q. Yes.

A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer. Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of those—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q. I see.

A. Now possibly in repeating your question, you could give me an idea of that spectrum, I could respond more correctly.

Q. Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?

A. Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so that the students attend there, rather than their parish churches. Some schools feel that this is not a good idea; they should always be in their parish

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APPENDIX—Continued

church; so that varies a great deal from school to school.

NLRB v. Southwestern Electric Cooperative, Inc.

794 F.2d 276 (7th Cir.), June 18, 1986—274 NLRB 922

On petition to enforce Board Order

Before Posner, Flaum, and Easterbrook, Circuit Judges

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Flaum, Circuit Judge: The National Labor Relations Board seeks enforcement of its order finding that the Southwestern Electric Cooperative, Inc. violated sections 8(a)(1) and 8(a)(5) [1] of the National Labor Relations Act by refusing to process employee grievances unless and until Local Union 702 of the International Brotherhood of Electrical Workers put those grievances in writing. We find that the NLRB's order was supported by substantial evidence. The contract in force allowed the Union, and it was the Union's past practice, to orally detail the grievances to be arbitrated. Therefore we enforce the order.

I.

The respondent Southwestern is a public rural electric cooperative located in Greenville, Illinois. Since 1952 Southwestern has recognized Local Union 702 as the exclusive bargaining representative of production, maintenance, and construction employees at three facilities. Southwestern and the Union have executed successive bargaining agreements since that time and executed the 1982–84 collective bargaining agreement that is at issue here. In that collective bargaining agreement, Section 3.02 imposes a duty on Southwestern to meet with the Union about "differences that may arise between" them. [2] Section 3.03 provides that this duty is triggered when the disagreement is "presented" to the company by the Union. [3] "In case of a failure to agree in this manner," Section 3.04 provides that the Union has the right to seek a higher level resolution of the grievance by the Labor Relations Committee of the Cooperative. [4] If this effort fails, either party to the agreement has the right to invoke binding arbitration, provided that two conditions as specified in Section 3.05 are met. [5] The two conditions are that the

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[1] Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), provide as follows:

Sec. 8. (a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[2] "Sec. 3.02: The Cooperative agrees to meet and to treat with the duly accredited officers and committees of the Union in the following manner on differences that may arise between the Cooperative and the Union."

[3] "Sec. 3.03: In case of any disagreement arising between the Cooperative and any employee andor employees under this Agreement, such disagreement shall first be presented by the Steward to the Foreman or Operations Supervisor of the Cooperative in charge of the work and the Business Representative of the Local Union."

[4] "Sec. 3.04: In case of a failure to agree in this manner, the Business Manager of the Local Union, who may be accompanied by a committee of the employees of the Cooperative, shall endeavor to adjust disagreements with the Labor Relations Committee of the Cooperative. In case of failure to then reach an agreement, the matter shall be submitted to arbitration in the manner provided in Section 3.05."

[5] Sec. 3.05: The party desiring arbitration shall give notice in writing by registered mail to the other party and shall on or before the fifth (5th) working day following the date of the mailing of such notice, advise such other party in writing by registered mail of the names of two (2) representatives to serve on the Board of Arbitration hereinafter referred to. Such other party shall, on or before the fifth (5th) working day following the receipt of such notice, advise the party seeking arbitration, in writing by registered mail, of the names of two (2) Representatives to serve on said Board of Arbitration. The four (4) Representatives so designated shall constitute a Board of Arbitration and shall meet promptly and endeavor to settle the grievance or grievances submitted, and in case of failure to reach a settlement within five (5) days (Sundays and Holidays excluded) from the date of their initial meeting, the four (4) members so

Continued

party desiring arbitration (1) gives "notice in writing" to the other party, and (2) notifies the other party in writing of the names of two representatives to serve as arbitrators.

On November 19, 1982 Southwestern posted a notice of layoff for fifteen employees represented by the Union. On November 21 and 29, 1982 representatives of the Union and Southwestern met and discussed a variety of issues relating to the layoffs. At the last meeting both sides agreed to proceed as quickly as possible to formal arbitration "to get it over with." However, the precise matters to be arbitrated remained indefinite. After the meeting Southwestern obtained a panel of arbitrators from the Federal Mediation and Conciliation Service and forwarded a list of their names to counsel for the Union. The Union's attorney telephoned Southwestern's attorney to discuss selecting an arbitrator and at that time the conflict that is at issue in this case arose.

Counsel for Southwestern requested a written list of the specific items to be arbitrated. The Union's attorney orally detailed the issues in dispute but refused to submit a written list. Counsel for both sides exchanged a series of letters regarding their respective positions on the Union's obligation to supply a written statement of the grievance prior to the selection of an arbitrator. The Union's attorney met with Union officials several times and orally reported in detail to Southwestern's attorney what matters were to be arbitrated. The Union then offered to exchange written statements of the issues prior to the actual arbitration but Southwestern again refused to select an arbitrator unless the Union put the issues that the Union's counsel had orally explained in writing.

Three days after the two attorney's last telephone call the Union filed the unfair labor practice charge at issue in this case. The Administrative Law Judge, and the Board, found that Southwestern had violated sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), by unilaterally modifying the grievance-arbitration terms contained in the collective bargaining agreement. The NLRB's order requires Southwestern to cease the unfair labor practice by withdrawing its requirement that grievances be put in writing and by selecting arbitrators for the resolution of the underlying dispute.

II.

We find that the Board's decision is supported by substantial evidence on the record as a whole and represents a reasonable construction of the Act. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d), 29 U.S.C. § 158(d), defines the collective bargaining obligation as prohibiting a party to a collective bargaining agreement from terminating or modifying an agreement prior to its expiration date. Accordingly, an employer acts in derogation of section 8(d), and thereby violates sections 8(a)(5) and (1) of the Act, by making mid-term changes in any provision of a collective bargaining agreement relating to a mandatory subject of bargaining, such as wages, hours, or other terms and conditions of employment without first obtaining the union's consent. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 675, 101 S.Ct. 2573, 2579, 69 L.Ed.2d 318 (1981); *Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183–88, 92 S.Ct. 383, 399–402, 30 L.Ed.2d 341 (1971); *N.L.R.B. v. Manley* Truck Line, Inc., 779 F.2d 1327, 1329 (7th Cir.1985); *Chicago Magnesium Castings Co. v. N.L.R.B.*, 612 F.2d 1028, 1034 (7th Cir.1980).

There is substantial evidence to support the Board's findings that there is no express contractual requirement that grievances be put in writing, and that sections 3.01 through 3.05 (as described in Part I of this opinion) appear on their face to contemplate that prior to arbitration the parties' disagreements will be resolved orally and informally. For thirty years the Union had always presented grievances orally without protest from Southwestern. Substantial evidence, in the form of the language of

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designated shall select a fifth member of said Board. In the event the four (4) members of the Arbitration Board cannot agree on a fifth arbitrator within five (5) days of the date on which they decide the dispute can be settled in no other manner, then either or both parties may call upon the director of Federal Mediation and Conciliation Service at Washington, D.C., to appoint the fifth member who shall act as an impartial member and as the Chairman of said Board. The Arbitration Board so constituted shall hear and consider the evidence submitted to it and render a decision on the grievance or grievances presented without avoidable delay. It is agreed that a majority decision rendered by said Board shall be final and binding on both parties.

the contract and the long and consistent history of how both sides interpreted that language, supports the Board's finding that the right to file oral grievances was "contained in" the collective bargaining agreement.

The Board's finding is also supported by common practice and common grievance-arbitration procedures. These procedures are by their very nature adjuncts to the parties' collective bargaining process, and therefore they must operate flexibly if they are to foster prompt dispute resolution. *See* Newman and Wilson, *Arbitration—As the Parties See It, A Union Point of View,* contained in Arbitration Promise and Performance (Proc. of the 36th Ann. Meeting Nat. Acad. of Arbitrators) 39 (BNA 1983). To maintain this needed flexibility, it is therefore clear that "[p]recise pleadings in moving from step to step ordinarily should not be required." F. Elkouri & E.A. Elkouri, How Arbitration Works, 120 n. 60 (1973).

Southwestern contends that it has a statutory right under section 8(d) of the Act to information relevant to the processing of any grievance and that by requiring that all grievances be presented in writing it was only exercising that right. But the right to information does not include the right to dictate the form that information comes in. "It is well settled that an employer is not obligated to furnish relevant information in the exact form requested by the employees' representative. Rather '[i]t is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining.' " *Roadway Express, Inc.,* 275 NLRB No. 156, slip op. 2, 120 LRRM 1024, 1024 (July 17, 1985), quoting *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949). Accord *United Aircraft Corp.,* 192 NLRB 382, 427 (1971), enfd. in rel. part, 534 F.2d 422, 466 (2d Cir.1975); *Abercrombie & Fitch Co.,* 206 NLRB 464, 466 (1973).

III.

We find no merit in any of Southwestern's other claims and therefore order the Board's determination enforced.

Timothy Nevins v. NLRB

796 F.2d 14 (2d Cir.), June 23, 1986—278 NLRB No. 17

On petition to review Board Order

Before VAN GRAAFEILAND, KEARSE and MINER, Circuit Judges

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MINER, Circuit Judge: This is a petition to review an order of the National Labor Relations Board ("NLRB") dismissing petitioner Timothy Nevins's unfair labor practices complaint against Donald Browne, his former employer. Nevins's complaint alleged that Browne failed to provide the collective bargaining agreement benefits applicable to his employment as a "helper" on the improper ground that he was not a union member and that on January 5, 1981, Browne constructively discharged him by offering him continued employment as a helper if he would agree to accept wages and benefits at less than union scale. The NLRB concluded that it should defer to a decision made in a prior arbitration proceeding finding in favor of Browne on contractual grievances brought by Nevins concerning his dismissal and rate of pay. Because we find that the issues before the NLRB in large part were not parallel to those before the arbitrator, we conclude that the NLRB abused its discretion by deferring to the earlier ruling, and, accordingly, remand the matter to the NLRB for further proceedings.

I. BACKGROUND

Donald Browne owns and operates Bailey Distributions, a wholesale beverage distributorship in the Bronx, New York. He is a signatory to a collective bargaining agreement entered into by the Soft Drink Workers Union ("Union") and the New York Pepsi-Cola Distributors Association, Inc., of which he is a member. The agreement, among other things, establishes wage rates and benefits for all employees of the signatories and provides for binding arbitration to resolve any grievances between employer and employee.

Browne employed Nevins in various capacities, and at various times, between 1977 and 1981. The exact nature of that employment, however, is a matter of some dispute. According to Browne, Nevins was employed as a relief driver when Browne's regular drivers were on vacation and as a regular driver for a short time in the fall of 1980, when Browne attempted to add an additional route to his business. Neviens's employment as a regular driver ended in September of 1980, when Browne canceled the additional route for economic reasons. Nevins's employment as a relief driver ended in November of 1980, when all of Browne's regular drivers returned from vacations. According to Nevins, however, Browne also employed him as a helper to assist the regular route drivers. When he worked as a helper, he was paid by the driver he was assisting. When he worked as a driver or relief driver, Browne would pay him directly.

On Friday, January 2, 1981, Nevins arranged to meet Ronald Walsh, one of Browne's regular drivers, to assist him in his deliveries along his route. When Walsh did not appear, Nevins telephoned Browne, who directed him to come to the warehouse and take the truck out himself. Nevins obliged and performed Walsh's duties for the day and was paid for the work. On Monday, January 5, 1981, Browne terminated Walsh and informed Nevins that Browne himself would be taking over Walsh's route. According to Nevins, Browne then offered him continued employment as his helper if Nevins would agree to accept forty to fifty dollars a day "off the books" and if he would follow Browne along the route in his own van. Nevins refused the employment offer. While admitting that an offer of employment as a helper was made to Nevins, Browne denies that he ever conditioned such employment upon the acceptance of sub-scale wages. Rather, Browne contends that Nevins declined the employment because he wished to work only as a driver. In addition, Browne alleges that he never was aware of any employment relationship between Walsh and Nevins and never authorized Walsh to hire Nevins as a helper.

Nevins then wrote to the Union, requesting that a grievance be filed against Browne on his behalf for his "unjust" termination and for certain underpayments made to him by Browne for his work as a helper. In his letter, Nevins stated that he wished "to be reinstated back to my position as a relief driver and helper and to obtain back pay which I feel is owed to me for the time I was a helper during the past three years." In response, the Union contacted the arbitrator named in the collective bargaining agreement and requested arbitration of Nevins's grievance, framing the issue to encompass Browne's dismissal of Nevins.

In April of 1981, Nevins filed unfair labor practice charges with the NLRB against Browne and the Union. Nevins charged that Browne had failed to afford him the benefits of the collective bargaining agreement because he was not a Union member, thereby causing him to receive less wages and benefits than he was entitled to, in violation of sections 8(a)(1), (2) & (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1)–(3) (1982). In addition, Nevins charged that Browne had constructively discharged him on January 5, 1981 by conditioning his employment as a helper on the relinquishment of certain wage and benefit rights under the collective bargaining agreement, in violation of sections 8(a)(1), (3) of the NLRA, 29 U.S.C. §§ 158(a)(1), (3). As for the Union, Nevins alleged that it had failed to process his grievances properly because of his non-union status. In June of 1981, the NLRB's regional office issued a complaint against Browne reflecting Nevins's charges. Nevins then dropped his charges against the Union.

One week after the filing of the charges with the NLRB, Nevins commenced an action in federal district court against Browne and the Union, alleging violations of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), and section 102 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1982). The complaint asserted that Browne had made improper deductions from Nevins's wages during his employment and had not compensated Nevins in accordance with the collective bargaining agreement; that Browne had terminated Nevins on January 5, 1981 in violation of the collective bargaining agreement; and that the Union had failed to represent Nevins adequately in his grievances and had refused to provide him with a copy of the collective bargaining agreement. In July of 1981, the district court dismissed the action on the ground that Nevins had failed to exhaust the binding arbitration procedures provided for in the collective bargaining agreement. In disposing of the matter, the court noted that Nevins would be able to "raise any and all issues relevant to [his] claim of arbitrary treatment" in the arbitration proceeding.

On December 8, 1981, the parties took part in an arbitration hearing on the grievances. Nevins and Browne both testified as to their employment relationship, Nevins asserting that he had worked for Browne primarily as a helper and that Browne had not paid him in accordance with the collective bargaining agreement, and Browne saying that he had never employed, or authorized the employment of, Nevins as a helper. On February 3, 1982, the arbitrator issued his decision denying Nevins's grievances.

On its face, the decision addressed two issues: whether Browne properly had ter-

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minated Nevins from his positions as a *driver* and *relief driver* in the fall of 1980 and whether Browne properly had compensated Nevins for his work as a helper prior to November of 1980. As to the former issue, the arbitrator concluded that Browne had canceled the route on which Nevins was a driver because of insufficient sales along the route. He further found that Nevins's employment as a relief driver had ended because all the regular drivers had returned from vacations. Consequently, the arbitrator found nothing improper about Nevins's loss of employment. As to the latter issue, the arbitrator concluded, based upon the testimony at the hearing, that Browne had never employed Nevins as a helper and thus could not be liable for underpaying Nevins for such employment. The arbitrator did note that Nevins was paid for working as a driver on January 2, 1981, but he failed to attach any significance to that fact.

Several months later, the parties took part in a hearing before an administrative law judge regarding Nevins's unfair labor practices complaint. On January 3, 1983, the ALJ issued his decision upholding the complaint and finding that Browne improperly had deprived Nevins of wages and benefits guaranteed to him in his position as a helper by the collective bargaining agreement and that Browne constructively had discharged Nevins on January 5, 1981, by offering him continued employment as a helper conditioned upon the acceptance of sub-scale wages. In his decision, the ALJ rejected the arbitrator's earlier factual finding that Browne had not employed Nevins as a helper and, consequently, held that a deferral to the arbitrator's decision was not appropriate.

Fifteen months later, the NLRB remanded the matter to the ALJ for further consideration in light of its decision in *Olin Corporation,* 268 N.L.R.B. 573 (1984), which established a new standard for determining whether to defer to an arbitrator's decision. In a second opinion, the ALJ adhered to his earlier decision, concluding that the issues presented before him were not parallel to those before the arbitrator and that critical facts relating to the unfair labor practice claims had not been presented in the arbitration.

On January 21, 1986, a three-member panel of the NLRB rejected the ALJ's decisions and concluded that it should defer to the arbitrator's decision. Following the standard for deferral set forth in *Olin,* the NLRB reasoned that the issues before the arbitrator and the ALJ "both turn[ed] on whether Nevins was ever employed by . . . [Browne] as a helper." In turn, since the arbitrator had determined that Nevins had never been so employed and since, according to the NLRB, the facts relevant to the making of such a determination were presented to the arbitrator, the NLRB panel concluded that there was no basis for the ALJ to re-examine the issues.

In his petition for review, Nevins asserts that the NLRB's decision to defer to the earlier arbitration ruling constituted an abuse of its administrative discretion. Specifically, while recognizing the NLRB's right to defer in such situations, Nevins contends that the NLRB in this instance did not follow its own guidelines as set forth in *Olin.* According to Nevins, the statutory claims before the NLRB were neither parallel to the contractual claims before the arbitrator nor raised before the arbitrator in the earlier proceeding. Attacking the arbitration proceeding directly, Nevins further alleges that that proceeding was itself unfair, given the existence of a direct conflict of interest between Nevins and the Union, Nevins's representative, arising from an alleged interest of the Union in not having Nevins classified as a helper.

II. Discussion

The authority to defer to an earlier arbitrator's ruling is discretionary with the NLRB. *Liquor Salesmen's Union Local 2 v. N.L.R.B.,* 664 F.2d 318, 326 (2d Cir.1981), *cert. denied,* 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982). The standard in this circuit for reviewing an NLRB decision to defer is whether that decision constituted an abuse of administrative discretion. *N.L.*

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R.B. v. New York University Medical Center, 702 F.2d 284, 288 (2d Cir.), *vacated on other grounds,* 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 73 (1983).

The NLRB is given wide lattitude in deciding which situations merit deferral. *Liquor Salesmen's Union,* 664 F.2d at 326. This discretion, however, is tempered by the adoption of administrative rules or guidelines governing such decisionmaking. Once an agency adopts such guidelines, it cannot "blithely ignore" them. *N.L.R.B. v. Horn & Hardart Company,* 439 F.2d 674, 679 (2d Cir.1971). While it may alter or amend its guidelines, the NLRB "cannot lightly change the rules on a case by case basis." *Liquor Salesmen's Union,* 664 F.2d at 326.

The NLRB traditionally has employed a three-pronged standard in determining whether to defer. It has exercised its discretion only when the arbitration hearing appears to have been fair and regular, the parties have agreed to be bound by the arbitrator's decision, and the arbitrator's decision is not clearly repugnant to the purpose of the NLRA. *Spielberg Manufacturing Company,* 112 N.L.R.B. 1080 (1965). In *Olin,* the NLRB expanded this standard to require the issues before the arbitrator to have been factually parallel to those before the NLRB and the arbitrator to have been presented generally with those facts relevant to disposing of the unfair labor practice charges. *Olin,* 268 N.L.R.B. at 574–75. The burden is placed upon the party requesting the NLRB to ignore the earlier arbitration decision to establish the inadequacy of that proceeding. *Id.* The issue for us to resolve on this petition, therefore, is whether the NLRB properly applied the *Olin* standard to Nevins's unfair labor practices complaint. We conclude that it did not.[1]

Here, the arbitrator addressed two contractual grievances in his formal decision: Nevins's claim that Browne had paid him sub-scale wages for his work as a helper and his claim that Browne improperly had terminated him from his positions as a driver and a relief driver in the fall of 1980. In contrast, the unfair labor practices complaint against Browne addressed two statutory claims: Nevins's charge that Browne had discriminated against him in his position as a helper as to wages and other benefits because of Nevins's non-union status and the charge that Browne had constructively discharged Nevins on January 5, 1981 by conditioning his continued employment upon the acceptance of sub-scale wages and benefits. In its decision, the NLRB reasoned that the arbitrator's factual finding that Browne had never employed Nevins as a helper was dispositive as to all contractual and statutory claims. It therefore determined that the issues in both proceedings were factually parallel. Upon reviewing the testimonial evidence before the arbitrator, it further found that the arbitrator had ample facts relating to the employment relationship between Browne and Nevins to reach this conclusion.

As to Nevins's first statutory claim, discriminatory treatment in his employment as a helper, we have little difficulty in concluding, as did the NLRB, that the arbitrator's determination of Nevins's employment status disposed of the issue. Nevins in fact concedes on appeal that the arbitrator's ruling is dispositive. Obviously, if the arbitrator's determination that Nevins never was employed as a helper is accepted, Nevins's statutory claim, alleging underpayment as a helper, cannot stand. The threshold question on the statutory issue therefore is factually parallel to those issues decided by the arbitrator. The arbitrator further was presented with the facts necessary to make such a determination—both Nevins and Browne testified at length as to their employment relationship. It certainly was within the purview of the arbitrator to weigh the credibility of the witnesses and rule accordingly.

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The NLRB's decision to defer on the second statutory issue, the claim of a constructive discharge on January 5th, however, did not satisfy the NLRB's standard under *Olin,* and accordingly, requires a remand. First, the issues before the arbitrator were not factually parallel to this second statutory issue. The arbitrated issues dealt with alleged underpayments to Nevins during his employment and an alleged discharge from his employment as a driver and relief driver in November of 1980. Neither of these issues relates to the circumstances surrounding Browne's allegedly improper offer of employment on January 5th. More important, the arbitrator's determination that Browne had not employed Nevins as a helper does not dispose of the issue of whether Browne offered employment as a helper to Nevins on January 5th (a fact which Browne concedes) conditioned upon Nevins's acceptance of sub-scale wages. It is clear that at the time of the offer of continued employment Nevins had been performing services for Browne. Browne admits that on Friday, January 2nd, Nevins drove a truck for him along one of his routes. Consequently, the issue whether he was constructively discharged from his employment by the allegedly improper offer on January 5th was not affected by the arbitrator's earlier ruling that Browne never had employed him as a helper.

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[1] In *Taylor v. N.L.R.B.,* 786 F.2d 1516 (11th Cir.1986), the Eleventh Circuit rejected the standard for deferral under *Olin,* holding that it "does not protect sufficiently an employee's rights granted by the [NLRA]." *Id.* at 1521. The basis for this conclusion was that *Olin* places the burden of demonstrating the need for an independent NLRB review upon the petitioner, as opposed to placing the burden of demonstrating the need to defer upon the NLRB. Nevins does not challenge the *Olin* standard and we need not reach the issue discussed in *Taylor* in any event, because we conclude here that the standard was not satisfied.

Nor can it be claimed that the arbitrator was presented generally with the facts necessary to resolve the constructive discharge issue. In its decision, the NLRB relied, for the proposition that the parties had presented the facts relevant to this issue, upon Nevins's statement at the hearing before the ALJ that he recalled testifying before the arbitrator regarding the January 5th incident. The arbitrator's decision, however, made no mention of the January 5th incident, referring in passing only to Nevins's work on January 2nd as a driver for Browne. Moreover, at the subsequent hearing before the ALJ, Union counsel, who had argued on behalf of Nevins at the arbitration hearing, testified that he did not raise the issue of the January 5th discharge before the arbitrator. He further testified that he could recall nothing regarding the January 5th incident being mentioned at that time. Nevins also testified that his counsel in fact had not raised the issue for resolution at the arbitration and that he himself had not explained to the arbitrator the basis upon which he refused Browne's offer of employment. In light of this testimony and the absence of any reference to those events and issues in the arbitrator's ruling, we find no basis for the NLRB's conclusion that the facts necessary to resolve the constructive discharge issue were before the arbitrator.

We reject the NLRB's contention that Nevins purposely did not raise the issue of the improper offer of employment as a helper before the arbitrator because he wanted to be reinstated only as a driver and therefore should now be barred from challenging the arbitrator's failure to address the issue. First, while Union counsel testified that his failure to raise the issue at the arbitration on behalf of Nevins was based upon his understanding of Nevins's wishes, it is not clear that this in fact was the case. In his initial letter to the Union requesting that a grievance be filed on his behalf, Nevins stated that he wished to be reinstated to his position as a "relief driver and helper." Moreover, at the time of the arbitration hearing, Nevins had already filed the unfair labor practice charges, specifically complaining about the January 5th offer of employment as a helper. Regardless whether Nevins is to blame for not raising the issue before the arbitrator, however, the fact of the matter is that the *Olin* standard for deferral was not satisfied, since the issue was not raised and the facts necessary to resolve the issue were not presented to the arbitrator. Deferral by the NLRB to the arbitrator's ruling as

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to this issue, therefore, would constitute an abuse of its administrative discretion.

III. CONCLUSION

Having determined that the NLRB's standard for deciding whether to defer to a decision of an arbitrator has not been satisfied in this case, we vacate the order for which review is sought and remand the matter to the NLRB for further proceedings consistent with this opinion.

John Cuneo, Inc. v. NLRB

792 F.2d 1181 (D.C. Cir.), June 24, 1986—276 NLRB 75

On petition to review Board Order

Before WALD and GINSBURG, Circuit Judges, and RE, * Chief Judge, United States Court of International Trade

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PER CURIAM: In this case, we review an order by the National Labor Relations Board (Board) requiring John Cuneo, Inc. (Cuneo) to provide $16,877.49 in back pay to Jerry Brite, an employee against whom the company committed an unfair labor practice. The amount of back pay due depends, in part, on whether Brite was a permanent or a temporary employee. The Board neglected to address one of Cuneo's two major arguments about why Brite should be treated

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

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as a temporary employee. We therefore remand the case to the Board for further consideration of this unresolved issue.

When Jerry Brite applied for a job with Cuneo, he deliberately misrepresented on his application that he was unemployed. In fact, Brite was temporarily laid off from work at Eclipse Lookout Company (Eclipse) and subject to recall at any time. In ignorance of Brite's actual status, Cuneo hired Brite on August 24, 1977 with the intention of making him a permanent employee. One month later, Brite joined other Cuneo employees in a strike. On November 14, 1977, the union tendered to Cuneo the striking employees' unconditional offer to return to work. Cuneo refused to reinstate the strikers. On December 6, 1977, Brite was recalled to Eclipse.

The Board found that Cuneo's refusal to allow Brite and his fellow strikers to return to work was an unfair labor practice. *See John Cuneo, Inc.*, 253 N.L.R.B. 1025 (1981), *aff'd sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1178, 103 S.Ct. 831, 74 L.Ed.2d 1025 (1983). Cuneo, therefore, was liable to Brite for back pay covering the time Brite was illegally denied work. If Brite had only temporary employee status, his back pay entitlement would run from the date of his offer to return to work until the date when the temporary employment would have ended. If Brite gained permanent employee status, he could collect back pay for the considerably longer period running from the date of his offer to return to work until the date on which the company made him an unconditional offer of reinstatement. The Board found that Brite was a permanent employee and that Cuneo had failed to make him a valid offer of reinstatement until August 19, 1983. Thus, the Board held Cuneo liable for back pay running from November 14, 1977 to August 19, 1983. *See John Cuneo, Inc.*, 276 N.L.R.B. No. 12 (1985); *John Cuneo, Inc.*, JD-(ATL)-88-84, at 14 (Nov. 28, 1984) (ALJ Decision), *reprinted in* Joint Appendix (J.A.) at 20. [1]

Cuneo objects to this holding on two grounds. First, the company argues that Brite was, or should be treated as, a temporary employee who would have left Cuneo's employ on December 6, 1977, when he returned to Eclipse. Second, Cuneo contends that it made a valid offer of reinstatement to Brite on September 21, 1978, much earlier than the Board found.

The second contention can be put swiftly to rest. The Administrative Law Judge found, and the Board affirmed, that the alleged offer contained in a September 21, 1978 mailgram [2] was ineffective on two counts: it was not sufficiently specific and unequivocal; and it did not afford Brite adequate time to consider his reply. *See* ALJ Decision at 10, *reprinted in* J.A. at 16; *John Cuneo, Inc.*, 276 N.L.R.B. No. 12 (1985). Judgments about such issues as the reasonableness of a reply period and the specificity of an offer of employment are uniquely within the Board's special expertise and, consequently, merit large respect on judicial review. Cuneo has suggested no persuasive reason to override the Board's determination that the mailgram was not "specific, unequivocal, and unconditional," and therefore did not toll the back pay period. Accordingly, we affirm the Board's holding that the alleged offer of reinstatement made on September 21, 1978 was ineffective. [3]

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The company's first contention, however, cannot be disposed of so easily. Cuneo provided two bases for its argument that Brite should be treated as a temporary employee. First, the company contended that Brite himself viewed his employment at

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[1] The Board slightly reduced this period of liability for other, unrelated reasons that are not at issue on appeal. *See John Cuneo, Inc.*, 276 N.L.R.B. No. 12, 2-3 (1985).

[2] The text of the mailgram read: John Cuneo Inc. anticipates a need for another employee on the first shift. Should you be interested in reinstatement advise me immediately. If I do not hear from you by the close of the work day September 25, 1978, I will assume you have no interest.

[3] Cuneo contends that the Board is precluded from asserting that the mailgram did not constitute a valid offer of reinstatement because, in its earlier briefs in the liability stage of this case, the Board referred to the September 21 mailgram as an offer of reinstatement. *See* Brief of Petitioner John Cuneo, Inc. at 14-17. We reject Cuneo's argument. Cuneo seeks to bind the Board to statements in its briefs that relate to an issue which was neither litigated nor decided in the earlier proceeding. *See* ALJ Decision at 6-8, *reprinted in* J.A. at 12-14. Preclusion does not apply in these circumstances.

Cuneo as temporary and would have returned to Eclipse in December even if he had still been on the job at Cuneo when Eclipse recalled him. The Board adequately replied to this argument by pointing out that Cuneo had failed to carry its burden of proof. *See John Cuneo, Inc.*, 276 N.L.R.B. No. 12, 2 (1985). Brite's wages were higher at Eclipse than at Cuneo. But that single fact was insufficient to demonstrate that Brite would have left the comparative security of work at Cuneo to return to Eclipse, where his work had been interrupted by lay offs covering more than one third of the time he was employed there. *See* Transcript of Hearing at 55–58, *reprinted in* J.A. at 29–32. Without further proffered evidence on the issue, the Board reasonably concluded that Cuneo "ha[d] not shown that Brite would have left its employ and returned to the prior employer had [Cuneo] not discharged him unlawfully." *Cuneo, Inc.*, 276 N.L.R.B. No. 12, 2 (1985).

This clear and adequate response by the Board stands in sharp contrast to the complete neglect of Cuneo's other argument about why Brite should be treated as a temporary employee. Cuneo suggested that if Brite had not concealed that he was laid off from Eclipse, Cuneo would not have hired him as a permanent employee. The company might have hired him as a temporary worker, or it might not have offered him employment at all. Cuneo urges that Brite should not be allowed to enjoy the benefits of a status he acquired only through deception in his employment application. *See* Brief of Petitioner, John Cuneo, Inc. at 10–12; *cf. John Cuneo, Inc.*, 276 N.L.R.B. No. 12, 2 & n. 5 (1985) ("The Respondent [Cuneo] argues it was not aware of Brite's employment history with the prior employer at the time it hired Brite. . . . Brite failed to list the former employer on his job application.").

The Board's opinion is inexplicably silent on the question whether deliberate misrepresentation on an application for employment is sufficient to strip an employee of his permanent status when he acquires that status by virtue of the misrepresentation. We express no opinion on this question; we merely note that the Board also expressed no opinion in response to Cuneo's argument that this kind of deception should alter the employee's status for remedial purposes. This is the first issue the Board should address on remand.

If the Board finds that deliberate misrepresentation on a job application could, at least in some circumstances, cause the employee to forfeit his permanent status, the Board must then go on to determine whether Cuneo has provided—or should be afforded an opportunity to provide—evidence sufficient to demonstrate that the appropriate circumstances exist in this case. What must Cuneo show to prove that it would not have hired Brite as a permanent employee if it had been aware of his employment history? Has Cuneo proffered—or should it be accorded an opportunity to adduce—evidence adequate to make such a showing? These are the additional questions the Board may need to confront and decide on remand.[4]

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We affirm the Board's conclusions with respect to the ineffectiveness of the September 21, 1978 alleged offer of reinstatement. We also uphold the Board's finding that Cuneo failed to proffer evidence adequate to prove that Brite would have returned to Eclipse in December of 1977 even if he had then been working steadily for Cuneo. But we cannot affirm the Board's holding that Brite was a permanent employee because the Board failed to consider Cuneo's argument that Brite forfeited the benefits of his status when he procured that status through deliberate misrepresentation. We therefore vacate the Board's order directing Cuneo to pay Brite $16,877.49, plus interest, and remand the case to the Board for further proceedings consistent with this opinion.

It is so ordered.

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[4] If the Board decides that the misrepresentation argument is legally sound—and, therefore, that these factual issues require consideration and resolution—it may wish to remand the case to the Administrative Law Judge (ALJ) for further fact findings. The ALJ, at the hearing already held, believed that the question of Brite's status as permanent or temporary had been resolved in the underlying unfair labor practice proceeding. *See* ALJ Decision at 5–6, *reprinted in* J.A. at 11–12. For this reason, the ALJ refused to accept evidence Cuneo proffered on this issue. The Board disagreed with the ALJ on this point, and held that the issue was not precluded, but then ruled that Brite was a permanent employee. *See John Cuneo, Inc.*, 276 N.L.R.B. No. 12, 2 (1985). Cuneo, therefore, has never had an opportunity to place on the record evidence in support of its argument that Brite's deception should disqualify him for the back pay that would accrue to a permanent employee. On remand, the Board may wish to allow Cuneo to supplement the meager record on this question before addressing Cuneo's argument.

NLRB v. Parsons School of Design a Division of the New School for Social Research

793 F.2d 503 (2d Cir.), June 24, 1986—275 NLRB 173

On petition to enforce Board Order

Before FEINBERG, Chief Judge, and KAUFMAN and NEWMAN, Circuit Judges

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FEINBERG, Chief Judge: The National Labor Relations Board applies for enforcement of its order against Parsons School of Design. The Board found that Parsons violated section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the certified representative of its part-time faculty. The Board concluded that post-election modification of the bargaining unit from a combined unit of full- and part-time faculty members to one including only part-time faculty did not require a new election. In reaching its decision, the Board distinguished a prior decision of this court, *Hamilton Test Systems, New York, Inc. v. NLRB,* 743 F.2d 136 (2d Cir.1984). We hold that the Board's modification of the unit requires a new election and that Hamilton, supra, applies to the facts of this case. Accordingly, we deny the Board's application for enforcement.

I.

Parsons School of Design, a division of the New School for Social Research, is an educational institution offering college and graduate courses in art and design. The school's main campus is located in New York City; it also has branches in Los Angeles and Paris. Parsons employs approximately 20 full-time and 200 part-time instructors at its New York campus. Typically, the part-time instructors are successful practitioners in their particular fields. In August 1982, the Parsons Faculty Federation, New York State United Teachers, American Federation of Teachers, AFL–CIO (the Union) filed a representation petition with the Board. The Union initially sought to represent all full-time and part-time instructors employed at Parsons' New York campus. The Union later amended its petition to include only part-time instructors, although it indicated that it was willing to represent the larger unit. After a hearing, the Board's Regional Director determined that an appropriate unit included both full- and part-time faculty at Parsons' New York campus and directed that an election in that unit be held on May 9–12, 1983. The Regional Director denied Parsons' motion for reconsideration.

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Parsons filed a request for review of the Regional Director's decision, arguing that a combined unit was inappropriate and that a unit of part-time faculty only would also be inappropriate. Shortly before the scheduled election, the Board granted the employer's request for review. The Board decided, however, that the election should proceed and the ballots of full- and part-time instructors should be segregated and then impounded according to the "vote and impound" procedures set forth in 29 C.F.R. § 102.67(b). [1] The Board provided two ballot boxes, one for full-time instructors and one for part-time. The ballots for full- and part-time faculty were identical. The Board's representatives did not explain why separate boxes were used unless asked. The election was held as scheduled in May 1983.

In February 1984, the Board issued a Decision on Review and Direction of Election. Finding that a unit limited to part-time instructors was appropriate, the Board modified the Regional Director's earlier unit determination. Apparently unaware that an election had been held in the combined unit, the Board also directed that an election be held in the modified unit. Several weeks later, the Board amended its decision to eliminate that portion directing an election and remanded the matter to the Regional Director to open and count the ballots impounded in the May 1983 election. The amended decision is reported at 268 N.L.R.B. 1011 (1984).

Parsons objected to the election, claiming that the results should be set aside because the official notice of election described a unit different from the one the Board later found appropriate and, thus, the voters were prevented from making an informed decision. The Regional Director overruled these objections, holding that the unit determination "had no bearing as to whether the voters desired Union representation" and that there was no evidence that employees would have changed their votes if they had known that a part-time unit had been found appropriate. The Board summarily denied Parsons' request for review of that decision. After various challenges were resolved, there were 99 ballots for the Union and 92 against.

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[1] The relevant portion of 29 C.F.R. § 102.67(b) reads as follows:

The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file a request for review with the Board in Washington, D.C. The regional director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the regional director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (emphasis in original)

The Board certified the Union as the exclusive representative of the part-time faculty in October 1984. However, Parsons refused the Union's request to bargain, and the Union filed an unfair labor practice charge against Parsons. The Board's General Counsel issued a complaint and moved for summary judgment. In response, Parsons acknowledged its refusal to bargain, but argued that it was justified. Citing Hamilton, supra, decided several months earlier, Parsons maintained that certification of the Union as representative of the part-time unit was invalid because the voters had been misled as to the scope of the unit. In a decision reported at 275 N.L.R.B. No. 18 (1985), the Board held that all issues were or could have been litigated in the prior representation proceeding and concluded that the employer unlawfully refused to bargain with the Union. The Board distinguished *Hamilton* principally because the new unit excluded less than 10% of the employees previously included. This application for enforcement followed.

II.

The central issue raised by the Board's application is the extent to which *Hamil-*

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ton applies to this case. In *Hamilton,* the Board initially certified a unit consisting of all 31 non-clerical employees at one of the employer's facilities. On the eve of the election, however, the Board granted the Union's request for review of the unit determination. It nonetheless conducted a scheduled election in the original unit and segregated and impounded the ballots pursuant to section 102.67(b). The Board later decided that a smaller, 14-employee unit was appropriate and determined that, of the ballots cast in the smaller unit, the union had won by a margin of two votes. The employer petitioned this court for review of the Board's finding that it committed an unfair labor practice by refusing to bargain with the union and the Board cross-petitioned for enforcement.

The court recounted the history of section 102.67(b). 743 F.2d at 140–42. It noted that the regulation was adopted following the recommendation of the Chairman's Task Force on the National Labor Relations Board. Id. at 140 (citing Chairman's Task Force on the NLRB, Interim Report and Recommendations 13 (1976) [hereafter Task Force Report]). The Task Force recommendation was a response to criticisms of delay in the election process that had occurred when the Board granted a request for review of a pre-election ruling, but was unable to decide the issue before the election date and therefore postponed the election. Task Force Report at 11. The court observed that:

> [t]he regulation merely states that a challenge to a decision by the regional director should not serve as a stay of a representation election. A major purpose of this rule is to eliminate meritless appeals that are filed merely to delay the date of an election. Challenges to a regional director's eligibility determination frequently involve only the inclusion or exclusion of a few voters and, even if successful, may not change significantly the scope of the unit.
>
> We do not believe that the regulation provides the Board with the authority to inform employees that they are voting for representation in a broad facility-wide unit and later to consider the ballot as a vote for representation in a unit that is less than half the size and considerably different in character.

743 F.2d at 140. Accordingly, the court granted the employer's petition, concluding that application of section 102.67(b) had denied employees the right to make an informed choice in the representation election. It pointed out that the Task Force had also recommended that the Board " 'develop a balloting process under which the election could be held, whatever the eventual decision might be on the appropriate unit,' " id. at 141 (quoting Task Force Report at 12), but that the Board had failed to do so. Accord *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294 (9th Cir.1985).

Parsons argues that the case is controlled by *Hamilton,* and that the election here was similarly defective. It notes that the notice of election described an all-faculty unit and, although the Board separated the ballots of full- and part-time instructors, it did not generally inform the voters of the possible change. Respondent then offers various reasons why part-time instructors who voted for the Union might not have done so had they known that the unit would be limited to the part-time faculty; e.g., their expectation that the full-time instructors would assume most of the responsibility for collective bargaining and other union work and the desire of part-time faculty members for unity among the faculty and maximum bargaining strength. Finally, Parsons points out that, as in *Hamilton*, the vote here was very close and a shift of only a few votes would have changed the outcome.

The Board, on the other hand, continues to maintain that this case is distinguishable from *Hamilton*. It compares the post-election modification in *Hamilton*, which reduced the bargaining unit by more than one half, with the modification here which excluded less than 10% of the faculty. The Board notes that the Union leadership is composed primarily of part-time faculty and that, since the full-time instructors are not thought to have greater status, their

exclusion from the unit was not likely to reduce support for the Union. Because the part-time instructors are over 90% of the total faculty, the Board contends that conflict and divisiveness are unlikely to result from union representation of only the part-time faculty. It argues that the court should defer to its exercise of discretion in using the vote and impound election procedures. Finally, petitioner claims that the fact that Parsons endorsed the Board's vote and impound procedure in a letter to the faculty prior to the election should be taken into account in weighing the merits of its later objection to the election.

III.

As a preliminary matter, contrary to the Board's view, we attach no significance to Parsons' failure to raise its objections prior to the election or to its letter to the faculty approving the Board's decision to go ahead with the election. Like the employer in *Hamilton*, Parsons "had no basis for a complaint . . . until the Board decided to overturn the Regional Director's determination. . . . The problem arose when the Board, months after the voting was completed, decided to reshape the bargaining unit presented to the voters." 743 F.2d at 140. Similarly, in *NLRB v. Lorimar Productions, supra*, 771 F.2d at 1300, the Ninth Circuit held that section 102.67(b) did not require a party to seek a stay of election in order to preserve its right to object to an election.

Turning to the validity of the election, we recognize that the Board has broad discretion to develop and implement procedures used in representation elections. See, e.g., *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir.1970), cert. denied, 401 U.S. 954, 91 S.Ct. 966, 28 L.Ed.2d 237 (1971). However, we find that application of the vote and impound procedure in this case denied the employees their right to make an informed choice of a collective bargaining representative. Although we are reluctant to further prolong these already protracted representation proceedings, we agree with respondent that *Hamilton* controls this case. While the post-election modification of the bargaining unit was not as numerically significant as in either *Hamilton*, 743 F.2d at 140 (unit reduced by more than half), or *Lorimar*, 771 F.2d at 1302 (unit reduced by more than one-third), the size of the modification is not the only relevant consideration. But cf. Task Force Report at 14 (employer members would have limited vote and impound procedures to eligibility issues involving less than 10% of the voters). The court in *Hamilton* relied on changes in the character and scope of the bargaining unit, 743 F.2d at 140–141; see also *Lorimar*, 771 F.2d at 1302, as well as the closeness of the election results. 743 F.2d at 141 (change of one vote would have altered the result); see also *Lorimar*, 771 F.2d at 1302 (same). In this case, the character and scope of the unit were significantly altered by the Board's post-election modification. The unit changed from one which included all of the faculty at the New York campus to one composed of a distinct, albeit large, subdivision within the faculty. The full-time faculty employees excluded from the unit, while comparatively few in number, are particularly important to the school and carry great weight in all matters affecting it. This is because the full-time faculty members, unlike the part-timers, are committed primarily to their academic careers.

The Board argues that the part-time employees would not have voted differently if they had known the eventual scope of the unit. However, we fear that "[t]he realities of the workplace do not warrant such a conclusion." *Hamilton,* 743 F.2d at 141. In *Hamilton,* the court found several reasons why the employees might have changed their votes: insufficient strength in the reduced unit; differences between the job classifications included in the unit; desire for a unified workforce; and concern over interpersonal friction in the smaller unit. Id.; see also *Lorimar,* 771 F.2d at 1302 (citing similar considerations). We be-

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lieve that some of these concerns, as well as others, might have caused the Parsons employees to vote differently, had they known that they were voting on a unit of part-time instructors only. In particular, the part-time instructors might have feared insufficient strength in a unit comprising less than all of the faculty or they might have desired Union representation only for a unified workforce. It is also possible that some of the part-time faculty members intended to rely on the full-timers to assume responsibility for a significant part of the Union work, since the full-time faculty have more time to devote to the Union and also have more of a stake in improving the terms and conditions of employment. As in both *Hamilton* and *Lorimar,* the election was a very close one. If these concerns moved only four of the 99 part-time instructors who voted for the Union to change their votes, the outcome of the election would have been different.

The Task Force that recommended the vote and impound procedure recognized that it would present certain problems where the unit determination was the issue in dispute. Task Force Report at 12. However, as we noted earlier, the Task Force also indicated that it was

> confident the Board could develop a balloting process under which the election could be held, whatever the eventual decision might be on the appropriate unit. An analogue is the *Globe* [Machine & Stamping Co., 3 N.L.R.B. 294 (1937)] election procedure which has been used successfully since 1937.

Task Force Report at 12–13. The result here could have been avoided if the Board had acted on this suggestion and developed a balloting process that informed the employees of the alternative bargaining units and allowed them to vote for or against union representation in each unit. See *Hamilton,* 743 F.2d at 141 (criticizing failure to develop procedure); see also *Lorimar,* 771 F.2d at 1302 (failure to use two ballots deprived voters of their right to vote for the unit later certified by the Board). The Board could have prepared a revised notice of election and a second ballot without unduly delaying the election in this case. If each part-time instructor had voted on both units, the Board could then have accurately determined whether the part-time unit ultimately certified represented the informed choice of a majority of the part-time faculty. The Board's failure to adopt such procedures has produced the delay section 102.67(b) was designed to avoid.

IV.

The Board also asks us to rule on its decision establishing a bargaining unit limited to part-time faculty. It argues that the part-time instructors at Parsons share a sufficient community of interests. In support of this conclusion, the Board contends that the record amply demonstrates the part-timers' shared interests. All of the part-time faculty are hired because of their special expertise and professional experience, have identical employment contracts, are paid according to the same method of compensation and teach under similar conditions. The Board maintains that its decision is not inconsistent with Goddard College, 216 N.L.R.B. 457, 459 (1975) (record failed to establish that part-time faculty shared a community of interest) or other board precedents. Parsons, on the other hand, urges us not to reach this issue. If we reach the merits, however, it points to a stipulation of facts, which, using language drawn from Goddard College, supra, describes the part-time faculty as a "diverse and heterogenous group of people," whose primary interest, source of income and commitment are to their professional careers outside Parsons. It contends that the Board's unit determination was arbitrary, unreasonable and not supported by substantial evidence.

While Parsons is correct that the procedural posture of this case does not compel us to decide the propriety of the

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Board's unit determination, we deem it appropriate to do so to avoid further delay. See *Hamilton,* 743 F.2d at 139–40 (finding unit determination appropriate); *Lorimar,* 771 F.2d at 1298–1300 (same). We note that "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed,' " *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805, 96 S.Ct. 1843, 1844, 48 L.Ed.2d 382 (1976) (per curiam) (quoting *Packard Motor Co. v. NLRB,* 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947)). Accordingly, our scope of review of the Board's unit determination is a narrow one, see, e.g., *Mercy Hospital of Buffalo v. NLRB,* 730 F.2d 75, 77 (2d Cir.1984); we will not disturb the determination unless we find it to be arbitrary or not supported by substantial evidence. Id. at 78. Moreover, "the unit approved by the Board need not be the *most* appropriate unit, only *an* appropriate unit." *NLRB v. Hudson River Aggregates, Inc.,* 639 F.2d 865, 871 (2d Cir.1981) (emphasis in original). Based on the Board's findings, we conclude that the unit ultimately selected by the Board is an appropriate bargaining unit.

For the reasons stated above, the case is remanded to the Board to conduct a representation election in a unit composed of the part-time faculty.[2]

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[2] See *Lorimar,* 771 F.2d at 1302 n. 3 ("Remand for a new election is appropriate despite the passage of time and accompanying employee turnover.").

Walter J. Slaughter v. NLRB

794 F.2d 120 (3d Cir.), June 27, 1986—274 NLRB 1104

On petition to review Board Order

Before HIGGINBOTHAM and STAPLETON, Circuit Judges, and TEITELBAUM, District Judge *

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A. LEON HIGGINBOTHAM, JR., Circuit Judge: This is a petition for review of a supplemental decision and order of the National Labor Relations Board ("the Board") dismissing Petitioner Walter J. Slaughter's unfair labor practice complaint. 274 N.L.R.B. No. 176 (1985). For the reasons that follow, we will grant the petition for review and remand for further proceedings.

I.

On July 20, 1982, the Board issued a decision and order in this matter finding that Intervenor E.I. DuPont deNemours & Co. ("DuPont") violated § 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1) (1982),[1] by discharging Petitioner from his job in a nonunion plant for refusing to submit to an investigatory interview with his supervisor without a fellow employee present, where Petitioner reasonably believed that the interview might result in disciplinary action. The underlying facts are recounted in detail in our initial opinion in this matter. *E.I. DuPont deNemours & Co. (Chestnut Run) v. N.L.R.B.,* 724 F.2d 1061, 1063–64 (3d Cir.1983) (*"DuPont I"*), *vacated,* 733 F.2d 296 (3d Cir.1984) (*"DuPont II"*). The Board's original unfair labor practice finding was based on its conclusion that the rule of *N.L.R.B. v. J. Weingarten, Inc.,* 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975)—holding that § 7 of the Act protected an employee's right to refuse to submit to an investigatory interview without the presence of a union representative—also applied in a nonunion setting by virtue of § 7's general protection of "other concerted activities for the purpose of . . . mutual aid or protection." 262 N.L.R.B. 1028 (1982) (following *Materials Research Corp.,* 262 N.L.R.B. 1010 (1982)). We held that the Board's interpretation of the Act was permissible, 724 F.2d at 1063, and accordingly enforced its order.

On February 17, 1984, while DuPont's petition for rehearing was pending, the Board moved this court to vacate *DuPont I* and remand the matter to the Board for further consideration. The Board stated that it had another case pending that presented similar issues, that it was giving additional thought to the questions involved, and that

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* Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

[1] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:

§ 7, in turn, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

> the public interest and the interests of the parties would be better served by its considering . . . this case together with the other case posing related questions, to issue decisions comprehensively addressing the questions raised in this
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> area, thereby allowing for more effective judicial review.

DuPont II, 733 F.2d at 297. "Mindful of the deference owed the Board's special expertise in interpreting the Act," we determined that "our discretion [was] best exercised by postponing further judicial involvement until we have been informed of a comprehensive adjudication by the NLRB." 733 F.2d at 297–98 (footnotes omitted). Accordingly, we vacated *DuPont I* and remanded the matter to the Board for reconsideration.

In *Sears, Roebuck and Co.*, 274 N.L.R.B. No. 55 (1985), the Board overruled *Materials Research*, holding that its extension of the Supreme Court's *Weingarten* decision to nonunion employees was erroneous. 274 N.L.R.B. No. 55, at 2. Following *Sears*, the Board ruled on remand that Petitioner's refusal to submit to an investigatory interview without a *Weingarten* representative [2] was not protected concerted activity and dismissed his unfair labor practice complaint. 274 N.L.R.B. No. 176, at 3–4.

II.

In *Sears* a majority of the Board held that the Act *compels* the conclusion that nonunion employees do not enjoy the rights recognized in the *Weingarten* decision. 274 N.L.R.B. No. 55, at 3 n. 5. The reasoning of *Sears* was incorporated by reference into the Board's decision in this case. Thus, if we are to sustain the Board's action, it must be on the basis that no other interpretation of the Act is permissible, regardless of whether their order could be sustained on other grounds. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943); 3 K. Davis, *Administrative Law Treatise* § 14.29 (2d ed. 1980). Because we adhere to this Court's earlier view, stated in *DuPont I*, that *Materials Research* represented a permissible interpretation of the Act, we cannot sustain the Board's action.

A.

In *Weingarten, supra*, the Supreme Court held permissible the Board's construction of § 7 as creating a statutory right in an employee to refuse to submit without union representation to an interview that he reasonably fears may result in his being disciplined. 420 U.S. at 260, 95 S.Ct. at 965. The Court described the "contours and limits of the statutory right," 420 U.S. at 256, 95 S.Ct. at 963, as defined by the Board in a series of decisions:

> *First*, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. *Id.*
>
> *Second*, the right arises only in situations where the employee requests representation. 420 U.S. at 257 [95 S.Ct. at 963].
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> *Third*, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. *Id.* (footnote omitted).
>
> *Fourth*, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. 420 U.S. at 258 [95 S.Ct. at 964].
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> *Fifth*, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. 420 U.S. at 259 [95 S.Ct. at 964].

The Court identified a number of factors supporting the Board's interpretation.

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[2] There are some indications in the record that Petitioner desired a witness, as opposed to a representative. Counsel for Petitioner, however, stated unequivocably at oral argument that what Petitioner sought was a *Weingarten* representative, as the Board so found, and our analysis proceeds on that factual premise.

First, it noted that the action of an employee seeking representation at an investigatory interview clearly constitutes "concerted activity" for "mutual aid or protection," even though the employee alone may have a stake in the outcome, since the union representative whose participation is sought would help safeguard the interests of the entire bargaining unit by exercising vigilance over the fairness and uniformity of the employer's disciplinary practices. 420 U.S. at 260–61, 95 S.Ct. at 965. The Court also suggested that the representative's presence provides an assurance to other members of the bargaining unit that they could also obtain a representative's aid and protection if called upon to attend a similar interview. 420 U.S. at 261, 95 S.Ct. at 965. The Court further observed:

> The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U.S.C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *Ibid.* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 [85 S.Ct. 955, 966, 13 L.Ed.2d 855] (1965).

420 U.S. at 261–62, 95 S.Ct. at 966. The Court also found that the presence of a representative could assist a "fearful and inarticulate" employee to relate accurately the incident being investigated, and that the representative might be able, through informal discussion and persuasion conducted at the threshold, to discourage unjustified grievances. 420 U.S. at 262–63, 95 S.Ct. at 965.

In *Materials Research, supra,* the Board considered whether the *Weingarten* rule applied in a nonunion setting:

> The decision in *Weingarten,* of course, is framed in terms of the right to the assistance of a "union representative" at an investigatory interview. That terminology, however, was utilized because it accurately depicted the specific fact pattern presented, i.e., an employee in an organized facility requesting the assistance of her union steward, and not because the Court intended to limit the right recognized in *Weingarten* only to unionized employees. This is readily apparent from the *Weingarten* decision itself. The Court emphasized that the right to representation is derived from the Section 7 protection afforded to concerted activity for mutual aid or protection, not from a union's right pursuant to Section 9 to act as an employee's exclusive representative for the purpose of collective bargaining. . . . Moreover, the Court carefully differentiated the role assigned to a "representative" at an investigatory interview from that of a collective-bargaining representative acting in its representative capacity. Indeed, the term "representative" in this context is quite limited in that the role is described as acting as an assistant present "to assist the employee, and . . . to clarify the facts or suggest other employees who may have knowledge of them." [420 U.S. at 260, 95 S.Ct. at 965.] In addition, the Court made it clear that the employer is free to carry on its inquiry without interviewing the employee who requests assistance, thereby leaving the employee the choice of attending the interview unaccompanied, or having no interview and foregoing any benefits that might be derived from one. Finally, to dispel any possible remaining doubt about the matter, the Court stressed that the employer has no obligation to bargain with any such "representative" who may be permitted to attend an investigatory interview.

262 N.L.R.B. at 1012 (footnotes omitted).

The Board was also of the view that nonunion employees may have an even *greater* need for *Weingarten* representation than union employees, since they do not normally have the benefits of a collective bargaining agreement or established grievance procedures. 262 N.L.R.B. at 1014. The Board rejected the contention that the *Weingarten* right was not useful where the employee could not avail himself of an experienced shop steward:

> [T]he type of assistance that any individual can provide in the situation outlined in *Weingarten* is limited and can certainly be performed by a fellow employee. A coworker can assist by eliciting favorable facts and even, perhaps, save the employer production time by helping to get to the bottom of the problem that occasioned the interview. Certainly, that an employee is not part of a represented unit does not alter the real possibility that a single employee, confronted by an employer investigating conduct which may result in discipline, may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors, as was noted in *Weingarten*. Indeed, without the benefit of a grievance-arbitration procedure to check unjust or arbitrary conduct, an employee in an unorganized plant may experience even greater apprehension than one in an organized plant and need the moral support of a sympathetic fellow employee. Moreover, a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily.

262 N.L.R.B. at 1015.

When Petitioner's unfair labor practice complaint was first before it, the Board simply incorporated the *Materials Research* holding—decided that same day—without additional analysis. 262 N.L.R.B. 1028, 1029 n. 2 (1982). On cross-petitions for review and enforcement, this court, echoing the reasoning of *Materials Research*, concluded that "the logic and reasoning of *Weingarten* carry equal force in the non-union context." *DuPont I*, 724 F.2d at 1065.[3] As noted previously, the panel subsequently vacated this opinion at the Board's request to permit reconsideration of the issues involved. *DuPont II*, *supra*. That reconsideration took place in the *Sears* case, *supra*, in which a majority of the Board, as then constituted,[4] overruled *Materials Research*, holding that the Act *compelled* the conclusion that "*Weingarten* rights are inapplicable where . . . there is no certified or recognized union." 274 N.L.R.B. No. 55, at 2. On the basis of this turnaround in *Sears*, the Board dismissed Petitioner's complaint on remand.

B.

The limited role of the federal courts in the administration of the Act is well-established. The Board has the primary responsibility for applying the general provisions of the Act to the complexities of industrial life. *Pattern Makers' League v. N.L.R.B.*, —— U.S. ——, 105 S.Ct. 3064, 3075, 87 L.Ed.2d 68 (1985). We do not sit to substitute our wisdom on the subject of labor relations for that of the Board, *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979), nor to ensure "academic consistency" in its interpretation of the Act, *DuPont II*, 733 F.2d at 297. Rather, we review its interpretations of the Act only to determine their reasonableness, *N.L.R.B. v. City Disposal Systems*, 465 U.S. 822, 104 S.Ct. 1505, 1510, 79 L.Ed.2d 839 (1984). Interpretations of the Act that are inconsistent with the statutory mandate, that frustrate the congressional policy, or that rest on an erroneous legal foundation, however, must be set aside. *N.L.R.B. v. Brown*, 380 U.S. 278, 291–92, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965).

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In recognition of these principles, in *DuPont I* we sustained the Board's former view that § 7 of the Act gave nonunion employees the right to a *Weingarten* representative, despite the reservations of at least one member of the majority regarding the wisdom of such a practice.[5] In further recognition of the deference owed the Board, the panel vacated *DuPont I* at the Board's request, to permit it to reconsider the issues involved. Had the Board, on remand, determined that practical considerations such as those noted by Judge Adams in *DuPont I* led it to conclude that § 7 *should* not be interpreted as extending *Weingarten* rights to nonunion employees, that determination, too, would be entitled to considerable deference, and we would have a very different case before us. But see *Finkin,* Labor Law by Boz—A Theory of Myers Industries, Inc., Sears, Roebuck and Co., *and* Bird Engineering, 71 Iowa L.Rev. 155 (1985); Note, *Extending* Weingarten *Rights to Nonunion Employees,* 86 Colum.L.Rev. 618 (1986). Instead, the Board went much further and held—in direct contradiction to *DuPont I*—that *Materials Research* reflected an *impermissible* (*i.e.,* unreasonable) interpretation of the Act, and that the contrary result was *compelled.*

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[3] One member of the *DuPont I* majority, Judge Adams, did note that he had some reservations about the wisdom of applying *Weingarten* to nonunion settings, in particular that difficulties might arise because a nonunion coworker representative "lacks the objectivity and expertise of a union steward and because such non-union representatives do not operate under the constraints imposed by an established labor organization. . . . Nevertheless, in light of the Supreme Court's opinion in *Weingarten*, Judge Adams [was] unprepared to hold, despite his concerns, that the Board's decision here is inconsistent with the Act." 724 F.2d at 1065 n. 5.

[4] The *Materials Research* majority consisted of Members Fanning, Zimmerman, and Jenkins. Chairman Van de Water and Member Hunter dissented. By the time of *Sears*, only Hunter remained on the Board.

[5] Judge Adams and District Judge Ackerman, sitting by designation, formed the *DuPont I* majority. Judge Garth dissented on other grounds.

It is the Board's duty to choose amongst permissible interpretations of the Act to best effectuate its overarching goals. *See Pattern Makers' League,* 105 S.Ct. at 3076–77 (White, J., concurring). Our role is to mark out the boundaries of what the Act permits. *See Prill v. N.L.R.B.,* 755 F.2d 941, 942 (D.C.Cir.), *cert. denied sub nom., Meyers Industries v. Prill,* —— U.S. ——, 106 S.Ct. 313, 352, 188 L.Ed.2d 294 (1985). In *DuPont I* we held that *Materials Research* was within those boundaries. Though that opinion was subsequently vacated and is therefore not strictly binding on this panel, we have found nothing in the Board's opinion in *Sears,* or in its brief and argument before us now, that would lead us to conclude that our earlier view of what the Act permits was erroneous.

The overruling of *Materials Research* took place with a minimum of fanfare, the *Sears* majority simply incorporating the *Materials Research* dissent of then-Chairman Van de Water and making a few "additional observations." 274 N.L.R.B. No. 55, at 3. We discern two distinct, yet converging lines of argument behind the Board's current position that *Materials Research* reflected an impermissible interpretation of the Act. First, they argue that *Weingarten* was premised on the right of *organized* employees to be free from "dealing with" their employer individually regarding the terms and conditions of employment, and thus is inapplicable here. Second, the Board contends that § 7 cannot be an independent source of such a right in unorganized employees, because that would be inconsistent with the principle of exclusivity embodied in § 9(a).[6]

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The Board contends, following Van de Water's *Materials Research* dissent, that the right to representation at an investigatory interview was, historically and analytically, rooted in § 8(a)(5) of the Act[7] rather than § 7, in recognition that "the unlawful interference caused by an employer's refusal of a request for a representative is the frustration of an employee's right to be free from being required to deal *individually* with the employer in a situation where the established collective-bargaining relationship mandates a right of employees to require that the employer deal with the employee's selected collective-bargaining representative." 262 N.L.R.B. at 1017 (Van de Water, Ch., dissenting) (emphasis in original). Van de Water further contended that extension of the *Weingarten* rule, illogically, gave nonunion employees a right to representation in investigatory interviews that they do not enjoy in "other employer-employee confrontations relating to terms and conditions of employment." 262 N.L.R.B. at 1019. In a persuasive response, the *Materials Research* majority stated that Van de Water erroneously relied on a pre-*Weingarten* case, *Texaco, Inc., Houston Producing Division,* 168 N.L.R.B. 361 (1967), *enforcement denied,* 408 F.2d 142 (5th Cir.1969), involving the right to union representation in an actual *disciplinary* meeting which, the Board held, affected terms and conditions of employment and thereby implicated the right to be represented by one's collective bargaining agent. The Board viewed investigatory interviews, on the other hand, "as involving only a potential for action adverse to terms and conditions of employment and, therefore, lacking any matter to which a bargaining obligation attached." 262 N.L.R.B. at 1013. *See also Weingarten,* 420 U.S. at 259–60, 95 S.Ct. at 964 ("The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview."). Thus, in the case of investigatory interviews, the employer need not bargain, and can even bypass the interview altogether. Nor does the fact that the right is specifically limited to situations where there is a reasonable apprehension of discipline demonstrate, as the Board suggests, that the employee's right is linked to the employer's bargaining obligation. That requirement was merely intended to ensure that the right would not apply "to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." *Weingarten,* 420 U.S. at 257–58, 95 S.Ct. at 964 (quoting *Quality Mfg. Co.,* 195 N.L.R.B. 197, 199 (1972), *enforcement denied in part,* 481 F.2d 1018 (4th Cir.1973), *rev'd sub nom., ILGWU v. Quality Mfg. Co.,* 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed.2d 189 (1975)). We think it is plain beyond cavil that the *Weingarten* right is rooted in § 7's protection of concerted activity, not § 8(a)(5)'s guarantee of the right to bargain collectively.

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[6] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment. 29 U.S.C. § 159(a).

[7] It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title. 29 U.S.C. § 158(a)(5).

The Board also relies on *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975). That case involved a group of minority employees who confronted their employers directly on race discrimination issues, rather than utilizing the grievance mechanism created by their union-negotiated collective bargaining agreement. The employees argued that they were engaged in protected concerted activity within the meaning of § 7. The Court held that such activity was proscribed under § 9(a), because it constituted an attempt to bargain with the employer over the terms and conditions of employment as they affected racial minorities. The Court reasoned that the exclusive representation principle contained in § 9(a) and the principle of majority rule central to the Act's policy of fostering collective bargaining left no room for separate bargaining by dissident employees in a unionized workplace, but rather "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." 420 U.S. at 63, 95 S.Ct. at 985 (quoting *N.L.R.B. v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967)). A contrary conclusion would undermine "the orderly collective-bargaining process contemplated by the NLRA," as well as the duly elected union's "legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." 420 U.S. at 69–70, 95 S.Ct. at 988. Because the minority caucus' attempt to bargain separately undermined the union's status as the exclusive bargaining representative under § 9(a), it was not a legitimate and protected exercise of § 7 rights.

The Board describes *Emporium Capwell* as standing for the broad proposition that § 7 rights are circumscribed by § 9(a), and contends that the right asserted by Petitioner conflicts with § 9(a)'s exclusivity principle. The Board's analysis misconstrues *Emporium Capwell.* That decision was grounded in the need to protect the union's § 9(a) status as the majority-elected, exclusive bargaining representative, so to assure orderly collective bargaining. It cannot, therefore, be read to hold that the § 9(a) exclusive representation rule limits the § 7 rights of non-unionized employees. Section 9(a) on its face simply defines the status and role of a union once recognized or certified as the collective bargaining representative pursuant to the wishes of a majority of bargaining unit members. *Emporium Capwell* is thus irrelevant in the setting where there is no union, no exclusive bargaining representative, and no collective bargaining. This is highlighted by the fact that, as discussed above, *Weingarten* expressly held that the employer has no duty to bargain with the union representative in attendance at an investigatory interview. Board Member Hunter made this observation in his separate opinion in *Sears,*[8] stating "I am unable to understand the majority's reasoning as to how *Emporium Capwell* has any relevancy to the issue here, which, as I have noted, has nothing to do with collective bargaining." 274 N.L.R.B. No. 55, at 16.

The Board's two lines of argument begin to merge when it contends that, although there is no duty to "bargain" with a union representative at an investigatory interview, there is a duty, based on *Weingarten,* to "deal" with the representative by allowing him or her to speak, to make proposals and suggestions or to offer alternative forms of discipline. Since such functions constitute "dealing with" the employer, the argument continues, and "dealing with" an employer is a primary indicium of labor organization status as well as a traditional union function, placing a *Weingarten* representative in a non-union setting means requiring the employer to recognize and deal with the equivalent of a union representative, contrary to the Act's exclusivity principle. 274 N.L.R.B. No. 55, at 7. This, however, blurs the Act's distinction between "dealing" and "bargaining." One commentator has persuasively refuted this argument:

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[8] Member Hunter concurred in the Board's result, but found the denial of *Weingarten* rights to non-union workers to be a reasonable and permissible interpretation of the Act, rather than a compulsory one. 274 N.L.R.B. No. 55, at 9.

> The entire argument rests upon a non sequitur. A statutory labor organization is indeed one that "deals with" employers, not one that "bargains" with employers. This broader formulation was chosen to give the greatest possible reach to the Act's prohibition of company unionism. And the majority is indeed correct in observing that a single individual can qualify as a statutory exclusive bargaining representative under section
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> 9(a). But the system of exclusive representation, which the majority claims would be derogated from by the extension of *Weingarten* to the unorganized, is expressly one of collective bargaining, not of dealing. Accordingly, if, as the Supreme Court held, the employer has no statutory duty to bargain with the *Weingarten* representative, the function of that representative in the unorganized setting cannot be in derogation of the exclusivity principle or any other important statutory policy. And for that reason, just as Member Hunter's concurrence seemed to recognize, *Emporium Capwell* is spectacularly irrelevant to the question presented.

Finkin, *supra,* 71 Iowa L.Rev. at 182 (footnotes omitted).

We now reaffirm our previous view that under the reasoning of *Weingarten* it is at least permissible to interpret § 7 as guaranteeing union members and unorganized employees alike the right to a representative at investigatory interviews. If that interpretation is permissible under the Act, it follows that the directly contradictory view expressed in *Sears* is not compelled. Because the Board's dismissal of Petitioner's complaint was based on the erroneous premise that such a result was compelled by the Act, we must under the *Chenery* rule grant the petition for review and remand to the Board. Accordingly, we have no occasion to consider in the first instance whether the interpretation of the Act announced in *Sears* is a permissible one, or whether the Board's action might be sustained on that alternative ground. *Cf. Ewing v. N.L.R.B.,* 768 F.2d 51, 54–56 (2d Cir.1985); *Prill v. N.L.R.B.,* 755 F.2d at 942, 956–57.

> Where the agency has rested its decision on an unsustainable reason, the court should generally reverse and remand even though it discerns a possibility, even a strong one, that by another course of reasoning the agency might come to the same result. . . . [T]he process, even though it may appear wasteful as regards the case at hand, is important for the proper execution of the legislative will, since proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not.

Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 Duke L.J. 197, 222–23.

CONCLUSION

For the foregoing reasons, the petition for review will be granted and the case will be remanded to the Board for further proceedings consistent with this opinion.

NLRB v. Hawaiian Flour Mill, Inc.

792 F.2d 1459 (9th Cir.), June 30, 1986–274 NLRB 1108

On petition to enforce Board Order

Before FERGUSON, CANBY, and HALL, Circuit Judges

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FERGUSON, Circuit Judge: The National Labor Relations Board (Board) seeks enforcement of its March 25, 1985 order requiring Hawaiian Flour Mills, Inc. ("HFM") to bargain collectively with the International Longshoremen's and Warehousemen's Union Local 142 ("Union"). The Board found that HFM had committed an unfair labor practice in violation of the National Labor Relations Act ("NLRA") §§ 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1). HFM contends that the Board improperly certified the Union because two supervisors' prounion conduct coerced the employees, thus denying them their freedom of choice in the election. We enforce the Board's order.

I.

Hawaiian Flour Mills manufactures and warehouses flour for commercial and retail bakeries, commercial kitchens, and restaurants in Honolulu. HFM is comprised of milling, warehousing, delivery, and packing divisions as well as export, quality control, and administrative departments. There are also support services in sales, purchasing, and maintenance. HFM has thirty-three hourly wage employees in Honolulu.

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Until the 1981 election, the company was not unionized.

In June 1981, Gordon Pascal, superintendent of the HFM warehouse, telephoned Calvin Werner, a Union representative, and told him "we were interested in the Union." Pascal did not disclose HFM's identity. Werner told Pascal that he could not talk with Pascal because he was part of management. Two weeks later, Rudy Akina, an HFM employee, called the Union to begin an organization drive. Among the employees who handed out union authorization cards was Thomas Reis, head miller at the plant. Reis handed out five authorization cards and signed one himself. The Union filed a petition on July 22, 1981, seeking certification as the exclusive bargaining unit representative at HFM.[1]

Both the Union and HFM campaigned for their respective positions. The company president, Lealand Blackburn, held management meetings to plan the company's antiunion campaign. Pascal participated in these, and assisted in carrying out the company's plans. The parties dispute whether Reis participated in any of the meetings. Until the week before the election, Reis actively supported the Union. After speaking with Blackburn, Reis changed his position, but he testified that some employees thought he remained pro-union throughout the campaign.

The Board conducted a secret ballot election on September 10, 1981. Before the election, both parties stipulated that Pascal was a supervisor within the meaning of section 2(a)) of the NLRA, 29 U.S.C. § 152(11). Pascal did not vote in the election. The parties did not determine Reis' status prior to the election. Reis voted in the election. Of thirty-three employees, seventeen voted for and fourteen voted against the Union. Two ballots, including Reis', were challenged. Both sides agreed that these ballots would not affect the outcome of the election.

On September 16, 1981, HFM filed a timely objection to the election, alleging that the Union engaged in improper conduct, destroying the "laboratory conditions" necessary for a free election. HFM alleged that Pascal's and Reis' supervisory prounion conduct interfered with the employees' free choice in the election.

After hearings in February, March, and June 1982, the hearing officer concluded that both Reis and Pascal were statutory supervisors during the campaign but that their activities were not coercive. He found that Pascal was a major supervisor, who supported the company's antiunion campaign by speaking at meetings, informing management of employees' positions on the union issue, and circulating an anti-union petition. He also found that Pascal asked several "employees their opinion about the union and may have stated he was in favor of a union."[2] Based on this evidence the hearing officer concluded "that Pascal did not sponsor or campaign on behalf of the union" during the critical period. The hearing officer found that Reis was a "minor" supervisor who actively campaigned for the Union until a week before the election when he switched to an antiunion position. The hearing officer concluded that there was no "reasonable basis for believing" that Reis' or Pascal's conduct impaired the employees' freedom of choice.

HFM timely objected to the hearing officer's findings. In May 1984, the Board adopted the hearing officer's findings but clarified Reis' status as a supervisor. The Board certified the Union as the exclusive agent of the bargaining unit employees.

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[1] The proposed unit was composed of "[a]ll full-time and part-time warehouse, maintenance, utility and sanitation employees, packers, drivers, and millers of the Employer . . .; excluding employees, guards and watchpersons as defined in the Act."

[2] He did not credit the testimony of two employees, Williams and Tautillo, that Pascal forced one of them to sign a paper to bring in the Union and told the other that "the 'boys' wanted the union and asked him if he wanted to join, also, that the union may be a good thing."

In October 1984, when HFM refused to bargain, the Union filed unfair labor practice charges with the Board's General Counsel. The General Counsel issued a complaint alleging that HFM refused to furnish requested information and refused to bargain, in violation of sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1). In January 1985, the General Counsel moved for summary judgment. The Board issued its decision and order on March 25, 1985, granting the General Counsel's motion for summary judgment. Finding "no merit to the Respondent's defenses based on improper certification of the Union," it held that HFM committed an unfair labor practice by refusing to bargain with the Union. HFM continued to refuse to bargain in order to obtain review of the Board's order by this court. *See NLRB v. Belcor, Inc.,* 652 F.2d 856, 858 (9th Cir.1981).

II.

A Board order must be enforced if the Board correctly applied the law and its findings of fact are supported by substantial evidence on the record viewed as a whole. *NLRB v. Island Film Processing Co.,* 784 F.2d 1446, 1450 (9th Cir.1986). The Board has broad discretion to establish safeguards and procedures necessary to conduct representative elections. *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330–331, 67 S.Ct. 324, 327–328, 91 L.Ed. 322 (1946); *Island Film,* 784 F.2d at 1450.

Supervisory participation in a union campaign will not per se invalidate an election. *Wright Memorial Hospital v. NLRB,* 771 F.2d 400, 404 (8th Cir.1985). However, supervisory support for a union organizing campaign will invalidate the union's victory when it " 'reasonably tend[s]' to have a coercive effect on or [is] 'likely to impair' an employee's choice." *Island Film,* 784 F.2d at 1451 (quoting *ITT Lighting Fixtures v. NLRB,* 658 F.2d 934, 937 (1981), *appeal after remand,* 712 F.2d 40 (2d Cir.1983), *cert. denied,* 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 833 (1984)).

When "the supervisors' conduct create[s] an impression that the employer favor[s] the union" or when the "supervisors' conduct create[s] a fear of future retaliation," an election must be invalidated. *Island Film,* 784 F.2d at 1452 (citation omitted). Fear of retaliation is created when a prounion supervisor's solicitation of employees " 'contain[s] the seeds of potential reprisal, punishment, or intimidation.' " *Id.* (quoting *Global Marine Development, Inc. v. NLRB,* 528 F.2d 92, 95 (9th Cir.1975), *cert. denied,* 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976)). In determining whether the supervisor's conduct is impermissible solicitation, we consider both " 'the extent of the supervisor's authority and the extent of his pro-union activity.' " *Id.* at 1451 (quoting *ITT Lighting Fixtures v. NLRB,* 712 F.2d 40, 43–44 (2d Cir.1983), *cert. denied,* 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 833 (1984)). Evidence of actual threats are not required; implied threats of retaliation are sufficient. *Id.*

HFM argues that the Board's order should be overturned because the Board incorrectly applied the law when it labeled the supervisors major and minor. HFM does not claim that the employees thought the supervisors' conduct represented the employers' position, but rather that the conduct of Pascal and Reis reasonably tended to coerce employees into voting for the Union.

The Board adopted the hearing officer's report labeling Reis as a minor supervisor and Pascal as a major one. This typology is often used as shorthand to explain the extent of a supervisor's authority and, thus, his coercive ability. However, characterizing supervisors as major or minor has been subject to considerable criticism. *See Island Film,* 784 F.2d at 1451–52 (determination of effect of supervisor's conduct cannot be made by simply labeling a supervisor as major or minor) (citing *ITT Lighting Fixtures,* 712 F.2d at 43–44); *Turner's Express, Inc. v. NLRB,* 456 F.2d 289, 291 (4th Cir.1972) (such designations not supported by the law). *But see Butler-Johnson Corp. v. NLRB,* 608 F.2d 1303, 1306 (9th Cir.1979) (statements made by low-level supervisors "are more likely to express individual views and less likely to influence employee's decisions than statements by high-level officials") (quotation omitted). Certainly the characterization of a supervisor as "minor" cannot save an election when that supervisor has the power to punish or reward, and acts so that the threat of exercising that power reasonably tends to coerce employees in their voting. *See Island Film,* 784 F.2d at 1452. On the other hand, we conclude that the Board's classification of a supervisor as "minor" does not invalidate the Board's decision upholding an election, so long as the Board properly focused on "the extent of the supervisor's authority and the extent of his pro-union activity" in making its findings of noncoercion, and so long as substantial evidence in the record supports the Board's findings. *ITT Lighting Fixtures,* 712 F.2d at 44. Here the Board carefully evaluated the actual extent of the authority of Pascal and Reis, as well as their conduct, in determining that neither acted in a manner likely to coerce employees in their vote.

The Board found that while Pascal had extensive supervisory authority, he did not engage in prounion conduct during the election period. HFM disputes the Board's findings and challenges the hearing officer's decision to discredit the testimony of Williams and Tautillo. The hearing officer's conclusions with regard to Pascal are supported by substantial evidence. There is no dispute that Pascal called Werner to discuss the Union, and that Pascal discussed the Union with at least two other employees, including Reis, before the election. While this conduct is relevant, *Id.* at 1452 n. 8, it is not sufficient, in and of itself, to invalidate the election.

HFM also urges us to find that Reis had "plenary authority within the mill" and that his prounion conduct had a coercive effect on employees. In support of its contention that Reis had extensive authority, HFM cites testimony that Reis effectively recommended hiring and terminating employees, that he transferred employees, and that he recommended pay increases within prearranged schedules. HFM also cites Reis' authority to issue written warnings and to evaluate employees at the end of their probation. HFM claims that training new millers was "almost exclusively the responsibility of Reis" and that his duties included scheduling fumigation, and supervising employees during it. Reis described himself as generally "ramrodding" the operation of the mill.

We conclude that the Board's findings regarding Reis' supervisory authority and noncoercive conduct are supported by substantial evidence on the record. While we might draw different conclusions from the testimony, "resolving conflicting interpretations of particular facts is not within the province of this court, for the inferences to be drawn from the evidence are matters for the Trial Examiner and the Board." *International Union, UAW v. NLRB,* 392 F.2d 801, 806 (D.C.Cir.1967), *cert. denied,* 392 U.S. 906, 88 S.Ct. 2058, 20 L.Ed.2d 1364 (1968).

The Board found that Reis had limited supervisory authority. It considered not only Reis' power to punish but also to reward employees. *See Island Film,* 784 F.2d at 1451–52 (citation omitted). HFM did not uniformly follow his recommendations, he did not attend management meetings or participate in management group decisionmaking, he punched a time clock like other employees, and he received an hourly wage and the same fringe benefits as other nonsupervisory employees. The timing and amount of pay increases for miller trainees were fixed according to a predetermined schedule that Reis had no part in setting. Reis' supervisor, not Reis, approved vacations, overtime, and time cards. We agree that substantial evidence on the record supports the Board's finding that Reis had minimal authority over the employees.

Substantial evidence on the record also supports the Board's conclusion that Reis' prounion conduct was not coercive. Reis signed an authorization card and gave out five others. He testified that when he gave out the cards he told the employees to "sign them" and that one or two did. A supervisor's signing and giving out authorization cards does not invalidate an election. *See Wright Memorial Hospital,* 771 F.2d at 405; *Global Marine,* 528 F.2d at 94–95. In context, Reis' statement to employees that they should sign the cards was not the kind of pressure that could reasonably tend to coerce employees in their freedom of choice. *See Wright Memorial Hospital,* 771 F.2d at 405; *cf. Turner's Express,* 456 F.2d at 292 (supervisors' persistent interrogations of employees about whether they intended to sign cards and warnings about the dangers of not signing, constituted coercion).

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Reis also talked with employees after softball games. In those discussions, Reis told employees why he favored the Union and what he thought it could do for them. He testified that he tried to convince "borderline" employees to vote for the Union. He denied acting as the Union's agent but, rather, described his statements as his "personal views." Reis also organized a meeting at the plant about a week before the election where he intended to discuss the pros and cons of the Union, but he admitted that during the meeting his statements favored the Union. Talking to employees about the union, expressing personal views about the union, and answering questions about the union are permissible expressions of opinion when made in noncoercive and nonthreatening circumstances. *Wright Memorial Hospital,* 771 F.2d at 405 (collecting cases); *cf. Turner's Express,* 456 F.2d at 292 (election invalidated when supervisors warned employees and threatened that they would "pay for it" if they didn't vote for the union). No evidence on the record supports the conclusion that Reis' activities were anything more than personal expressions of opinion about the Union. Furthermore, he was the only supervisor to engage in pronoun activity during the election period. *Cf. Island Film,* 784 F.2d at 1453 & n. 9 (five supervisors engaged in almost continuous activity among twenty-five employees over whom they exerted significant influence). Reis' conduct does not invalidate the election.

III.

We find Pascal's and Reis' activities insufficient to invalidate the bargaining unit election at HFM. While evidence of actual coercion is not required, we find insufficient evidence to support HFM's claim that employees could reasonably fear retaliation from Reis or Pascal so as to interfere with their freedom of choice. We enforce the Board's order.

International Longshoremen's Association, AFL–CIO v. Davis

476 U.S. 380, May 27, 1986

On appeal from the Supreme Court of Alabama

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JUSTICE WHITE delivered the opinion of the Court

The opinion in *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are pre-empted by the provisions of the National Labor Relations Act, see 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. II): Subject to exception only in limited circumstances, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon,* and it must be applied again today. Before addressing that question, however, we must consider the very nature of such pre-emption—whether *Garmon* pre-emption is in the nature of an affirmative defense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court's power to adjudicate that may be raised at any time.

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I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a ship superintendent or trainee ship superintendent. The ship superintendents apparently served as the immediate superiors of the longshoremen employed by Ryan-Walsh. They were on salary, however, and their compensation was generally lower than that received by the longshoremen, who worked on an hourly basis.

In early 1981, Ben Trione, one of the ship superintendents who worked for Ryan-Walsh, contacted the appellant International Longshoremen's Association (ILA or Union), a union that represents longshoremen and other employees on the waterfront, to discuss the possibility of organizing the superintendents and affiliating with the Union. Although the parties here dispute the content of the conversations that occurred at this stage between Trione and the ILA representatives regarding the ship superintendents and their eligibility for union membership, it is undisputed that a meeting of the superintendents was organized by Trione and attended by Benny Holland, an ILA official from Houston, Texas.

At this meeting, several of the superintendents expressed a fear of being discharged for participating in union-related activities. According to Davis' witnesses, Holland's response to this was to reassure them that the Union would get them their jobs back with backpay if that happened. According to Holland, however, Holland's response was that they would be protected in that manner only if they were determined not to be supervisors under the Act and that he did

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not know whether or not they would be considered supervisors. [1] Holland further testified that he had submitted this issue to the Union's lawyers and had not received a definitive opinion from them by the time of the meeting. The meeting, according to all witnesses, resulted in a number of the ship superintendents, including Davis, signing pledge cards and a Union charter application with the ILA. [2]

On the day following the organizational meeting, Ryan-Walsh fired Trione. Trione contacted the ILA, which supplied him with an attorney. The attorney filed an unfair labor practice charge against Ryan-Walsh with the National Labor Relations Board, alleging that Trione was an employee under the Act and that Ryan-Walsh had violated § 8(a)(1) and § 8(a)(3) of the Act by discharging him for participating in

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union activities. See 29 U. S. C. §§ 158(a)(1), (3). [3] The NLRB's Regional Director, however, determined that Trione was a supervisor under the Act and declined to issue a complaint. [4] Trione did not, as he had a right to do, appeal this determination to the NLRB General Counsel. See 29 CFR § 102.19 (1985). Shortly thereafter, Davis was also dis-

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charged by Ryan-Walsh, apparently for his continued efforts to organize the ship superintendents and to join the Union.

In response to his discharge, Davis filed this suit against the ILA in the Circuit Court of Mobile County, alleging fraud and misrepresentation under Ala. Code § 6-5-101 (1975). [5] The case proceeded to trial, and a jury entered a verdict in Davis' favor in the amount of $75,000. Throughout the trial, the Union defended the suit on the merits, raising no issue that the suit was pre-empted by the NLRA. In its motion for judgment notwithstanding the verdict, however, the ILA raised for the first time a claim that the state court lacked jurisdiction over the case because the field had "been preempted by federal law and federal jurisdiction." App. 96a. The Circuit Court denied the Union's motion without opinion and entered judgment on the jury's verdict.

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[1] Under § 2(11) of the Act, 61 Stat. 138, a supervisor is defined as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11).
Supervisors as defined in this section are expressly not considered to be employees as defined in § 2(3) of the Act. 29 U.S.C. § 152(3).

Only employees as defined in § 2(3), however, are given rights under § 7 of the Act, 61 Stat. 140, 29 U. S. C. § 157, which provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[2] Apparently, however, an insufficient number of cards was obtained, see 29 U. S. C. § 159(a), and no representation petition was filed with the NLRB.

[3] Section 8(a) of the Act, 49 Stat. 452, in turn, provides in relevant part:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. §§ 158(a)(1), (3).

[4] Under the Act, an employer does not commit an unfair labor practice under § 8(a)(3) if it fires a supervisor for union-related reasons: An employer "is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union." *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 812 (1974). See also *Operating Engineers v. Jones*, 460 U.S. 669, 671, n. 1 (1983); *Beasley v. Food Fair of North Carolina, Inc.*, 416 U. S. 653, 656–657 (1974). An employer may, however, *allow* its supervisory employees to join a union. See *Florida Power & Light, supra*, at 808, 813. Even though supervisors are not covered by the Act, a discharge may constitute a § 8(a)(1) unfair labor practice if it infringes on the § 7 rights of the employer's nonsupervisory employees. See, *e.g.*, *Parker-Robb Chevrolet, Inc.*, 262 N. L. R. B. 402 (1982), aff'd *Automobile Salesmen's Union Local 1095 v. NLRB*, 229 U. S. App. D. C. 105, 711 F.2d 383 (1983) (summarizing post–1982 standard for finding violations of the Act in disciplinary actions taken against supervisors).

In response to Trione's complaint, the Regional Director stated his conclusions as follows:

"As a result of the investigation, it appears that fufther proceedings on the charge [of a violation under Section 8 of the Act] are not warranted inasmuch as the evidence disclosed that Mr. Trione was employed as a supervisor within the meaning of Section 2(11) of the Act. For this reason, Section 8(a)(3) would not be applicable to his discharge inasmuch as 'supervisors' are specifically excluded from the definition of employee under the Act. Nor is there sufficient evidence to establish that Mr. Trione's discharge violated Section 8(a)(1) of the Act. I am, therefore, refusing to issue a complaint in this matter." App. 62a–63a.

[5] That section provides: "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud."

On appeal to the Supreme Court of Alabama, the ILA argued that pre-emption was not a waivable defense and that the state fraud and misrepresentation action was pre-empted under *Garmon*. Although acknowledging that other state courts had adopted the ILA's position that NLRA preemption was nonwaivable, [6] the Alabama court held that "[i]t is not the circuit court's subject matter jurisdiction to adjudicate a damage claim for the tort of fraud—even if it arises in the context of a labor-related dispute—that is pre-empted. Rather, it is the state court's *exercise* of that power that is subject to preemption." 470 So. 2d 1215, 1216 (1985). The court's view was that as a state court of general jurisdiction the Circuit Court had had subject-matter jurisdiction over this ordinary tort claim for damages. As a waivable defense, the pre-emption claim was required under Alabama

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law to be affirmatively pleaded. Since it was not so pleaded, it was deemed waived. [7]

The Alabama Supreme Court, although holding that the ILA's pre-emption claim had been waived, stated in a footnote that if it had had occasion to reach the merits, it would have found no pre-emption:

> "The instant facts fall squarely within the 'peripheral concern' exception to federal preemption of state jurisdiction of labor-related disputes. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243–44 (1959). The National labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case, [Davis] has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of 'peripheral concern' to the NLRB. See, *e.g., Linn* v. *United Plant Guard Workers Local 114*, 383 U. S. 53 (1966)." *Id.*, at 1216–1217, n. 2 (citations omitted).

The Alabama Supreme Court accordingly affirmed the judgment against the Union. The Union appealed to this Court; Davis moved to dismiss the appeal on the ground that the decision below rested on an adequate and independent state ground because the Alabama Supreme Court's decision was based on an application of a state procedural rule. The ILA's submission, however, raised a substantial question whether reliance on the procedural rule rested on an erroneous view of the scope of *Garmon* pre-emption, a matter of

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federal law, and hence whether the procedural ground relied on was adequate and independent. We noted probable jurisdiction, 474 U. S. 899 (1985). [8]

II

A

Given the reliance of the Alabama Supreme Court on its procedural rule governing the presentation of affirmative defenses, we first decide whether that rule in this case represents an independent and adequate state ground supporting the judgment below. If it does, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment. See, *e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 566 (1977); *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945); *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The inquiry into the sufficiency of the asserted state ground, however, is one that we undertake ourselves. See *Michigan* v. *Long*, 463 U. S. 1032, 1038 (1983); *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931).

In concluding that the Union's pre-emption claim was procedurally barred, the Alabama Supreme

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[6] See, *e.g., Consolidated Theatres, Inc.* v. *Theatrical Stage Employees Union, Local 16*, 69 Cal. 2d 713, 447 P. 2d 325 (1968).

[7] In reaching this conclusion, the Alabama Supreme Court noted that Alabama Rule of Civil Procedure 8(c) requires that affirmative defenses be specifically asserted and concluded that although pre-emption was not specifically listed as an affirmative defense under Rule 8 "it quite obviously falls within the nature of those defenses specifically listed." 470 So. 2d, at 1216, n. 1. See also *Powell* v. *Phenix Federal Savings & Loan Assn.*, 434 So. 2d 247 (Ala. 1983) (holding claim of pre-emption of state-law affirmative defenses to be deemed waived if not affirmatively pleaded).

[8] Assuming, as we decide below, that the judgment below did not rest on an independent and adequate state ground and that we therefore have jurisdiction over this case, this is a proper appeal under 28 U. S. C. § 1257(2), since the Alabama Supreme Court upheld a state statute, § 6–5–101, as applied, against a claim of federal pre-emption.

Court first held that because the Mobile County Circuit Court, as a state court of general jurisdiction, had subject-matter jurisdiction over the simple tort claim of misrepresentation, there could be no preemption of that court's actual jurisdiction. Only the exercise of that jurisdiction could be preempted.

This explanation has a certain logic to it; but the point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by

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state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body. It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. See, *e.g., Kalb* v. *Feuerstein,* 308 U. S. 433 (1940). Whether it has done so in a specific case is the question that must be answered when a party claims that a state court's jurisdiction is preempted. Such a determination of congressional intent and of the boundaries and character of a preempting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.

If the Alabama procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:

> "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake* v. *Oklahoma,* 470 U. S. 68, 75 (1985) (citing *Herb* v. *Pitcairn, supra,* at 126; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164 (1917)).

To determine the sufficiency of the state procedural ground relied upon by the Alabama Supreme Court we must ascertain whether that court correctly resolved the antecedent federal question regarding the nature of *Garmon* preemption under the NLRA. Specifically, the question is whether *Garmon* pre-emption is a waivable affirmative defense such that a state court may adjudicate an otherwise pre-empted claim if the *Garmon* defense is not timely raised

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or whether *Garmon* pre-emption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate.

B

The Court's opinion in *Garner* v. *Teamsters,* 346 U. S. 485, 490–491 (1953), articulated what has come to be the accepted basis for the broadly preemptive scope of the NLRA:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controveries. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Building on this cornerstone, the *Garmon* Court went on to set out the now well-established scope of NLRA pre-emption. Given the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," 359 U. S., at 243, the Court held that "due regard for the federal enactment requires that state jurisdiction must yield," *id.,* at 244, when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of § 7 or § 8. The Court acknowledged that "[a]t times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections." *Ibid.* Even in such ambiguous situations, however, the Court concluded that "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.*, at 244–245. Thus, the Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*, at 245.

In *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963), we considered the application of these principles to a situation in which the Georgia courts had awarded relief based on a complaint that contained allegations that made out "at least an arguable violation of § 8(b)." *Id.*, at 546. There, we reviewed a claim that "the subject matter of [the] suit was within the exclusive jurisdiction of the National Labor Relations Board," *id.*, at 543, and held that, even though the state court was authorized to adjudicate the claim as a matter of state law, the state court "clearly exceeded its power" in awarding relief on the complaint. *Id.*, at 548. Specifically, "the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547.

That our conclusion was in fact jurisdictional was accentuated by our discussion of the procedural context in which the case arose. The state court had awarded a temporary injunction only, and a permanent order had not yet been issued. We rejected, however, the argument that the judgment was not yet final for purposes of our own jurisdiction:

> "[W]e believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction nor is it the question of whether federal or state law governs a case properly before the Georgia courts. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." *Id.*, at 548 (citations omitted).

See also *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 497–498, n. 5 (1983). *Curry* made clear that when a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under *Garmon*, then state jurisdiction is extinguished.[9]

Since *Garmon* and *Curry*, we have reiterated many times the general pre-emption standard set forth in *Garmon* and the jurisdictional nature of *Garmon* pre-emption; we have also reaffirmed that our decisions describing the nature of *Garmon* pre-emption and defining its boundaries have rested on a determination that in enacting the NLRA Congress intended for the Board generally to exercise exclusive jurisdiction in this area. See, *e.g.*, *Journeymen* v. *Borden*, 373 U. S. 690, 698 (1963); *Iron Workers* v. *Perko*, 373 U. S. 701, 708 (1963); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 309–310 (1964); *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 60 (1966); *Vaca* v. *Sipes*, 386 U. S. 171, 179 (1967); *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 285–291 (1971); *Farmer* v. *Carpenters*, 430 U. S. 290, 296–297, 305 (1977); *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, 188–190 (1978); *Operating Engineers* v. *Jones*, 460 U. S. 669, 676 (1983); *Belknap, Inc.* v. *Hale*, *supra*, at 510–511; *Brown* v. *Hotel Employees*, 468 U. S. 491, 502–503 (1984); *Wisconsin Dept. of Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U. S. 282, 286 (1986).

Davis does not seriously dispute this conclusion—at least as a general matter. He concedes, in fact, that "when a particular issue has been placed by Congress within the primary and exclusive jurisdiction of the NLRB, a state court will have no subject matter jurisdiction to adjudicate the issue. In such cases, any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is preempted." Brief for Appellee 13. Davis notes, however, that this Court has acknowledged that *Garmon* does not preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Lockridge, supra,* at 289. Specifically, Davis points to *Garmon's* own recognition that some controversies that are arguably subject to § 7 or § 8 are not pre-empted:

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[9] We note that this conclusion derives from congressional intent as delineated in our prior decisions. Thus, our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.

> "[D]ue regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S., at 243–244 (citations omitted).

Both before and since *Garmon* we have identified claims that fall within one or both these articulated exceptions. See, *e.g., Belknap, Inc.* v. *Hale, supra; Farmer* v. *Carpen-*

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ters, supra; Linn v. *Plant Guard Workers, supra; Automobile Workers* v. *Russell,* 356 U. S. 634 (1958); *Machinists* v. *Gonzales,* 356 U. S. 617 (1958); *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (1957); *Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656 (1954).[10] But these cases serve only as more precise demarcations of the *scope* of *Garmon* pre-emption. They have not redefined the *nature* of that pre-emption in any way. A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. Consequently, the state procedural rule relied on by the Alabama Supreme Court to support the judgment below was not a sufficient state ground, and the Union was and is entitled to an adjudication of its pre-emption claim on the merits.[11]

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III

As the *Garmon* line of cases directs, the pre-emption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA. That much is clear. There is also no dispute that if Davis was a supervisor, he was legally fired,[12] the Union misspoke if it represented that there was legal redress for the discharge, and there is no pre-emption. But if Davis was an employee, his discharge for union activities was an unfair practice, the Union was protected in its attempt to interest him in the Union, and it did not err in representing that if he was discharged for joining the Union, there would be a remedy. We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts.

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[10] We have also acknowledged an exception for conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board. See *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180 (1978). See also *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 325–332 (1971) (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.,* 397 U. S. 195, 201–202 (1970) (WHITE, J., concurring).

[11] Our reasoning and decision here are supported by this Court's decision in *Kalb* v. *Feuerstein,* 308 U. S. 433 (1940). In that case, the Court faced an issue involving state jurisdiction in a bankruptcy case that was strikingly similar to the issue presented by this case. There, a state court had entered a judgment of foreclosure against the appellants. Although the appellants had a petition pending concurrently in the bankruptcy court, the state courts rejected their challenge that the foreclosure was invalid because of the pending bankruptcy proceedings on the basis of a procedural default. In the face of the appellees' assertion that the procedural default presented an adequate nonfederal ground for the State's judgment, however, this Court accepted the appellants' contention that federal law itself "oust[ed] the jurisdiction of the state court" during the pendency of the bankruptcy proceeding. The state judgment thus "was not merely erroneous but was beyond [the state court's] power, void, and subject to collateral attack." *Id.,* at 438. The Court based this holding on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums, and Congress' statutory exercise of that right.

Given our longstanding interpretation of congressional intent regarding NLRA pre-emption under *Garmon,* this case is in all relevant respects the same as *Kalb.* Based on its constitutional power to regulate interstate commerce, Congress has created by statute a uniform body of laws governing labor relations and has vested in the National Labor Relations Board the exclusive jurisdiction over administration of those laws. And, although the exclusive nature of this jurisdiction was not explicitly noted by Congress, this Court has held that such exclusivity was intended by Congress. Enactment of such exclusive jurisdiction must, by operation of the Supremacy Clause, pre-empt conflicting state-court jurisdiction. That the entity chosen to administer those laws is administrative rather than judicial, as in *Kalb,* does not alter the pre-emptive effect of the federal law. Consequently, a procedural default in state court does not protect a state-court judgment from pre-emption.

[12] There is no allegation or evidence here that Davis' discharge, assuming he was a supervisor, was aimed at Ryan-Walsh's nonsupervisory employees or that it interfered with those employees' § 7 rights. See n. 4, *supra.*

The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim,

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without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. *Marine Engineers* v. *Interlake S.S. Co.*, 370 U. S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation. In this case, therefore, because the pre-emption issue turns on Davis' status, the Union's claim of pre-emption must be supported by a showing sufficient to permit the Board to find that Davis was an employee, not a supervisor. Our examination of the record leads us to conclude that the Union has not carried its burden in this case.

Expecting that the Union would put its best foot forward in this Court, we look first at its submission here that there is an arguable case for preemption. The Union's brief states that its conduct was protected by federal law if Davis was an employee, that in order to find the Union liable the jury must have found that Davis was a supervisor, and that "the state law controversy of whether the Union made a misrepresentation and the federal controversy of whether the superintendents were in fact supervisors are 'the same in a fundamental respect.'" Brief for Appellant 16 (quoting *Operating Engineers* v. *Jones*, 460 U. S. 669, 682 (1983)). So far, the argument proceeds in the right direction. As for the critical issue of whether Davis is an employee or a supervisor, the Union asserts only that "[a]bsent a clear determination by the NLRB that the ship superintendents are supervisors rather than employees, superintendents are arguably employees and the state is preempted from applying its law." Brief for Appellant 13. In making this contention, the ILA

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relies on our cases indicating that pre-emption can be avoided if an individual's supervisory status has been determined "'with unclouded legal significance.'" *Hanna Mining Co.* v. *Marine Engineers*, 382 U. S. 181, 190 (1965) (quoting *Garmon*, 359 U. S., at 246). See also *Jones, supra*, at 680. It does not undertake any examination of Davis' duties as a ship superintendent. It makes no attempt to show that Davis was more like an employee than a supervisor as those terms are defined in §§ 2(1) and (11) of the Act, 29 U. S. C. §§ 152(1) and (11).[13] It points to no evidence in the record indicating that Davis was not a supervisor. It does not argue that Davis' job was different from Trione's or that the Regional Director was wrong in finding that Trione was a supervisor. Its sole submission is that Davis was arguably an employee because the Board has not decided that he was a supervisor.

We cannot agree that Davis' arguable status as a supervisor is made out by the mere fact that the Board has not finally determined his status. The lack of a Board decision in no way suggests how it would or could decide the case if it had the opportunity to do so. To accept the Union's submission would be essentially equivalent to allowing a conclusory claim of pre-emption and would effectively eliminate the necessity to make out an arguable case. The better view is that those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.

Moreover, neither *Garmon* nor *Hanna Mining* supports the Union position. *Garmon* itself is the source of the arguably protected or prohibited standard for pre-emption. The Court stated, 359 U.S., at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by

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[13] Whether a particular employee is a supervisor under the Act depends on his or her actual duties, not on his or her title or job classification. See, *e.g., Winco Petroleum Co.*, 241 N. L. R. B. 1118, 101 LRRM 1100 (1979).

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> § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of the federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Later the Court said: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence" of the Board. *Id.*, at 245. Of course, the Court explained, the Board might decide the case one way or other, but in the "absence of the Board's clear determination that an activity is neither protected or prohibited," *id.*, at 246, it is not for the courts to decide the case. It is apparent from these passages that a court first must decide whether there is an arguable case for pre-emption; if there is, it must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the court entertain the litigation. Nothing in *Garmon* suggests that an arguable case for pre-emption is made out simply because the Board has not decided the general issue one way or the other.

Hanna Mining also does nothing for the Union's submission. The Court there, relying on *Garmon*, held that there was no pre-emption because the Board or its General Counsel had in fact adversely decided the issues on which the claim of pre-emption rested. Obviously, no inference may be drawn from that decision that a party makes out a case for pre-emption by merely asserting that the issue involved has not been decided by the Board. The Union's position is also negated by *Interlake S.S. Co., supra*, where the Court found pre-emption only after examining the facts and deciding "whether the evidence in this case was sufficient to show that either of [the organizations] was arguably a 'labor organization' within the contemplation of § 8(b)." *Id.*, at 178. The Court went on to hold that while there was persuasive evi-

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dence that the marine engineers were supervisors, the Board had nevertheless effectively decided that the union involved was a labor organization within the meaning of the Act. While agreeing with the principles announced by the Court, Justice Douglas dissented because he had a different view of the facts of the case. Consequently, a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.

Here, the Union points to no evidence in support of its assertion that Davis was arguably an employee. The Union's claim of pre-emption in the state courts was also devoid of any factual or legal showing that Davis was arguably not a supervisor but an employee. In this respect, its brief in the Alabama Supreme Court was similar to its brief here, and its post-trial motion for judgment in the trial court contained no more than a conclusory assertion that state jurisdiction was pre-empted. Until that motion, no claim of pre-emption had been made out, but whether Davis was a supervisor or an employee was a relevant inquiry in making out his case. He alleged in his complaint that he was a supervisor. The Union answered that it was without sufficient information to form a belief as to whether or not he was. Moreover, in moving for summary judgment or for directed verdict at the close of Davis' case and at the close of all the evidence the Union did not assert that Davis was an employee, not a supervisor, let alone point to any evidence to support such a claim.[14] In sum, the Union has not met its burden of showing that the conduct here was arguably subject to the Act.

IV

We hold that where state law is pre-empted by the NLRA under *Garmon* and our subsequent cases, the state courts lack the very power to adjudicate the claims that trigger pre-

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emption. Thus, the Alabama Supreme Court's holding that the ILA had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the judgment below, and that court erred in declining to address that claim on the merits. On the merits, we reject the ILA's characterization of our prior cases as holding that the mere lack of a conclusive determination by the Board that an activity is without the purview of the Act renders that activity arguably subject to the Act. Rather, we reaffirm our previously expressed view that the party asserting pre-emption must make an affirmative showing that the activity is arguably subject to the Act and we therefore affirm the judgment of the Alabama Supreme Court.

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[14] Although it is not our task *sua sponte* to search the record for evidence to support the Union's pre-emption claim, we find nothing in the record to make out even a colorable case for holding that Davis was not a supervisor.

So ordered.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment

The Court holds that appellant Union's federal pre-emption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Appellee Davis sued the Union in the Circuit Court of Mobile County alleging fraud and misrepresentation. Davis had been first a trainee ship superintendent and then a ship superintendent in the employ of Ryan-Walsh Stevedoring Co. in Mobile. Although the ship superintendents were theoretically superior to the longshoremen, they were paid

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salary and their compensation was generally lower than that of the longshoremen, who worked for hourly wages.

One of Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in union-related activities. Testimony at trial indicated that one Benny Holland, a Union representative, had assured the superintendents that the Union would get them their jobs back with backpay if they were discharged. As a result of the meeting, a number of the ship superintendents including Davis signed pledge cards and an application for a Union charter from the ILA.

Sure enough, first another superintendent and then Davis were discharged by Ryan-Walsh, and the Union did not succeed in getting them their jobs back, with or without backpay. Davis then filed this suit, which the Union defended on the merits throughout the trial; at the conclusion of the trial the jury returned a verdict in Davis' favor for $75,000. Only at this point, in a motion for judgment notwithstanding the verdict, did the Union first raise its pre-emption claim, a technique that the Court now sanctions.

The Supreme Court of Alabama refused to consider the claim, observing that Alabama Circuit Courts are courts of general jurisdiction having authority to try, *inter alia*, cases involving fraud and misrepresentation. That court held that the Union's pre-emption claim was an affirmative defense under the Alabama Rules of Civil Procedure, and had to be affirmatively pleaded in order to be considered. I agree with this Court that Congress could, if it wished, forbid Alabama to impose any such procedural rule, but I am convinced that Congress has done no such thing.

The Court relies on what it apparently considers to be the similar case of *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940). There Congress *did* provide quite explicitly that state courts

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should be deprived of jurisdiction in cases where mortgage foreclosure proceedings in those courts were also the subject of a petition in bankruptcy in federal court. Congress said:

> " '(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:
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> * * * * *
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> " '(2) proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of

land.'" *Id.*, at 440–441 (quoting Frazier-Lemke Act) (emphasis deleted).

In the present case, by contrast, Congress has never said a word about pre-emption of state-court jurisdiction. This Court, in a long line of cases beginning with *Garner* v. *Teamsters*, 346 U. S. 485 (1953), has enunciated a judicial doctrine of pre-emption in labor relations cases based on the implied intent of Congress. But as the Court noted in *Garner:*

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Id.*, at 488 (footnote omitted).

Thus when the Court speaks of the pre-emption of "subject-matter jurisdiction" here, it must rely on a far more dimly refracted version of congressional intent than did the *Kalb* Court: not what Congress said, but what this Court thinks Congress might have said had it been confronted with

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the situation. This is far too thin a reed to support the perverse application of the doctrine in the present case.

The Court also places undue reliance upon its opinion in *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963). There the claim of federal pre-emption had been properly presented by the union at every stage of Georgia proceedings. This Court, on direct review of a judgment of the Supreme Court of Georgia, held that Congress had denied to the Georgia courts the authority to issue an injunction because the matter was "within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547. The Court's opinion in *Curry* refers to state-court "jurisdiction," but as Justice Frankfurter explained, "the term 'jurisdiction' . . . is a verbal coat of . . . many colors." *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, 39 (1952) (dissenting opinion). The Court's opinion today implicitly suggests that the word "jurisdiction" is to lawyers what a term like *Bombycilla cedrorum* (cedar waxwing) is to ornithologists: a description of one and only one particular species recognized throughout the world. We all know that the term "jurisdiction" does not partake of that specialized a meaning.

Nothing in *Curry*, and certainly nothing in *Kalb*, foreordains the result in this case. State-court judges and trial courts of general jurisdiction in Alabama and in the other 49 States are experts primarily in state law, not federal law. Indeed, with the advancing march of federal legislation in areas heretofore left to state law, it would be an impossible task for any judge—federal or state—to keep abreast of the various areas in which there might be federal pre-emption. Here Alabama, by application of a neutral statute with a precise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining

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a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance. But it is this Court, not Congress, that has ordained the result. I believe the Court is mistaken in doing so, and I therefore cannot join Part II of its opinion.

Having concluded that National Labor Relations Act pre-emption is "jurisdictional," and hence may be raised at any time, the Court goes on to decide that the Union has not carried its burden of showing that the conduct at issue here was "arguably" protected or prohibited by the Act. With this I agree. Accordingly, I join Parts I and III of the Court's opinion and concur in the judgment.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today reaffirms that a pre-empted cause of action, as defined in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), is a claim that a state court is without power to adjudicate. *Ante*, at 393. I fully agree, and therefore join Parts I and II of the Court's opinion. But I believe that the standard enunciated in Part III to determine the pre-emption *vel non* of a particular cause of action is erroneous, as well as at odds with the principles and policies of *Garmon*. I therefore dissent from Part III of the Court's opinion and from its judgment.

In *Garmon*, this Court held that when an activity is protected or prohibited by the Act, or arguably protected or prohibited, courts must defer to the exclusive competence of the National Labor Relations Board. *Id.,* at 245. In the absence of the Board's clear determination that an activity is neither protected nor prohibited, nor arguably so, courts must stay their hand. "[W]hether federal law *does* apply is to be decided" by the Board. *Taggart* v. *Weinacker's, Inc.,* 397 U. S. 223, 229 (1970) (separate memorandum of Harlan, J.) (emphasis added). The Court today purports to follow *Garmon,* but nonetheless requires that the party "claiming

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pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted," *ante,* at 396, and proceeds to require here that the Union make a showing "sufficient to permit the Board to find that Davis was an employee, not a supervisor." *Ante,* at 395. In transforming the notion that some activities are *arguably* protected or prohibited into a requirement that a party claiming pre-emption make out an "arguable case," *ante,* at 396, it seems to me that the Court misses the point of its decision in *Garmon.* As a result of the decision today, a court, under the guise of weighing the sufficiency of the evidence, will be making precisely the determination that *Garmon* makes clear is for the Board, and only the Board, to make.

To understand how far the Court strays from the practical and congressionally mandated standard articulated in *Garmon,* it is sufficient to look to the basis of the broad pre-emption doctrine. Under the Act, some activities are protected and some are prohibited; other activities are subject to state regulation, while still others, not at issue in this case, are to be left unregulated by both federal and state authorities. Thus, the determination of whether an activity falls within the sphere of protected or prohibited is the crucial question under federal law, and one which this Court recognized is not always an easy determination to make. *Garmon,* 359 U. S., at 244. Accordingly, Congress deprived state courts of jurisdiction over actually or arguably protected or prohibited conduct and "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal," thereby ensuring that the federal scheme would be administered uniformly with the wisdom and insight resulting from specialized expertise and experience. *Garner* v. *Teamsters,* 346 U. S. 485, 490 (1953), quoted in *Garmon,* 359 U. S., at 242. [1] Permitting courts to

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determine whether activity is protected or prohibited could result in a court's finding unlawful an activity that the Board might embrace as lawful.

In an attempt to garner support for its holding, the Court relies on *Marine Engineers* v. *Interlake S.S. Co.,* 370 U. S. 173, 184 (1962). Such reliance is misplaced. Indeed, in *Interlake* the Court reaffirmed *Garmon,* recognizing that the definition of "labor organization," like the definition of "supervisor," is "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." 370 U. S., at 180. In *Interlake,* this Court held that only the Board could determine whether the union met the statutory definition of a "labor organization."

The Court in *Interlake,* in dicta, then reviewed the evidence that was presented. Such evidence was certainly not intended to be held up as the benchmark of the showing required successfully to claim that an activity is *arguably* protected; the Court made clear that that evidence was sufficient to show that the conduct was *actually* protected:

> "This was a case, therefore, where a state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that *the Board had actually determined* the underlying issue upon which its jurisdiction depended" (emphasis added). *Id.,* at 184. [2]

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Thus, in *Interlake,* the Court was presented with actual determinations by the Board; under *Garmon* that is the only kind of showing sufficient to take the pre-emption decision out of the hands of the Board.

The present case underscores the signal merit of *Garmon.* [3] Davis was fired for union activities. According to Davis, he was assured by the Union that, if fired, he could obtain reinstatement. Davis' ability to obtain reinstatement turns on whether Davis is a supervisor. If Davis is a supervisor, the

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[1] Justice Harlan, whose concurrence in *Garmon* indicated his initial hesitancy to accept its categorical treatment of particular claims, came to embrace its approach, recognizing that any other would require this Court, as the final court of review, to monitor every case in which a pre-emption claim is raised:

"Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be

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Act would not protect him against retaliatory actions by his

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employer based on his union activities and Davis' suit would be cognizable in state court for the Union's alleged intentional misrepresentation. However, if Davis is not a supervisor, the employer would have committed an unfair labor practice in firing him, and Davis would be entitled to redress by the Board. Thus, the issue here falls within the rubric of "arguably"—the conduct at issue is arguably protected because Davis may be a statutory employee, not a supervisor. [4]

The crucial question then was whether Davis was a supervisor. The task of identifying supervisors is an "aging but nevertheless persistently vexing problem." *NLRB* v. *Security Guard Service, Inc.,* 384 F.2d 143, 145 (CA5 1967). Supervisory status is an inherently fact-specific determination that turns on an individual's duties, not job title or classification. See, *e.g., Winco Petroleum Co.,* 241 N. L. R. B. 1118 (1979) (giving an employee the title "supervisor" or even theoretical power to perform some supervisory functions does not convert a rank-and-file employee into a statutory supervisor); *Pattern Makers Assn.,* 199 N. L. R. B. 96 (1972) (shop foreman with supervisory authority who worked with tools 40% of his time was supervisor despite contract which defined supervisory employees as persons who did not work with tools of trade). It is precisely because of the difficulty in assessing the statutory supervisory status of an individual, and the need for uniformity in the interpretation of the federal labor laws, that this Court, in *Hanna Mining Co.* v. *Ma-*

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rine Engineers, 382 U. S. 181 (1965), held that state law can be applied only if the supervisory status of the individuals in question "has been settled with unclouded legal significance." [5] *Id.,* at 190. The supervisory status of Davis has never been settled by the Board.

Thus, in asserting that Davis was arguably a supervisor, the Union "advance[d] an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Ante,* at 395, quoting *Interlake,* 370 U. S., at 184. That is the only kind of showing that is properly required under *Garmon.* [6]

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thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 289–290 (1971).

[2] Similarly, the fact that the Board had asserted jurisdiction over the unions in *Interlake,* at the time the state-court case was pending, is not an indication of the standard of "arguably," because that evidence "was *more than sufficient* to create an arguable case" (emphasis supplied), 370 U. S., at 182, n. 16, even though the unions had consistently advanced the position before the Board that they were not organizations within the meaning of the act.

[3] To be sure, the *Garmon* universe is not without imperfection. JUSTICE WHITE has long sought to eliminate the "arguably protected" coverage of *Garmon* pre-emption. See, *e. g., Lockridge,* 403 U. S., at 325–332 (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.,* 397 U. S. 195, 201 (1970) (WHITE, J., concurring). In *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180 (1978), the Court addressed what I believe was at the heart of JUSTICE WHITE's opposition to "arguably protected." There the Court acknowledged an exception to *Garmon* pre-emption for conduct that is arguably protected where the injured party has no means of bringing the dispute before the Board. The opinion today speaks of a broader opposition to "arguably protected," as its effect in this case is to expand the *Sears* exception to encompass a case where the injured party, here Davis, does have the means of bringing the dispute before the Board. Apparently seeking to eliminate "arguably protected," but unable to do so directly, JUSTICE WHITE establishes a standard that is nearly as effective. Justice Harlan, speaking for the Court in *Lockridge* and responding to those who sought to weaken *Garmon,* provides the answer to JUSTICE WHITE today: "[A]lthough largely of judicial making, the labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress. While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." 403 U.S., at 302.

[4] In the ordinary case, since a determination of pre-emption poses a jurisdictional bar to a court's adjudication of the merits of a suit, a defendant claiming pre-emption will do so at the threshold, usually in a motion to dismiss. Thus, courts will be called upon to determine pre-emption before facts have been developed or discovery has occurred. This poses a difficult burden for a defendant required, under today's decision, to present a factual showing. If a fair reading of the complaint leads to a possibility that the activity complained of may be protected or prohibited, then the case falls squarely within the reach of "arguably protected," and the state court lacks jurisdiction over the dispute. See *Construction Laborers* v. *Curry,* 371 U S. 542, 546 (1963).

[5] There is indeed a cloud over Davis' status. As a "ship superintendent," Davis performs the same functions as workers called "walking foremen" in Houston, Tex. We are advised that the Houston walking foremen formed a union and are covered by a collective-bargaining agreement. See Juris. Statement 4, n. 3.

[6] In establishing the new standard, JUSTICE WHITE is joined by the four Justices who dissent from the Court's holding that pre-emption goes to subject-matter jurisdiction. These four would hold that pre-emption is merely a defense. Because under Alabama law, a defense that is not raised during trial is deemed waived, see *ante,* at 386, n. 7, the view of these four Justices means that the decision of the Alabama Supreme Court rested on an independent and adequate state ground, see *ante,* at 388–389, ineluctably leading to the conclusion that this Court is without jurisdiction over this case. Rather than stating that they would dismiss

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I therefore dissent from Part III of the Court's opinion and from its judgment.

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for want of jurisdiction, however, those Members of the Court reach out to join Part III of JUSTICE WHITE'S opinion.

NLRB v. International Brotherhood of Electrical Workers Local Union No. 46, Affiliated with the International Brotherhood of Electrical Workers, AFL–CIO

793 F.2d 1026 (9th Cir.), July 1, 1986—277 NLRB NLRB 1235

On petition to enforce Board Order

Before ALARCON and REINHARDT, Circuit Judges, and STEPHENS, District Judge *

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STEPHENS, District Judge: Robert Witty joined the International Brotherhood of Electrical Workers Local Union No. 46, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO (the Union) in 1980. Until May of 1983, he was employed by Commercial Electrical Contractors (CEC) as an electrician and/or operations manager.

David Sabey owned a majority of the stock of both CEC and a newly-formed electrical contracting firm that provided services for general contractors, PAC, Inc. Sabey offered Witty the position of president of PAC. Witty accepted and resigned from CEC on April 15, 1983, effective May 14, 1983. He became President and Operations ManagerAdministrator of PAC. Witty did not own any of the stock of PAC, nor did he share in its profits; he was paid by a fixed salary. Along with performing other duties for PAC, Witty established labor relations, set wage rates, hours of employment and benefits for employees, addressed wage or discrimination claims on behalf of PAC, and made final hiring decisions.

On April 14, 1983, Witty requested a "participating" withdrawal card from the Union which enabled him to remain eligible for death and pension benefits. The Union approved his request a few days after April 15. The Union subsequently discovered that PAC and CEC were owned by the same individual, and that Witty was acting as president of PAC. It filed internal union charges against Witty, claiming that he was working for an employer which did not have a contract with the Union in violation of its local rules and its international constitution. The Union also filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Witty was operating PAC as a non-union alter ego of CEC.

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The Union notified Witty by mail that he was to appear before its trial board on August 2, 1983, to answer the charges of violating Union local rules and its international constitution. The day before the hearing, Witty hand-delivered a letter to the Union which stated that he had been unaware that working for PAC violated Union rules and that he would not appear at the hearing because, from past experience with the Union, he did not think that the hearing would be impartial. The Union informed Witty on August 3, 1983, that he had been tried *in absentia,* been found guilty of violating certain provisions of the Union's local bylaws and international constitution, and been fined $16,000. The letter also informed Witty that one-half of the fine would be suspended if Witty signed a contract on behalf of PAC with the Union within 30 days and rescinded his withdrawal. Witty failed to appeal the imposition of the fine to the International Union.

After the Union trial and fine, Witty filed a charge with the NLRB alleging that the imposition of the fine by the Union violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B), which makes it unlawful for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or adjustment of grievances." The Regional Director of the NLRB dismissed the Union's alter ego charge and issued a complaint on Witty's charge.

On March 29–30, 1984, the Section 8(b)(1)(B) charge was heard before an administrative law judge. The ALJ refused to hear evidence regarding PAC's relationship to other entities or persons including CEC. The ALJ decided that since Witty was a representative of PAC for purposes of collective bargaining and the adjustment of grievances under Section 8(b)(1)(B), the Union had violated that Section by fining Witty because he worked for an employer that did not have a contract with the Union.

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* The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

The ALJ's order, subsequently adopted by the NLRB, required the Union to cease and desist from the prohibited behavior. The order also instructed the Union to rescind the fine levied against Witty and to expunge from the Union's records all documents regarding the internal Union charge, trial and fine of Witty. The NLRB has applied for enforcement of the order.

An NLRB order will be enforced if the Board's findings of fact are supported by substantial evidence in the record and if the Board correctly applied the law, even if the Court of Appeals might have reached a different conclusion based on the same evidence. *NLRB v. Jeffries Lithograph Co.,* 752 F.2d 459, 462–63 (9th Cir.1985). The NLRB's interpretation of the National Labor Relations Act is entitled to deference in the Court of Appeals, and the Court will uphold it if it is reasonably defensible. However, the Court will not rubber-stamp administrative decisions that it deems inconsistent with statutory mandate or that frustrate Congressional policy underlying the statute. *NLRB v. International Brotherhood of Electrical Workers Local 952,* 758 F.2d 436, 439 (9th Cir.1985).

A finding of violation of Section 8(b)(1)(B) will be upheld only if two distinct factual circumstances appear from the evidence in the record. First, there must be an individual who represents the employer in collective bargaining or grievance adjustment. Second, the union must have engaged in conduct which restrains or coerces the employer in its selection of that individual as its representative for those purposes. *NLRB v. International Brotherhood of Electrical Workers Local 340,* 780 F.2d 1489, 1491 (9th Cir.1986). Both direct union pressure affecting the selection of the representative or the willingness of that individual to act as a repre-

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sentative, and indirect pressure on the employer's representative to coerce the manner of conducting negotiations or grievance processing will violate the statute. *American Broadcasting Companies v. Writers Guild of America,* 437 U.S. 411, 436, 98 S.Ct. 2423, 2437, 57 L.Ed.2d 313 (1978); *Florida Power and Light Company v. International Brotherhood of Electrical Workers Local 641,* 417 U.S. 790, 800–802, 94 S.Ct. 2737, 2742–43, 41 L.Ed.2d 477 (1974); *NLRB v. International Brotherhood of Electrical Workers Local 73,* 714 F.2d 870, 871 (9th Cir.1980).

The Union argues that CEC created a sham entity, PAC, to avoid collective bargaining obligations under the Union's contract with CEC, and that Witty should not have been immunized from knowingly operating such a sham entity. The Union asserts that pressure to compel an employer to recognize a lawful labor contract obligation is not an unfair labor practice under Section 8(b)(1)(B).

The ALJ's determination that Witty had the authority to negotiate and sign a collective bargaining agreement with a labor organization on behalf of PAC is supported by his testimony describing his duties at PAC. In finding improper coercive activity by the Union, the ALJ determined that there was a direct link between the fine imposed on Witty because he was employed by a non-union employer, and his collective bargaining authority. The ALJ reached this conclusion because the Union expressly stated that it would reduce the fine if Witty would sign a contract on behalf of Pac with the Union within thirty days.

When union members are disciplined for working for a non-union company, "[f]ines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the services of his representative." *NLRB v. IBEW Local 340,* 780 F.2d at 1492, citing *American Broadcasting Companies v. Writers Guild,* 437 U.S. at 430, 98 S.Ct. at 2434. However, as stated in *NLRB v. IBEW Local 73,* 714 F.2d at 871–72:

> The union does not violate Section 8(b)(1)(B) by disciplining one of its members for working for a nonunion employer in violation of union bylaw, even though that member is also the bargaining representative of his employer, if the union neither represents nor has demonstrated an intent to represent the employer's employees. The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection.

In *NLRB v. IBEW Local 340,* 780 F.2d at 1492–93, this Court, following the holding quoted above, refused to enforce an NLRB order finding a union in violation of Section 8(b)(1)(B) because there was no evidence of specific overt acts by the union demonstrating its intent to represent the employees of the non-union employer. By contrast, in this case the evidence of the Union's intent to represent PAC's employees appears directly in its letter to Witty notifying him of the $16,000 fine and that the fine would be reduced if Witty would enter a labor agreement on behalf of PAC. This evidence fully supports the ALJ's decision that the Union engaged in an unfair labor practice under Section 8(b)(1)(B).

The Union also claims that the Board erred by affirming the ALJ's refusal to hear evidence on the Union's defense theory that PAC was an alter ego of CEC. An alter ego situation arises when an employer creates an entity through which it channels its operations with the purpose of avoiding the obligations of a collective bargaining agreement. *Carpenters Local No. 1846 v. Pratt Farnsworth,* 690 F.2d 489, 504 (5th Cir.1982) *cert. denied* 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). An alter ego employer will be bound by the terms of a collective bargaining contract entered into by its parent and the union. *NLRB v. Associated General Contractors,* 633 F.2d 766, 771 (9th Cir. 1980) *cert. denied* 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981).

The Union asserts that, if the evidence had been allowed, it would have shown that

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Witty was an employer, and not entitled to protection from discipline under Section 8(b)(1)(B). When an employer is himself acting as his own representative in negotiations and handling grievances, there can be no danger that his selection of a representative will be affected by any conduct of the union, and union punishment of the employer, if otherwise appropriate, will be upheld. *NLRB v. International Brotherhood of Electrical Workers Local 323,* 703 F.2d 501, 507 (11th Cir.) *cert. denied,* 464 U.S. 950, 104 S.Ct. 366, 78 L.Ed.2d 326 (1983), citing *Glaziers and Glassworkers Local 621, International Brotherhood of Painters,* 221 NLRB 509 (1975).

The internal union charge filed against Witty did not allege that PAC was the alter ego of CEC; Witty was fined solely because he was working for a non-union employer. A finding that PAC was an alter ego of CEC would not by itself negate the fact that an unfair labor practice has occurred. Only if Witty were an owner of CEC or could otherwise qualify as an employer would the Union's alter ego theory be relevant. The record reflects that Witty never had an ownership interest in PAC, for he neither owned any portion of the company nor shared in its profits. Similarly, the record does not reflect any facts that would warrant classifying Witty as an employer, under an alter ego theory or otherwise. The ALJ was therefore correct in determining that:

> . . . the *alter ego* theory would not establish an affirmative defense in these circumstances where PAC itself is an employer and Witty possesses authority for the purposes of collective bargaining and the adjustment of grievances on behalf of PAC.

The Union failed to make an offer of proof regarding the excluded alter ego evidence and now attempts to excuse its failure to do so by claiming that the ALJ made such a broad ruling that an offer of proof was rendered unnecessary. However, questioning was allowed on such subjects as Witty's employment by CEC, Sabey's ownership of the company, and the lack of Witty's financial interest, other than as a salaried employee, in PAC. The Union never sought to ask questions relating to any financial interest on the part of Witty in CEC. The ALJ invited an offer of proof on the alter ego issue, allowed questions challenging Witty's credibility, and stated that he would not rule in advance that any specific question was improper.

As the NLRB commented in its adoption of the ALJ's decision:

> The [Union] . . . never sought to lay [the] foundation for the excluded evidence at trial. Having failed to make an offer of proof that Witty held a financial interest in CEC, the [Union] cannot now claim prejudicial error if it is asserting evidence of such an interest exists. We further observe that the [Union] does not on brief claim there is any such evidence, newly discovered or in the record.

The Union's final contention is that it was denied its right to effective cross-examination of Witty at the hearing because of constant interruptions from the ALJ and opposing counsel. The Union asserts that the interruptions gave Witty "unwarranted time and information with which to formulate contrived answers." 29 C.F.R. Section 102.35(f) authorizes an ALJ "to regulate the course of the hearing." 29 C.F.R. Section 102.35(1) provides that an ALJ can "request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof." The Union has not been denied a right to effective cross-examination because the ALJ in this case listened to objections from opposing counsel and engaged in discussions regarding those objections.

The NLRB's order finding the Union in violation of Section 8(b)(1)(B) should be enforced. It is so ordered.

Baker et al. v. General Motors Corp.

478 U.S. 621, July 2, 1986

On appeal from the Supreme Court of Michigan

JUSTICE STEVENS delivered the opinion of the Court

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In Michigan an employee is ineligible for unemployment compensation if he has provided "financing"—by means other than the payment of regular union dues—for a strike that causes his unemployment. [1] The question presented by this

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appeal is whether Michigan's statutory disqualification is implicity prohibited by § 7 of the National Labor Relations Act. [2]

This case has a long history. Two appeals to the State Supreme Court and a series of administrative proceedings have determined the relevant facts and the meaning of the governing statutory provision. Before addressing the federal question, we shall therefore summarize the events that gave rise to the controversy and the propositions of state law that were resolved on each appeal.

The Relevant Events

The story begins in June 1967, when the international union [3] representing the work force in the automobile industry notified the three major manufacturers—General Motors, Ford, and Chrysler—that it intended to terminate all national and local collective-bargaining agreements when they expired on September 6, 1967. In August, after the UAW

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and GM had opened negotiations for a new national agreement, the members of the Union employed by GM voted to authorize strikes, if necessary, on national and local issues. When the agreements expired, the UAW began a national strike against Ford, but did not immediately strike any GM plants.

On October 8, 1967, while the Ford strike was continuing, [4] the UAW held a special convention to authorize "adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort." [5] At that convention the UAW amended its constitution to authorize the collection of "emergency dues" [6] that would be used to augment the Union's

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[1] Section 29(8) of the Michigan Employment Security Act provides:

"(8) An individual shall be disqualified for benefits for a week in which the individual's total or partial unemployment is due to a labor dispute in active progress . . . in the establishment in which the individual is or was last employed, or to a labor dispute, other than a lockout, in active progress . . . in any other establishment within the United States which is functionally integrated with the establishment and is operated by the same employing unit. . . . An individual shall not be disqualified under this subsection if the individual is not directly involved in the dispute.

"(a) For the purposes of this subsection an individual shall not be considered to be directly involved in a labor dispute unless it is established that any of the following occurred:

* * * * *

"(ii) The individual is participating in or financing or directly interested in the labor dispute which causes the individual's total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph." Mich. Comp. Laws § 421.29(8) (Supp. 1986).

[2] Section 7 of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. § 157, provides in part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[3] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (referred to in the text as the UAW and the Union).

[4] The UAW employees of the Caterpillar Company were also on strike.

[5] The proceedings of the convention recited that its purposes were:

" '1. [To] [r]eview the status of our 1967 collective bargaining effort.

" '2. To consider revision of the dues program of the International Union, UAW, to provide adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort.

" '3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, strike fund, membership eligibility, strike insurance program and other matters related to emergencies facing the International Union, UAW.' " 420 Mich. 463, 512–513, 363 N. W. 2d 602, 624 (1984).

[6] The text of the amendments reads, in pertinent part:

Continued

strike insurance fund. In a letter to GM employees explaining the purpose of the dues increase, the Union stated:

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> " 'These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our time comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members.' " 420 Mich. 463, 513, 363 N. W. 2d 602, 624–625 (1984) (footnote omitted).

The emergency dues were payable immediately and were to remain in effect during the "collective bargaining emergency." See n. 6, *supra.* They were much larger than the regular dues. Before the emergency, each UAW member paid strike insurance dues of $1.25 per month and administrative dues of $3.75. The amendment increased the contribution to the strike insurance fund to $21.25 per month for employees in plants where the average straight-time hourly earnings amounted to $3 or more, and to $11.25 in plants where the average earnings were lower. Thus, for the former group the increase of $20 was 16 times as large as the regular contribution to the strike fund; for the latter group the $10 increase was 8 times as large.

The strike against Ford was settled in October, before the first scheduled collection of the new special strike fund dues. Notwithstanding this development, emergency dues of $42 million were subsequently collected until November 30, 1967—when the UAW determined that it would not strike any GM plants "at least during the month of December 1967." [7] At this point the UAW advised its membership that even though "the collective bargaining emergency has not yet ended," the emergency dues would be waived during December and January and dues would revert to the regular rate of $5 per month. In December, the UAW and GM reached agreement on all national issues.

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In January 1968, however, three UAW local unions went on strike at three GM foundries for periods of 10, 11, and 12 days. [8] Strike fund benefits of $4 to $6 a day, totaling $247,245.31, were paid to the striking UAW employees from the fund in which the emergency dues collected in October and November had been deposited. At that time the emergency dues constituted about half of the money in the fund. [9] As a result of the strikes, operations were temporarily curtailed at 24 other functionally integrated GM plants, idling more than 19,000 employees. Most of these employees are appellants in this case. Their claims for unemployment benefits were considered at three levels of administrative review [10] and three levels of judicial review, [11] and were ultimately denied by the State Supreme Court.

" 'Article 16, Section 2(a) (new): Emergency Dues

" 'All dues are payable during the current month to the financial secretary of the local union.

" 'Commencing with the eighth (8th) day of october 1967 until October 31, 1967, and for each month thereafter during the emergency as defined in the last paragraph of this subsection, union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be as follows:

" '1. For those working in plants where the average straight time earnings * * * is three dollars ($3.00) or more, *twenty-one dollars and twenty-five cents* ($21.25) *per month.*

" '2. For those working plants where the average straight time earnings * * * is less than three dollars ($3.00), *cleven dollars and twenty-five cents* ($11.25).

* * * * *

" '*This schedule of dues shall remain in effect during the current collective bargaining emergency as determined by the International Executive Board* and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000). . . .' " *Id.*, at 472, 363 N. W. 2d, at 606.

[7] *Baker* v. *General Motors Corp.*, 409 Mich. 639, 653, n. 5, 297 N. W. 2d 387, 392, n. 5 (1980) (emphasis omitted).

[8] See *id.*, at 653, 297 N. W. 2d, at 392.

[9] See 420 Mich., at 520, 363 N. W. 2d, at 628. See also App. to Juris. Statement 113a, 115a (decision of Michigan Employment Security Board of Review on remand from Michigan Supreme Court).

[10] The claims were originally allowed by the Michigan Employment Security Commission, but on an appeal by GM a hearing referee reversed the MESC. On appellants' appeal the referee's decision was upheld by the Michigan Employment Security Appeal Board. See 420 Mich., at 474–475, 363 N. W. 2d, at 608.

[11] Appellants appealed the denial of unemployment benefits to three County Circuit Courts, two of which reversed the decision of the Appeal Board and one of which affirmed it. On further appeal, the Michigan Court of Appeals disallowed the claims, holding that the appellants had "financed" the labor dispute which caused their unemployment by paying emergency strike fund dues and that they were disqualified under Michigan Employment Security Act § 29(8)(a)(ii) as a consequence. See *Baker* v. *General Motors Corp.*, 74 Mich. App. 237, 254 N. W. 2d 45 (1977). The Michigan Supreme Court granted leave to appeal and disposed of certain issues before remanding to the Board of Review for further proceedings. See *Baker* v. *General Motors Corp.*, 409 Mich. 639, 297 N. W. 2d 387 (1980). See *infra* this page and 628.

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The First Appeal

In its first opinion in this case the Michigan Supreme Court decided two statutory questions and remanded a third for further consideration by the Board of Review.

It first held that the appellants' unemployment was "due to a labor dispute in active progress" at other establishments operated by the same employing unit and functionally integrated with the establishments where the appellants were employed within the meaning of the statute. It rejected the argument that the layoffs were due not only to the strikes, but also to a combination of management decisions and seniority provisions in the collective-bargaining agreement, holding instead that the strikes were a "substantial contributing cause" of the unemployment and need not be its sole cause.[12]

After finding the requisite causal connection between the strikes and the layoffs, the court considered the relationship between the emergency dues and the strikes. Appellants contended that their payments were expressly excepted from the coverage of the statute because they were "regular union dues." The State Supreme Court rejected this argument, explaining that the term "regular" had been used "to exclude from possible treatment as financing those dues payments re-

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quired uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or disputes." [13] The exception for regular union dues thus did not encompass "unusual collections for the purpose of supporting a labor dispute." [14]

The court did not decide whether the emergency dues constituted "financing" of the local strikes. It noted that the statute did not require that the payments made by the individuals whose disqualification was in issue must be traced into the hands of the striking employees, but it indicated that there must be a "meaningful connection" between the payments and the strikes to satisfy the "financing" requirement. It therefore remanded the case to the Appeal Board's successor tribunal to consider that question.[15]

The Second Appeal

On remand, the Board of Review concluded that there was a "meaningful connection" between the emergency dues and the GM strikes. It found that the dues were intended to support local strikes at GM plants, that strikes which might affect their own employment were foreseeable at the time appellants paid the emergency dues, and that the dues were a substantial source of funding for the strikes. The Supreme Court agreed.

As a predicate to its analysis, the court explained that the term "financing" should be construed in the light of the general purpose of the statute to provide assistance to persons

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who are involuntarily unemployed. The disqualification applies to "persons who are 'voluntarily' unemployed by financing the labor dispute that causes their unemployment. It does so because 'financing' is one of the statutorily designated ways in which a person may evidence 'direct involvement' in a labor dispute." [16] Thus, "[t]he end result of a proper meaningful connection definition should be to delineate persons whose own activities have contributed to their unemployment so as to make them voluntarily unemployed and therefore, ineligible for unemployment compensation benefits." [17]

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[12] "The seniority provisions and management decisions which plaintiffs identify as contributing causes of their unemployment would not themselves have caused plaintiffs' unemployment or any unemployment were it not for the labor disputes in active progress at the functionally integrated foundries. But for those disputes, materials would have been available at plaintiffs' places of employment, the work force at those establishments would not have been reduced, and the seniority provisions would not have become operative. The labor disputes in active progress at the foundries were shown by competent, material and substantial evidence to have been substantial contributing causes of the layoffs which idled plaintiffs. We affirm the board's finding that plaintiffs' unemployment was 'due to a labor dispute in active progress' within the meaning of subsection 29(8)." 409 Mich., at 661–662, 297 N. W. 2d, at 396.

[13] *Id.*, at 666, 297 N. W. 2d, at 398.

[14] *Ibid.*.

[15] "The appeal board did not give separate consideration to the meaning of 'financing,' in general or as applied to this case. We therefore remand this matter to its successor, the tribunal with the most experience and expertise in the application of the act, to reconsider, in light of its own unique familiarity with the act, practical considerations and related issues implicated by this question, whether plaintiffs' emergency dues payments were sufficiently connected with the local labor disputes which caused their unemployment to constitute 'financing' of those labor disputes." *Id.*, at 668, 297 N. W. 2d, at 399.

[16] 420 Mich., at 493, 363 N. W. 2d, at 616.

The Michigan Supreme Court considered and rejected appellants' argument that their emergency dues payments were not voluntary because they were required by the UAW in order to retain their union membership and their jobs at GM. The court held that employees could not use their own collective-bargaining agent as a shield to protect them from responsibility for conduct that they had authorized. It therefore specifically held that appellants' "emergency dues payments were not involuntary." [18]

Those payments constituted "financing" of the strikes that had caused appellants' unemployment because there was a "meaningful connection" between the payments and the strikes. In finding that causal connection the court relied on three factors—the purpose, the amount, and the timing of the emergency dues.[19] In finding the requisite purpose, the court noted that the dues had actually provided financial support for the strikes, that the strikes were foreseeable when the dues were collected, that it was also foreseeable that such strikes would cause the unemployment which actually occurred, and that the evidence of purpose and foreseeability was sufficient without relying on hindsight after the events occurred.[20] The court also concluded that the amount of the financing was significant, whether viewed in terms of the aggregate value of the emergency dues, the individual contributions by each member, or their support for the strikers.[21] Finally, it found only a "minimal" time lag between the collections of the emergency dues and their use to support the strikes that caused appellants' unemployment.[22] As a consequence, the court concluded that appellants were "not eligible for unemployment benefits because they caused their unemployment by financing, in a meaningfully connected way, the labor dispute that caused" their unemployment.[23]

Only after it had meticulously satisfied itself that the emergency dues payments constituted "financing" that made appellants ineligible for unemployment compensation under the Michigan statute, did the court turn to the question whether its construction of state law was pre-empted by federal law because it inhibited the exercise of rights guaranteed by the National Labor Relations Act (NLRA). The state court agreed with appellants that the right to support strikes by paying extraordinary dues was protected by § 7 of the NLRA, but concluded that the legislative history of the Social Security Act which was reviewed in *New York Tele-*

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[17] *Ibid.*, See *id.*, at 478, 363 N. W. 2d, at 609 ("Since the MESA is intended to provide benefits only to involuntarily unemployed persons, the purpose of § 29 is obvious. MESA § 29 lists the circumstances under which the Legislature holds that a person is not entitled to benefits under the MESA because he is *not* involuntarily unemployed").

[18] "As noted above, the statute does not recognize such a ploy. UAW membership is required for employment by GM because the UAW bargains for such a provision in its contract with GM. In so doing, the UAW represents its members and they must ratify any contract agreed upon by the UAW and GM. Therefore, any 'coercion' resulting from the terms of the contract does not make the plaintiffs' action in accord with the contract 'involuntary.' As the Court of Appeals said in *Applegate* v. *Palladium Publishing Co.*, 95 Mich. App. 299, 305; 290 N. W. 2d 128 (1980), and we adopt here:

"'Action taken by employees under a contract negotiated for them by their authorized agent must be considered their voluntary acts. In effect, plaintiff agreed to [act] pursuant to the collective bargaining agreement.'

"Any other holding would make all actions taken by union members pursuant to a union contract involuntary and relieve the members of responsibility for their contract-based actions. We cannot agree with such a rule. The plaintiffs' emergency dues payments were not involuntary." 420 Mich., at 499, 363 N. W. 2d, at 618–619.

[19] "A meaningful connection exists between the financing and the labor dispute that causes the claimant's unemployment where, for the purpose of assisting labor disputes which reasonably and foreseeably include the labor dispute that caused the claimant's unemployment, the claimant finances in significant amount and in temporal proximity the labor dispute that causes his unemployment. Where the Court finds these three elements present (purpose, amount, and timing), there is a meaningful connection between the financing and the labor dispute that causes the claimant's unemployment." *Id.*, at 506, 363 N. W. 2d, at 621–622. Accord, *id.*, at 500–501, 363 N. W. 2d, at 619.

[20] "The final aspect of the purpose analysis focuses on whether it was foreseeable at the time of the financing that supporting the labor disputes would cause the claimant's unemployment. In this case, there is and can be no dispute on this issue. Since it was foreseeable that local GM strikes would occur and be financed by the emergency dues, and since automotive industry production is based upon a series of interrelated production units which produce only one component of the automobile, it is obvious that a local labor dispute which idles one plant might cause layoffs at other plants which rely upon the component produced at the idled plant. This 'chain reaction' can move both 'up' and 'down' the line. Therefore, layoffs at plants not presently engaged in a local labor dispute were foreseeable due to local disputes.

"In conclusion, the evidence adduced in this case supports the conclusion that the purpose of the emergency dues included supporting labor disputes including those that actually caused the plaintiffs' unemployment. Therefore, the first portion of the meaningful connection definition is met." *Id.*, at 516–517, 363 N. W. 2d, at 626.

[21] See *id.*, at 519, 363 N. W. 2d, at 627 ("By any standard, the amount of increase is significant and demonstrates a meaningful connection with the labor dispute that caused their unemployment"). Accord, *id.*, at 517–520, 363 N. W. 2d, at 626–628.

[22] "As applied to this case, we find that this portion of the meaningful connection definition is satisfied since the payment of emergency dues immediately precedes the support of the labor dispute that caused the plaintiffs' unemployment. . . . The time lag between the collection and disbursement of the strike fund benefits is minimal when it is considered that the funds were collected 'by hand' at the local level, were forwarded to the SIF, and were distributed to striking GM employees only after they had satisfied an initial waiting period requirement." *Id.*, at 521, 363 N. W. 2d, at 628.

[23] *Id.*, at 521–522, 363 N. W. 2d, at 628.

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phone Co. v. *New York State Dept. of Labor,* 440 U. S. 519 (1979), demonstrated that Congress "intended to tolerate" the conflict between the state law and the federal law.[24] Accordingly, after some 15 years of litigation, the Michigan Supreme Court finally denied appellants' claim for unemployment compensation.

We noted probable jurisdiction of their appeal, 474 U. S. 899 (1985), and now affirm. We first discuss the problem presented by the case in general terms and then consider the specific contentions that appellants advance.

I

The National Labor Relations Act and the Social Security Act were both enacted in the summer of 1935. See *New York Telephone Co.* v. *New York State Dept. of Labor,* 440 U. S., at 527. Neither statute required any State to adopt, or to maintain, an unemployment compensation program. See *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 596 (1937). Title IX of the latter Act did, however, motivate the enactment of state programs throughout the Nation.[25] That Title authorized the provision of federal funds to States having

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programs approved by the Secretary of Labor. Although certain minimum federal standards must be satisfied, the scheme is one in which a "wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." *Id.,* at 593.

The policy of allowing "broad freedom to set up the type of unemployment compensation they wish" has been a basic theme of the program since the general outlines of the legislation were first identified in the Report of the Committee on Economic Security that was prepared for "the President of the United States and became the cornerstone of the Social Security Act." *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471, 482 (1977). In guiding state efforts to draft unemployment compensation programs, however, that Report also stressed the importance of the distinction between voluntary and involuntary unemployment. It characterized that distinction as "the key to eligibility." *Id.,* at 483. "To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed." *Id.,* at 482 (quoting Report of the Committee on Economic Security, as reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935)).

The involuntary character of the unemployment is thus generally a necessary condition to eligibility for compensation. But even involuntary unemployment is not always a *sufficient* condition to qualify for benefits, as we found in *Hodory.* In that case, we held that Ohio could disqualify a millwright who was furloughed when the plant where he worked was shut down because of a shortage of fuel caused by a strike at coal mines owned by his employer. Even though he was unemployed through no fault of his own, as the result of a labor dispute in which he had no interest, federal law did not require Ohio to pay him unemployment compensation.

In *Hodory* there was no claim that the National Labor Relations Act pre-empted Ohio's disqualification of unemploy-

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ment caused by a labor dispute. A pre-emption argument was advanced, however, in *New York Telephone Co.* v. *New York State Dept. of Labor,*

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[24] *Id.,* at 541, 363 N. W. 2d, at 637.

[25] "Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11." *Steward Machine Co.* v. *Davis,* 301 U. S., at 587–588 (footnote omitted).

440 U. S. 519 (1979), a case in which the employer contended that federal law *prohibited* the State from giving unemployment compensation to the company's striking employees. The evidence established that the payments not only provided support for the strikers but also imposed an added burden on the company and therefore plainly "altered the economic balance between labor and management." *Id.,* at 532. Relying on the pre-emption analysis in *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976), the employer therefore contended that the payments were inconsistent with the federal labor policy "of allowing the free play of economic forces to operate during the bargaining process." 440 U. S., at 531. We rejected the argument, not because we disagreed with its premises, but rather because we were persuaded by our study of the legislative history of the two 1935 Acts that Congress had intended to tolerate the conflict with federal labor policy. We explained:

> "Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments." *Id.,* at 544.

See *id.,* at 547 (BRENNAN, J., concurring in result); *id.,* at 549 (BLACKMUN, J., with whom MARSHALL, J., joined, concurring in judgment).

Our conclusion that Congress did not intend to pre-empt the States' power to make the policy choice between paying or denying unemployment compensation to strikers does not directly respond to the argument advanced by the appellants in this case. For they rely, not on the general policy of non-

interference with the free play of economic forces during the bargaining process, but rather on the claim that § 7 of the NLRA provides specific protection for their payment of the emergency dues required by the UAW. Nevertheless, the claim must be analyzed in the light of our conclusion in *New York Telephone Co.* that Congress expressly authorized "a substantial measure of diversity," 440 U. S., at 546, among the States concerning the payment of unemployment compensation to workers idled as the result of a labor dispute.

Thus, *New York Telephone Co.* makes it clear that a State may, but need not, compensate actual strikers even though they are plainly responsible for their own unemployment. And, on the other hand, *Hodory* makes it equally clear that a State may refuse, or provide, compensation to workers laid off by reason of a labor dispute in which they have no interest or responsibility whatsoever. In between these opposite ends of the spectrum are cases in which the furloughed employees have had some participation in the labor dispute that caused their unemployment. This is such a case, because the state court has found that appellants provided significant financial support to strikes against their employer with full knowledge that their own work might thereby suffer. It is clear, however, that in financing the local strikes, they were exercising associational rights that are expressly protected by § 7 of the NLRA. The question, then, is whether that protection deprives the State of the power to make the policy choice that otherwise would be plainly authorized by Title IX of the Social Security Act.

II

Appellants place their primary reliance on *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235 (1967), a case in which the Florida Commission had concluded that a union member was disqualified for unemployment compensation because she had filed an unfair labor practice charge against her employer. The Florida District Court of Appeal held that the Commis-

sion had properly treated the filing of the charge with the National Labor Relations Board as the initiation of a "labor dispute" within the meaning of the Florida statute disqualifying unemployment that "is due to a labor dispute." We reversed. We explained that Congress had made it clear that it wished all persons with information about unfair labor practices "to be completely free from coercion against reporting them to the Board," *id.,* at 238, and that the statute prohibited an employer from interfering with an employee's exercise of his right to file charges. Accordingly, we concluded:

> "[C]oercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. . . . Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.*, at 239.

The federal right implicated in *Nash* was the right to file an unfair labor practice charge with the Board. Arguably there are two different rights protected by § 7 that are implicated by this case—the right to contribute to a fund that will strengthen the union's bargaining position, and the right to expend money to support a strike. It would seem clear that it would be an unfair labor practice for an employer to discharge an employee for making a contribution to a strike fund or for voting in favor of a strike at another plant, just as it would be unlawful to discharge an employee for filing a charge with the Labor Board. In each such case, the unemployment would be attributable to an unlawful act by the employer rather than the foreseeable consequence of the exercise of the employee's § 7 rights.

In the actual case before us, however, the employer did nothing to impair the exercise of appellants' § 7 rights. To the extent that appellants may be viewed as participants in the decision to strike, or to expend funds in support of the local strikes, it is difficult to see how such a decision would be entitled to any greater protection than is afforded to actual strikers. In either event, the fact that the temporary unemployment is entirely attributable to the voluntary use of the Union's bargaining resources—untainted by any unlawful conduct by the employer—is a sufficient reason for allowing the State to decide whether or not to pay unemployment benefits.

Perhaps the answer is less obvious when we focus on the payment of the emergency dues before any actual strike decision has been made, but we believe similar reasoning leads to the same conclusion. Appellants were not laid off simply because they paid emergency dues. Rather, under the meticulous analysis of the case by the Michigan Supreme Court, they became unemployed because there was a meaningful connection between the decision to pay the emergency dues, the strikes which ensued, and ultimately their own layoffs. Under the state court's narrow construction of its own statute, the emergency dues decision was tantamount to a plant-wide decision to call a strike in a bottleneck department that would predictably shut down an entire plant. As the court put it, "since the Michigan law only disqualifies those who are directly involved in the labor dispute through financing, the MESA essentially only disqualifies 'strikers.'" 420 Mich. 463, 540, 363 N. W. 2d, 602, 637 (1984). Unquestionably federal law protects the employees' right to authorize such a strike; it is equally clear, however, that federal law does not prohibit the States from deciding whether or not to compensate the employees who thereby cause their own unemployment. *New York Telephone Co.*, 440 U. S., at 540–546.

Thus, the essential distinction between the *Nash* case and this one is the distinction between involuntary and voluntary unemployment that was recognized at the inception of the Social Security Act. A decision to file an unfair labor practice charge—even though it may in fact motivate a retaliatory discharge—cannot be treated as a voluntary decision to cause one's own unemployment without undermining an essential protection in the NLRA. But an employee's decision to participate in a strike, either directly or by financing it, is not only an obvious example of causing one's own unemployment—it is one that furthers the federal policy of free collective bargaining regardless of whether or not a State provides compensation for employees who are furloughed as a result of the labor dispute.

In reaching this conclusion, we of course express no opinion concerning the wisdom of one policy choice or another. Nor are we concerned with the possible application of the "financing" disqualification that has been adopted in numerous States other than Michigan and which, like the Florida statute involved in *Nash*, may be construed in a way that has an entirely different impact on § 7 rights. Specifically, we have no occasion to consider the circumstances, if any, in which individuals might be disqualified solely because they paid regular union dues required as a condition of their employment.[26] We merely hold that the "financing" disqualification in the Michigan statute as construed by the State Supreme Court in this case is not pre-empted by federal law.

Affirmed.

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, dissenting.

The State of Michigan disqualifies an individual from receiving unemployment benefits for "financing" the labor dispute that causes his unemployment. Mich. Comp. Laws § 421.29(8)(a)(ii) (Supp. 1986). As construed by the Michigan

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Supreme Court, this means that an unemployed individual is denied benefits for making a significant financial contribution to a labor organization "in temporal proximity" to the labor dispute that caused his unemployment if that contribution was "for the purpose of assisting labor disputes which reasonably and foreseeably include the dispute that caused the [individual's] unemployment." 420 Mich. 463, 506, 363 N. W. 2d 602, 621–622 (1984). Because I believe that, as so construed, this statute conflicts with the National Labor Relations Act (NLRA) in a way that Congress did not intend to permit, I respectfully dissent from the Court's opinion and judgment.

In enacting Title IX of the Social Security Act, Congress left the States a "wide range" of discretion to establish qualifications for receiving unemployment benefits. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 593 (1937); see also *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471, 482–489 (1977). We have previously found evidence in the legislative history of the Social Security Act indicating that Congress intended that this broad grant of authority should include power to authorize or deny unemployment benefits in ways that may interfere with the smooth operation of the federal labor laws. Thus, in *New York Telephone Co.* v. *New York State Dept. of Labor,* 440 U. S. 519 (1979), we held that the States were free to authorize or to prohibit payment of unemployment benefits to striking workers notwithstanding the impact of such payments on the collective-bargaining process. We based our conclusion on evidence in the legislative history of the Social Security Act specifically indicating that Congress intended to leave the States such authority. *Id.,* at 540–546 (plurality opinion); see also, *id.,* at 546–547 (Brennan, J., concurring in result); *id.,* at 549 (Blackmun, J., concurring in judgment).

It is clear, however, that the States' discretion to fashion qualifications for unemployment compensation is not boundless, and that state laws that conflict with the NLRA in ways

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that Congress did not intend to permit are pre-empted. For example, in *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235 (1967), petitioner filed an unfair labor practice charge with the National Labor Relations Board alleging that she had been laid off in retaliation for union activities. The Florida Industrial Commission determined that filing charges with the NLRB initiated a "labor dispute" within the meaning of the Florida statute denying benefits to individuals unemployed "due to a labor dispute." We concluded that the effect of such a disqualification on national labor policy was too great:

> "The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board. . . . It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.,* at 239 (footnote omitted).

As the Court recognizes, *ante,* at 635, a "financing" disqualification such as Michigan's implicates important rights that are protected by § 7 of the NLRA. In particular, such a disqualification may prevent workers from exercising their right to expend money in support of a strike, and, more generally, it will influence their willingness to contribute to a fund that will strengthen the union's position in collective bargaining. The question we must answer in this case, then, is whether—as in *New York Telephone Co.*—there is reason to think that Congress intended to tolerate the conflict between Michigan's "financing" provision and the NLRA, or

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[26] In their statement of the question presented, appellants described the statutory disqualification as one arising "solely because those individuals paid union dues," Brief for Appellants i, or, alternatively, as one arising "solely because those individuals paid union dues uniformly and lawfully required as a condition of employment," Juris. Statement i. As the Michigan Supreme Court carefully explained, however, the Michigan statute excepts the payment of regular union dues from the financing disqualification. See *supra,* at 627–628. See also n. 1, *supra.*

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whether—like the state law struck down in *Nash*—this conflict is one that Congress did not intend to permit.

I note at the outset that it is highly unusual to interpret one law by reference to the legislative history of a different law. However, because the NLRA and the Social Security Act were considered by Congress at the same time and were passed within five weeks of one another, it is sometimes appropriate to read them *in pari materia.* See *New York Telephone Co., supra,* at 540–541; *ante,* at 632–633. Nonetheless, the NLRA and the Social Security Act are distinct pieces of legislation that address very different concerns. Consequently, we cannot find that Congress intended to withdraw protections extended in the NLRA on the basis of the legislative history of the Social Security Act unless the expression of Congress' intent to do so is especially clear. In this case, the available evidence is anything but clear in support of the conclusion that Congress intended to permit States to deny unemployment benefits to individuals for "financing" a labor dispute in the manner approved by the Michigan Supreme Court. Unlike the discussion in the legislative history concerning unemployment benefits for actual strikers that was relied upon in *New York Telephone Co., supra,* at 542–544, there is no comparable discussion at any point in the legislative history of benefits for individuals who "finance" a labor dispute. Nor does the Report of the Committee on Economic Security, which "became the cornerstone of the Social Security Act,'" *ante,* at 633 (quoting *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S., at 482), mention the subject of a "financing" disqualification. The sole support for the use of a financing disqualification is in "draft bills" prepared by the Social Security Board one year after the Social Security Act was passed as examples of what the Act permitted the States to do. These draft bills disqualified workers from receiving benefits if their unemployment was due to a labor dispute which they were "participating in or financing or directly interested in . . . ." United States

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Social Security Board, Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types §§ 5(d)(1) and (2), pp. 9, 10 (1936).

One could argue that, in light of this scant legislative history, there is no basis for concluding that Congress intended to authorize the States to utilize *any* kind of "financing" disqualification that interferes with rights protected by the NLRA. However, because the draft bills constitute a contemporaneous construction of an Act by those charged with the responsibility for setting it in motion, they are entitled to considerable deference. See *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) (quoting *Power Reactor Development Co.* v. *Electrical Workers,* 367 U. S. 396, 408 (1961)). We may therefore conclude that the States may enact *some* sort of "financing" disqualification even though this might conflict with the NLRA. The difficult question is what kind.

Unfortunately, the Social Security Board did not elaborate on its understanding of the permissible scope of its financing disqualification, so there is nothing in the draft bills from which to determine how broad the disqualification may be, consistent with the NLRA. It is at least clear, however, that the Social Security Board thought that there were limits on the scope of any financing disqualification. For within just a few years, the Board deleted this disqualification from its draft bills, explaining:

> "The provision found in some laws extending the disqualification to individuals who are financing a labor dispute is not recommended since it might operate to disqualify an individual not concerned with the dispute solely on the basis of his payment of dues to the union that is conducting the strike." United States Social Security Board, Bureau of Employment Security, Proposed State Legislation Providing for Unemployment Compensation and Public Employment Of-

fices, Employment Security Memorandum No. 13, p. 56, note (Nov. 1940).

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Insofar as the legislative history of the Social Security Act supports only the conclusion that Congress intended to leave the States authority to deny benefits to actual strikers, and does not indicate that Congress anticipated a distinct disqualification of individuals whose money is used to pay for a strike, such a disqualification can only be permitted to the extent that it is necessary to effectuate the State's decision to disqualify actual strikers. Thus, a financing disqualification may be justified as necessary to prevent unions from circumventing the State's disqualification of actual strikers, something unions might accomplish by striking a key group of employees—knowing that the resultant work stoppage will cause additional layoffs and that laid-off workers will be supported by unemployment benefits—while sharing the cost of financing the strike among all the workers.

Where this is true, *i. e.*, where workers agree to pay special dues [1] to finance a particular labor dispute that they

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know will result in their own layoffs, they voluntarily cause their own unemployment in the same sense as actual strikers. Therefore, I agree with the Court that "[t]o the extent that appellants may be viewed as participants in the decision to strike, or to expend funds in support of the local strikes, it is difficult to see how such a decision would be entitled to any greater protection than is afforded to actual strikers." *Ante*, at 636–637. I also agree with the Court that, insofar as "the emergency dues decision was tantamount to a plantwide decision to call a strike in a bottleneck department that would predictably shut down an entire plant," *ante*, at 637, Michigan could disqualify workers who paid the dues. In other words, to the extent that Michigan denies benefits to workers who agree to pay special dues to finance the very strike

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that caused their unemployment, I agree that the Michigan statute is not pre-empted.

As interpreted by the Michigan Supreme Court, however, the Michigan statute also denies benefits to individuals whose unemployment results from a labor dispute financed with money raised for a *different* labor dispute—so long as the dispute that caused the unemployment was "foreseeable" at the time the contribution was made. Michigan's law thus denies benefits to an individual for "financing" a labor dispute even though he did not necessarily intend to finance that dispute. Yet, where this is the case, the disqualification cannot be justified as necessary to effectuate the disqualification of actual strikers. Therefore, to the extent that it interferes with rights protected by the NLRA, it is pre-empted. Moreover, in my view, an individual who did not intend to finance the labor dispute that led to his being laid off cannot be said to have "voluntarily" caused his own unemployment in the same sense as a striker; the Court's unexplained equation of the two is simply wrong.

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[1] The Michigan statute provides that "[t]he payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute . . . ." Mich. Comp. Laws § 421.29(8)(a)(ii) (Supp. 1986). The Court therefore limits its opinion approving Michigan's statute to disqualifications based on the payment of "special" dues. Although, for the reasons stated in text, I believe that Michigan's disqualification is overbroad even as limited to special dues, there is really no question that a state law denying unemployment benefits on the basis of regular dues payments is pre-empted by the NLRA. The Social Security Board's 1940 decision to delete the financing disqualification because it might operate to deny benefits solely on the basis of an individual's payment of dues to a union indicates that the Board thought that States could not deny unemployment benefits simply because unemployment is due to a labor dispute financed from a strike fund that includes contributions from the individual's ordinary union dues. Moreover, this conclusion is entirely sensible in that a disqualification based upon the payment of ordinary dues would seriously interfere with basic organizational rights protected by the NLRA: In order to bargain effectively, a union must be able to present a credible strike threat. This, in turn, requires the union to maintain an adequate strike fund, and without such a fund, the union's ability to bargain effectively would be greatly impaired. Consequently, unions typically use a portion of every member's ordinary dues to finance a standing fund to support strikes authorized by the union. Because the maintenance of a strike fund from ordinary dues is standard union practice, disqualifying workers whose unemployment results from a strike financed with ordinary union dues would, as a practical matter, mean disqualifying workers simply for being members of the union that authorized that labor dispute. Such a disqualification would severely impair the long-term capability of unions to organize workers. If some members of a union wanted to strike, other members having no direct stake in the strike would have a powerful incentive to oppose it, namely, the possibility that the strike might cause their own layoffs and leave them without financial resources. The union would consequently come under pressure to split into smaller units in order to avoid these conflicts—a result that is contrary to the most basic thrust of the NLRA. Moreover, this tendency would be more pronounced in industries that are functionally integrated, because strikes are more likely to cause layoffs among non-strikers in such industries; yet it is in precisely these industries that workers have the greatest need to combine in labor organizations that can present management with a unified front. It is inconceivable that the Congress that passed the NLRA and the Social Security Act would have found such a state of affairs acceptable, and therefore, in the absence of contrary evidence in the legislative history, I conclude that States are prohibited from denying benefits to individuals on the ground that their ordinary union dues were used to finance the labor dispute that caused their unemployment.

Finally, denying benefits to an individual who paid special dues merely because the strike that caused his unemployment was foreseeable when the decision to pay the dues was made interferes with rights protected by the NLRA in a much more pervasive manner than a disqualification of actual strikers. Consider the decision that must be made by a union member asked to vote on whether to collect special dues to finance an anticipated strike. If he agrees to pay the special dues and the strike results in his being laid off, he will not receive unemployment benefits under state law. This possibility will certainly influence his decision whether or not to vote in favor of the special dues, and, to that extent, the state law conflicts with a federally protected right. However, as explained above, because the union member's decision in this regard is essentially identical to the decision of an actual striker, I agree with the Court that it is reasonable to conclude that Congress was willing to tolerate this conflict.

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But under Michigan's statute, the union member must think about other "foreseeable" strikes in addition to the particular strike under consideration. Thus, it may be that the strike under consideration will not cause layoffs among nonstrikers, or that the union member feels strongly enough about that dispute that he is willing to tolerate the loss of unemployment compensation if he is laid off. But under the Michigan statute, the union member's decision whether to vote to authorize the collection of special dues is coerced still further by the *possibility* that some *other* strike, that might be financed by these dollars and that might result in layoffs, will leave him without unemployment compensation.[2] I do not see that there is any justification for this additional interference with rights protected by the NLRA; certainly the Court has offered none. It would be one thing if the legislative history showed that Congress intended to tolerate a conflict with the NLRA such as is created by Michigan's financing provision. But it does not. Therefore, I would hold that States may disqualify unemployed individuals for "financing" a labor dispute only where they agree to pay special dues specifically to finance the particular strike that caused their unemployment. To the extent that the Michigan statute exceeds this limitation, it is pre-empted by the NLRA.

Because of its construction of the Michigan statute, the Michigan Supreme Court did not find it necessary to consider whether the local foundry strikes were expressly contemplated by the UAW in its decision to collect the emergency dues. Accordingly, I would vacate the judgment below and remand the case to the Michigan Supreme Court to consider this question.

Stanley A. Dash v. NLRB

793 F.2d 1062 (9th Cir.), July 7, 1986; rehearing and rehearing en banc denied Sept. 8, 1986—273 NLRB 129

On petition to review Board Order

Before ANDERSON and PREGERSON, Circuit Judges, and SOLOMON, * Senior District Judge

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PREGERSON, Circuit Judge: Stanley A. Dash, Jr. appeals from a decision and order of the National Labor Rela-

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tions Board ("the Board"). The Board found that the Lawyers Co-operative Publishing Company ("LCP") did not violate section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") by discharging Dash or by appealing to the Wisconsin state court Dash's award of unemployment compensation benefits.[1] Dash contends that the Board's decision, which reversed the decision of the Administrative Law Judge ("ALJ"), is not supported by substantial evidence. We reverse in part and remand.

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[2] This concern is somewhat alleviated under the Michigan statute by the additional requirement that the labor dispute which causes the unemployment occur "in temporal proximity" to the making of the financial contribution.

* Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, Sitting by Designation.

[1] Although the facts involved in this case occurred in Wisconsin, Dash was a Nevada resident when the present action was filed. This court has jurisdiction to review a Board order when the person aggrieved by the order resides in the circuit. 29 U.S.C. § 160(f).

BACKGROUND

Dash worked for LCP as a sales representative from November 1971 until his termination on November 5, 1980.

In December 1979, Dash initiated a union organizing drive among LCP's sales representatives. On May 5, 1980, the sales representatives voted against unionization. Later that month, on the advice of a psychologist, Dash, who suffered extreme stress as a result of the organizing campaign, took a leave of absence from work. He did not immediately notify his regional manager, as required by company policy. On May 30, the National Sales Manager sent Dash a telegram threatening him with discharge if he did not report by telephone by June 3. Dash complied with the demand, and the threat of discharge was dropped. As a condition to his return to work, LCP required Dash to submit to a psychiatric examination by a doctor of LCP's choosing. Dash submitted to the examination on September 9, received a clean bill of health, and returned to work on September 22.

On November 4, 1980, Dash had an argument with Michael Santangelo, a customer service supervisor in LCP's home office. Dash admits that he may have sworn at Santangelo. LCP's management listened to Santangelo's version of the argument, but refused to listen to Dash when he tried to tell his version. On November 5, LCP discharged Dash.

Following the discharge, the Wisconsin Department of Industry, Labor and Human Relations (DILHR) awarded Dash unemployment compensation benefits. LCP appealed the award to the Appeal Tribunal of the DILHR (Appeal Tribunal). After a telephone hearing in which LCP presented no witnesses, the examiner of the Appeal Tribunal upheld the award. LCP filed a petition for review with the Wisconsin Labor and Industry Review Commission (Review Commission), which dismissed the petition as untimely. LCP then filed a complaint in the circuit court of Dane County, Wisconsin, asking that the Review Commission's decision be set aside, the examiner's decision reversed, and the proceeding remanded for a de novo hearing before the Appeal Tribunal. [2]

On January 14, 1980, during the course of the union organizing campaign, Dash filed an unfair labor practice charge against LCP in Case No. 30-CA-5603. Dash alleged that LCP had discriminated against him because of his union activity, and that Regional Manager Murrell had threatened his job security during a January 9 meeting because of his "negative attitude toward the company." The complaint, as later amended, alleged that LCP had committed numerous violations during the course of the union organizing campaign. Shortly before the scheduled hearing date, LCP reached a settlement agreement with the union. The Regional Director approved the agreement on October 1. Under the agreement LCP agreed to expunge from Dash's personnel file all references to the January 9 threat of probation and the May 30 threat of termination, and to refrain from considering those warnings in evaluating Dash's employment in the future.

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On November 12, one week after his termination, Dash filed a second charge against LCP in Case No. 30-CA-6152, alleging that LCP had discriminated against him because of his union activities and because of his testimony in Case No. 30-CA-5603. In particular, Dash alleged that LCP had discriminated against him by (1) threatening him with termination on May 30; (2) delaying his return to work from his medical leave of absence; and (3) discharging him on November 5.

On January 7, 1981, the Regional Director set aside the settlement agreement, stating:

> In view of the similarity and interwoven nature of the unfair labor practices in Case No. 30-CA-5603 and those presently alleged in Case No. 30-CA-6152, it appears that [LCP] has failed and refused to comply with all the terms and conditions of the settlement agreement . . . and has, in fact, continued to engage in conduct which appears to be not only violative of the [NLRA], but in retaliation for the charges in Case No. 30-CA-5603.

On January 25, the General Counsel issued a complaint, consolidating the charges in Case No. 30-CA-5603 and Case No. 30-CA-6152. The ALJ issued its decision and order on August 19, 1982, concluding that LCP had committed numerous violations of section 8(a)(1) and (3) of the NLRA,

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[2] The action was pending when this case was heard by the ALJ. At oral argument, Dash's counsel informed this court that the action has been dismissed, and that Dash has received his benefits.

29 U.S.C. § 158(a)(1) and (3). The ALJ found that LCP had subjected Dash to disparate and discriminatory treatment by requiring him to submit to an independent psychiatric examination before returning to work after his leave of absence, by discharging him for his union activities, and by filing its action in the Wisconsin state court. The ALJ concluded as a matter of law that these activities violated section 8(a)(1) and (3) of the Act. The ALJ ordered LCP to reinstate Dash to his former position, give him back pay with interest, expunge all references to his discharge from its records, withdraw its state court action, and reimburse Dash for legal fees incurred as a result of the state court action.

A three-member panel of the Board, with one member dissenting, reversed the ALJ's finding that LCP had committed an unfair labor practice by discharging Dash.[3] The Board majority found that LCP would have terminated Dash for his abusive behavior toward Santangelo, despite Dash's union activities. The Board unanimously found, contrary to the ALJ's finding, that LCP had not committed an unfair labor practice by filing its action in the Wisconsin state court. The Board refrained from deciding whether LCP had committed an unfair labor practice before executing the settlement agreement by requiring Dash to submit to an independent psychiatric examination before allowing him to return to work from his leave of absence.[4]

Dash filed a timely appeal, challenging the Board's findings that LCP had not committed an unfair labor practice by discharging him or by filing its state court action.[5] Dash contends that the Board's findings are not supported by substantial evidence.

STANDARD OF REVIEW

We will enforce the Board's order "if the Board has applied the correct legal standard and there is substantial evidence in the record as a whole to support its find-

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ings and conclusions." *Wakefield v. NLRB,* 779 F.2d 1437, 1438 (9th Cir.1986). Where the Board's findings are *not* supported by substantial evidence, we must set aside the findings and the orders resting on the findings. *NLRB v. Baptist Hospital, Inc.,* 442 U.S. 773, 782, 99 S.Ct. 2598, 2603, 61 L.Ed.2d 251 (1979) (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938); *Wakefield,* 779 F.2d at 1438.

When the Board and the ALJ make contrary findings, we give deference to the Board. We still consider the ALJ's findings, however, and weigh them with other evidence opposing the Board's decision. *NLRB v. Searle Auto Glass, Inc.,* 762 F.2d 769, 773 (9th Cir.1985).

DISCUSSION

I. *The Discharge of Dash*

Where a discharged employee alleges that his discharge constitutes an unfair labor practice, the General Counsel bears the burden of proving that the employee's exercise of a protected activity was a motivating factor in the termination. As an affirmative defense, the employer may show by a preponderance of the evidence that it would have terminated the employee despite the protected activity. *Searle Auto Glass, Inc.,* 762 F.2d at 773; *Wright Line,* 251 N.L.R.B. 1083, 1089 (1980), *enforced, NLRB v. Wright Line, a Division of Wright Line, Inc.,* 662 F.2d 899, 909 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982) (approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403–04, 103 S.Ct. 2469, 2475–76, 76 L.Ed.2d 667 (1983)).

A majority of the Board found that LCP had met its burden. One member, however, found that Dash's union activities were the sole cause for his termination. We find that although the Board applied the correct legal standard, its ultimate findings on this issue are not supported by substantial evidence.[6]

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[3] The Board issued its decision and order on December 7, 1984. The decision is reported at 273 N.L.R.B. No. 31.

[4] "[A]n unfair labor practice will not be found based on presettlement conduct unless there has been a failure to comply with the settlement agreement, or subsequent unfair labor practices have been committed." *Interstate Paper Supply Co.,* 251 N.L.R.B. 1423, 1424 n. 9 (1980); *see Ann's-Schneider Bakery,* 259 N.L.R.B. 1151, 1152 (1982).

[5] Dash also mistakenly challenged a purported finding by the Board that LCP had not committed an unfair labor practice by requiring him to submit to an independent psychiatric examination before returning to work from his leave of absence. However, as stated above, the Board made no finding with respect to this issue.

A. *The Background Evidence*

The Board majority found that LCP would have fired Dash following his argument with Santangelo despite Dash's union activities. In reaching this finding, the majority relied on what it termed "extensive background evidence establishing that [LCP] had long considered Dash to be an employee with serious behavioral problems."[7] This "extensive background evidence" consisted of one memorandum regarding Dash's attitude toward his job,[8] two customer complaints,[9] and testimony regarding a meeting between Dash and LCP's personnel manager.[10]

We do not find this background evidence persuasive for several reasons. First, as noted by the ALJ, the evidence shows that any problems with customers or with company personnel caused by Dash's aggressive nature were no different from those caused by the sales force generally. The evidence shows, rather, that customer complaints against salesmen were not unusual, and that LCP condoned aggressive—and even abusive—behavior by its sales representatives provided they were successful in selling law books. Second, the evidence shows that Dash was extraordinarily successful, and enjoyed great popularity among his customers. Finally, we note that at no time did LCP take any steps to discipline Dash before his termination.

Sales Manager Irv Kensler testified that it "was not uncommon" to hear complaints from customers that a salesman had been abusive or aggressive, because "[LCP employs] a bunch of hard hitting aggressive people and they step on toes once in a while." Asked whether, to his knowledge, any salesman had ever been discharged for being abusive or aggressive, Kensler replied emphatically, "No, no. Not if he was selling books." One sales representative testified that in his fifteen years of employment with LCP he had received between fifteen and twenty customer complaints. Yet this salesman was not terminated or disciplined; the only steps that LCP's management ever took in response to these complaints were to discuss the problem with him and suggest ways in which he might improve.

Dash had approximately 600 customers in his area, and made almost 2100 personal contacts with these customers each year. Yet in his nine years of employment with LCP, only two customer complaints were lodged against him. LCP, moreover, received numerous letters *commending* Dash as an excellent salesman. When Dash was under consideration for the position of regional manager, Anderson received over fifty letters of commendation from Dash's customers, and only one letter of criticism.

As stated above, Kensler testified that LCP would not discharge a salesman for abusive or aggressive behavior as long as he was successful. The evidence shows that Dash was extraordinarily successful. In 1979 Dash won awards for achieving more than 100 percent of his set quota and for having the highest production among sales representatives in his region. Dash also won two prizes in 1979: a trip to Bermuda for being one of LCP's highest overall producers, and a color television for selling more sets of a new bankruptcy publication than any other LCP sales representative. In reaching its conclusion that LCP considered Dash a problem, the Board majority apparently ignored all evidence of Dash's success and popularity as a salesman. There is no discussion of such highly favorable evidence in its decision.

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[6] Although the determination of an employer's motive for discharging an employee is "particularly within the purview of the NLRB," *Searle Auto Glass, Inc.*, 762 F.2d at 773 (quoting *Lippincott Industries, Inc. v. NLRB*, 661 F.2d 112, 116 (9th Cir.1981)), we may set aside the Board's determination of motive if we find that it is not supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

[7] The majority relied on this evidence only for its relevance to LCP's perception of Dash and its motive for discharging him. The majority refrained from making any factual findings with respect to the truth of the background evidence.

[8] This memorandum was written by Sales Manager Irv Kensler, and directed to Personnel Manager Richard Roth. The memorandum referred to Dash's "negative attitude"—which Kensler later testified pertained to territory changes about which Dash was displeased—and his aggressive demeanor with customers.

[9] Both customers complained that they felt Dash was overly aggressive. In response to one of these complaints, however, a third customer wrote to praise Dash for his persistence as a salesman. This customer wrote that Dash was "fiercely dedicated to his product" and "aggressively persuasive." Moreover, Kensler conceded, with respect to the other complaint, that it "was only one side of the story."

[10] The personnel manager called this meeting to discuss Dash's Christmas bonus, his sales forecast for 1980, and the friction that had developed between Dash and service correspondents in the home office. The personnel manager told Dash at the outset that LCP was considering putting him on probation, but that the decision would depend on the outcome of the meeting. Dash responded that he wanted to improve, and the threat of probation was dropped. This meeting, coincidentally, occurred on the same day that LCP's top management learned of the union organizing campaign. There is no evidence, however, that LCP knew of the campaign at the time of the meeting.

The dissenting Board member noted that LCP had always condoned Dash's activities. LCP never punished or reprimanded Dash for the two customer complaints, nor did it place him on probation after his meeting with Murrell on January 9, 1980. Indeed, even after receiving the two customer complaints, LCP considered Dash for promotion to regional manager.

The Board's reliance on this background evidence—the memorandum regarding Dash's attitude, the two customer complaints, and the meeting between Dash and the personnel manager—is therefore misplaced. The evidence shows that Dash was not a troublemaker, but on the contrary

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was one of LCP's top salesmen, and that any rare problem he may have had with customers and home office personnel was of the sort that one might expect from a successful, aggressive salesman. Such problems were not unusual among LCP's sales force.

B. *The Argument with Santangelo*

On November 4, 1980, Dash had an argument with an employee in LCP's customer service department. The employee reported the incident to her supervisor, Michael Santangelo, who then telephoned Dash. According to Santangelo, Dash immediately began swearing. Dash, however, testified that if he swore at Santangelo, it was only *after* Santangelo threatened to "slow down or reject" any order that Dash sent in to the customer service department.[11] Santangelo admitted telling Dash that if he did not calm down and stop swearing, any order that came into the department without an "i" dotted or a "t" crossed would be rejected.[12]

After the argument, Santangelo bypassed his own superior and went directly to Pete Bissett, the National Sales Manager. Bissett is Dash's superior. As soon as Santangelo mentioned Dash's name, Bissett stopped him and called in Roger Roth, the Personnel Manager. When Roth arrived, Santangelo continued his report of the incident. After hearing Santangelo's version, and without any discussion, Bissett and Roth decided to terminate Dash.[13] Neither Bissett nor Roth, nor any other person at LCP, made any attempt to learn Dash's version of the incident. When Bissett called Dash the following day to tell him he was fired, Bissett refused to listen to Dash's version.

The ALJ found that the sequence of events after Dash's argument with Santangelo indicated that "Dash had been singled out for harassment and for ultimate discharge," and that "LCP was looking for a reason to get rid of Dash and had been looking for a reason for some time." We agree. The evidence shows that there was nothing unusual about Dash's argument with Santangelo. Kensler testified that sales representatives swore at correspondents "all the time." He estimated that there "was probably one person in every region who was forever raising hell with someone in the home office." Yet, to his knowledge, no one had ever been disciplined for swearing. Other testimony supports this assertion. Gregory Talbot, a sales representative, testified that he had heard both salesmen and management use profanity, and that he had heard one salesman, Bob Carduner, curse at several members of LCP's top management. Talbot testified that Carduner was "practically always angry about something or somebody." Yet LCP later promoted Carduner to a management position. David Mann, a regional manager, testified that one of his salesmen had sworn at him, but was not disciplined in any way. And Barry Oliver, a former LCP collection correspondent, testified that he had often heard salesmen use profanity, and that he had used it himself on occasion. Oliver had never heard of anyone at LCP being fired for swearing.

The Board majority did not dispute the ALJ's finding that LCP was motivated to terminate Dash because of his union activities. The majority found, however, that LCP had met its burden of proving that it would have terminated Dash for his conduct toward Santangelo, regardless of his union activities. The evidence simply does not support such a finding. The evidence shows, rather, that swearing and abusive or aggressive behavior were commonplace among LCP's sales representatives, and that LCP did not discipline its sales representatives for swearing.

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[11] According to Dash, Santangelo's exact words were: "You will talk to me or I will rip up, return or lose every order of yours that comes through this department for clearance."

[12] The ALJ did not consider the sequence of the argument important, because he observed that "swearing at . . . customer service [personnel] was not uncommon." The Board concluded that Dash would have been terminated even if his version of the argument were accepted as true.

[13] Asked whether Bissett had said anything to Roth after hearing about the incident, Santangelo testified, "Oh, yes. [Roth] looked at [Bissett] and said what do you think we ought to do? [Bissett] said terminate him."

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We find LCP's conduct on November 4 and 5 to be highly significant. When Santangelo reported that he had argued with Dash, LCP failed to seek out Dash's version of the incident. It did nothing to verify that an argument had, in fact, occurred. When Dash tried to explain his version of the incident, Bissett refused to listen. Rather than try to ascertain what had really happened, LCP's management took Santangelo at his word, and assumed that Dash was to blame. We agree with the dissenting Board member, who found that LCP's "determination to hear only Santangelo's version established that its interest was in finding a plausible pretext for the discharge, and not in ascertaining what actually occurred."

The Board's finding that LCP would have terminated Dash despite his union activities is not supported by substantial evidence. LCP has thus failed to prove its affirmative defense to the charge of unfair labor practice in terminating Dash. Insofar as it relates to the issue of Dash's termination, therefore, we modify the Board's order to conform with the proposed order of the ALJ, that LCP be required to reinstate Dash to his former position without prejudice to seniority or other rights, give Dash back pay with interest according to law, and expunge from its personnel and other records any reference to the discharge. [14] Thus, we remand to the Board for hearing on the amount of back pay due Dash. *See Wakefield*, 779 F.2d at 1439 (denying enforcement of Board's order and remanding for reassessment of amount of back pay due to discharged employee).

II. *LCP's State Court Action*

The Board may not enjoin the "filing and prosecution of a well-founded lawsuit . . . as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 277 (1983). A well-founded lawsuit is one that has a reasonable basis in fact *or* law. *Id.* at 745–47, 103 S.Ct. at 2171–72. A suit has a reasonable basis in *fact* if it raises "a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts." *Id.* at 745, 103 S.Ct. at 2171. A suit has a reasonable basis in *law* "if there is any realistic chance that the plaintiff's legal theory might be adopted." *Id.* at 747, 103 S.Ct. at 2172.

The ALJ found that LCP's appeal of the award of unemployment benefits and its state court action were unlawfully motivated, and recommended that LCP be ordered to withdraw its state court action and reimburse Dash for legal expenses incurred as a result of the appeal. The Board, however, found that LCP's state court action had a reasonable basis in both fact and law. The Board found that LCP "reasonably could have contended . . . that it was prejudiced by the examiner's refusal" to continue the telephone hearing to allow it to obtain counsel and call witnesses, and by the examiner's reliance, in deciding for Dash, on LCP's failure to call witnesses. These findings are supported by substantial evidence.

LCP alleged that its failure to be represented by counsel at the telephone hearing before the Appeal Tribunal—as well as its failure to call witnesses—was the result of a misunderstanding of the instructions for the telephone hearing. When Dash appeared at the telephone hearing with his attorney, LCP requested an adjournment so that it could obtain counsel. The examiner refused. When the examiner asked LCP if it had any witnesses to call, LCP again requested an adjournment. The examiner again refused. In its decision upholding the award of benefits, the examiner stated that LCP had failed to call witnesses and as a result had failed to meet its burden of presenting

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[14] This court has jurisdiction to "make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." National Labor Relations Act § 10(f), 29 U.S.C. § 160(f); *cf. NLRB v. Max Factor and Co.*, 640 F.2d 197, 205 (9th Cir.1980), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 840 (1981) (noting that the court has the power to modify the Board's order where it is appropriate to do so).

evidence regarding the circumstances of Dash's discharge.

The Board found that the telephone hearing instructions presented an issue of material fact, "because they arguably prohibit legal representation and the presentation of witnesses at a telephone hearing." The language of the instructions clearly supports such an interpretation.[15] Furthermore, if such an interpretation had been adopted, LCP might have prevailed in the Wisconsin state court on its due process claim. LCP's state court action therefore had a reasonable basis in both fact and law, and the Board properly refused to enjoin it. *See Bill Johnson's Restaurants,* 461 U.S. at 743, 103 S.Ct. at 2170.

Once the Board has determined that an employer's state court action is well-founded, it must stay its proceedings and await the resolution of the state action. *Id.* at 745–46, 103 S.Ct. at 2171–72. If the employer prevails in the state court action, it will also prevail before the Board, because "the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 747, 103 S.Ct. at 2172. If, however, the employer does *not* prevail in the state court action, the Board must determine whether the employer filed the suit in retaliation for the employee's exercise of protected rights, and thereby committed an unfair labor practice. *Id.* If the Board finds that the action *was* retaliatory, it may order the employer to reimburse the employee for attorney's fees and other expenses. *Id.*

Here, the Board did not correctly apply the legal standard set forth in *Bill Johnson's Restaurants.* It did not stay its proceedings pending resolution of the state court action. The Board tried to obviate the need for further proceedings—in the event that LCP lost its state court appeal—by considering LCP's motivation for the appeal. The Board failed, however, expressly to determine "whether the suit had been filed in retaliation for the exercise of [protected] rights." *Id.* We therefore remand to the Board for a determination of this issue.

III. *The Requirement of an Independent Psychiatric Examination*

Dash contends that LCP committed an unfair labor practice by requiring him to submit to an independent psychiatric examination before returning to work. Both parties agree that Dash submitted to the examination before the settlement agreement was executed.[16]

The Board will neither set aside a settlement agreement nor find an unfair labor practice based on presettlement conduct unless it *first* finds either a failure to comply with the settlement agreement or a postsettlement unfair labor practice. *Cambridge Contracting, Inc.,* 259 N.L.R.B. 1374, 1381 (1982) (involving a settlement agreement); *Ann's-Schneider Bakery,* 259 N.L.R.B. 1151, 1152 (1982) (involving presettlement conduct).

Relying on this standard and on its finding that LCP had committed no postsettlement violations, the Board declined to decide whether LCP's requirement that Dash submit to an independent psychiatric examination constituted an unfair labor practice. The Board considered the requirement "only for the purpose of shedding light on [LCP's] motive for its postsettlement conduct," and concluded that the motive was proper.

As shown above, the evidence does not support the Board's finding that LCP would have terminated Dash despite his union organizing activities. Because we find that LCP *did* commit a postsettlement violation by terminating Dash, we must remand to the Board to determine whether LCP committed a presettlement violation by requiring Dash to submit to a psychiatric examination.

CONCLUSION

The Board's finding that LCP did not commit a postsettlement unfair labor practice by discharging Dash is not supported by substantial evidence. LCP has thus failed to prove its affirmative defense that it would have terminated Dash despite his union organizing activities. Having found a postsettlement violation, we therefore set aside the settlement agreement, and modify the Board's order to conform with the ALJ's proposed order. Therefore, LCP is ordered to offer Dash full and immediate reinstatement to his former position, without prejudice to seniority or other rights. LCP is further ordered to give Dash back pay with interest according to law, and to expunge from its personnel and other records any reference to the discharge. We remand to the Board for a determination of the amount of back pay due Dash.

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[15] The instructions read, in pertinent part: "This case has been scheduled for a telephone hearing. Your testimony will be taken and recorded over the telephone. . . . Immediately notify the Office Manager if you wish to: A. Have witnesses present at the hearing; (Requires personal appearance hearing), B. Be represented by an attorney or another person; (Requires personal appearance hearing). . . . Personal appearance hearings will be scheduled only upon your request."

[16] The psychiatric examination was conducted on September 9, 1980. The settlement agreement was signed by LCP and the union on September 15 and 18, respectively, and was approved by the Regional Director on October 1.

The Board's initial finding that LCP's state court action was well-founded is supported by substantial evidence. The Board failed, however, to determine—after the resolution of the state court action—whether the action had been filed in retaliation for Dash's exercise of protected rights. We therefore remand to the Board for a determination of this issue.

Because we find that LCP committed a postsettlement unfair labor practice by discharging Dash, we remand to the Board for a determination whether LCP committed a presettlement unfair labor practice by requiring Dash to submit to a psychiatric examination before returning from his leave of absence.

REVERSED IN PART AND REMANDED. EACH SIDE TO BEAR ITS OWN COSTS.

J. BLAINE ANDERSON, Circuit Judge, dissenting: I respectfully dissent. This is a classic case for the application of our deferential and narrow standard and scope of review. The majority recognizes our restrictive role but declines to apply it because they are not "persuaded" by the "facts." Fact finding and the inference to be drawn are for the Board, not this court. *See, e.g., Kallmann v. NLRB,* 640 F.2d 1094, 1098 (9th Cir.1981); *Zurn Industries, Inc. v. NLRB,* 680 F.2d 683, 693–94 (9th Cir.1982). The Board relied on significant facts not mentioned in the majority opinion, including, but not limited to, Dash's rather sorry record of rudeness and arrogance.

The interested reader and researcher are directed to the majority and dissenting opinions of the Board members, 273 N.L.R.B. No. 31 (1984), in support of the assertions made in this brief dissent. It is clear that the Board majority accepted an almost undisputed version of facts in reaching its conclusion. The facts so found by the Board are supported by the record and constitute substantial evidence on the record as a whole. In the interests of uniformity, stability and predictability, we must not substitute our judgment just for a preferred result.

We are obligated to deny the petition for review and I would do so.

San Francisco Web Pressmen and Platemakers' Union No. 4 v. NLRB

794 F.2d 420 (9th Cir.), July 7, 1986; original partial concurrence and partial dissent withdrawn and replaced July 22, 1986

On petitions to review and cross-application to enforce Board Order

Before: TANG and FERGUSON, Circuit Judges, and GRAY, * District Judge

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FERGUSON, Circuit Judge: San Francisco Web Pressmen and Platemakers' Union No. 4 ("Union") petitions for review of the National Labor Relations Board ("Board") Second Supplemental Decision and Order dated October 24, 1984; the Board applies for enforcement. That decision orders the Union to arbitrate a wrongful termination grievance, permits the employees involved to hire outside counsel at the union's expense, and orders the Union to pay back wages if the grievance cannot be arbitrated. We grant enforcement of those parts of the order compelling arbitration and permitting outside counsel, and deny enforcement of that part of the order making the Union potentially liable for backpay.

I.

Michael Tenorio and Gil Fowler ("Employees"), members of the Union since 1977, became involved in a barroom fight in August 1978 with another Union member. On learning of the incident, the Union Executive Board contacted the Employees and requested that they explain their conduct. The Employees considered the incident of no concern to the Union, and on August 23, 1978, told Paul Trimble, a member of the Executive Board, over the telephone that they would not appear. They visited Trimble at work that same day and, in a loud voice, Fowler asked to speak with him. Trimble agreed, but Fowler replied that he wanted to see him outside. Fowler asked when Trimble got off work, and promised to see Trimble then. Trimble felt threatened and asked security personnel to accompany him to his bus stop after work. Trimble reported the story to the Employer, who discharged Tenorio and Fowler the following day. [1]

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* Honorable William P. Gray, Senior United States District Judge for the Central District of California, sitting by designation.

The Union filed a grievance on the Employees' behalf. Union investigators interviewed Trimble and two eyewitnesses, but neither Tenorio nor Fowler. On August 29, 1978, the Joint Standing Committee, composed of two Employer and two Union representatives, upheld the discharges for cause. The Union declined to arbitrate the grievance.

On September 1, 1978, the Employees filed unfair labor practice charges with the National Labor Relations Board against the Employer and the Union. The General Counsel to the Board determined that the Employees were discharged "for cause," and issued no complaint against the Employer. He did, however, issue a complaint against the Union, charging it with breach of its duty of fair representation in processing Employees' grievance. After a hearing, an administrative law judge (ALJ) found a breach by the Union. The Board reversed on April 25, 1980, but this court reversed the Board and remanded, holding that the Union had breached its duty by failing to interview the Employees. *Tenorio*, 680 F.2d at 602.

On remand the Board issued a Supplemental Decision and Order. The Union timely petitioned this court for review of

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the decision. The Board applied for enforcement. The Board issued a Second Supplemental Decision clarifying a portion of its prior order. [2]

The Board ordered, in part, that the Union:

> (1) Request the Employer to reinstate Tenorio and Fowler, and pursue the remaining stages of the grievance procedure, including arbitration, if necessary.
>
> (2) Permit Employees to retain their own counsel during the grievance process and pay reasonable legal fees of such representation.
>
> (3) Pay Employees back wages from the date they first requested the Union to redress their grievance until they obtained substantially equivalent employment (less net earnings, plus interest) in the event that it is not possible to finally process the Employees' grievance.

Thereafter, the Board amended its application for enforcement, and the Union amended its petition for review.

II.

The Union challenges the propriety of the arbitration order, the permission to hire outside counsel at the Union's expense, and the backpay order. We discuss each issue in turn.

First, the Union contends that the Board improperly ordered the Union to pursue the grievance if the Employer refuses to reinstate the Employees. The Union argues that it effectively complied with the order by seeking reinstatement and arbitration after the ALJ's decision, and by referring the Employees to the Employer for hire. [3] We disagree. These efforts do not constitute full compliance with the order. For example, the Union has not attempted to compel arbitration through a section 301 suit. [4]

Second, the Union challenges the Board's order permitting the Employees to hire outside counsel for the remainder of the grievance procedure at the Union's expense. The Union argues that arbitration is impossible and therefore this portion of the order is "meaningless." We disagree.

A union has no duty to process a frivolous grievance. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275 (9th Cir.1983). However, a union may be liable for the expense of outside representation if it has failed to process a nonfrivolous grievance fairly. *Id.* at 1275–76.[5] Though the court in *Tenorio* made no explicit assessment of the merits of the Employees' grievance, we read *Tenorio* to hold that the grievance was not frivolous, because it found a breach of duty by the Union. *Tenorio,* 680 F.2d at 602. Therefore, the assessment of attorney's fees is within the Board's broad discretion. *Dutrisac,* 749 at 1275–76.

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[1] The events surrounding the Employees' discharge and the Union's failure to process their grievance properly are recounted in *Tenorio v. NLRB*, 680 F.2d 598, 600–01 (9th Cir.1982).

[2] The first supplemental decision ordered the Union to pay back wages in the event that the grievance could not be processed "due to considerations of timeliness." The second supplemental decision more fully explained the rationale of the backpay award and ordered the Union to pay back wages if the grievance was prohibited "for any procedural or substantive reason."

[3] Tenorio was eventually hired through the referral.

[4] We recognize that the four-year statute of limitations may bar a section 301 suit. However, federal interests such as the parties' attempt to resolve the case through the Board, *see Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033–37 (9th Cir.1983), may toll the statute, or the statute may be equitably tolled under California law, *id.* at 1033.

Third, the Union argues, and we agree, that because no tribunal has yet concluded that the Employees were discharged in breach of their contract, the Employees are not entitled to a backpay award. We hold that the Employees must show both a wrongful discharge by the **424** Employer and a breach of duty by the Union to collect backpay from the Union.[6]

The Board has broad discretion in fashioning a backpay remedy, and the remedy should stand unless it is an attempt to achieve ends not within the policies of the NLRA. *NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers Local 433,* 600 F.2d 770, 777–78 (9th Cir.1979) (citing *J.H. Rutter-Rex Manufacturing Co.,* 396 U.S. 258, 263, 90 SCt. 417, 420, 24 L.Ed.2d 405 (1969)), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). However, we enforce an order only if "the Board correctly applied the law." *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 724 (9th Cir.1980), *cert. denied,* 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981). We find that the Board incorrectly applied the law.

An employer and a union are jointly and proportionately liable for backpay when the employer has caused damage by wrongfully discharging the employee and the union has increased that damage by breaching its duty of fair representation. *E.g., Bowen v. United States Postal Service,* 459 U.S. 212, 223, 103 S.Ct. 588, 595, 74 L.Ed.2d 402 (1983); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 566, 96 S.Ct. 1048, 1057, 47 L.Ed.2d 231 (1976).[7] The employer and union each are liable for the portion of damages that it caused: the employer for back pay from the date of the wrongful termination to the date the employee would have been reinstated had the union not breached its duty, and the union for backpay thereafter. *Id.*

> "[Breach of contract and fair representation] claims are inextricably interdependent. 'To prevail against either the company or the Union, . . . [the employees] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.' " . . . The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164–65, 103 S.Ct. 2281, 2290–91, 76 L.Ed.2d 476 (1983) (quoting *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 66–67, 101 S.Ct. 1559, 1565–66, 67 L.Ed.2d 732 (1981) (citation omitted)).[8]

The Employees argue that the Supreme Court cases require an employee to show both wrongful discharge and breach of duty to prove employer liability, not union liability. They argue that they therefore should not have to show a wrongful discharge for the Union to be liable. We disagree. The language and reasoning of the cases refer to union liability for backpay as well. In addition, our circuits, other circuits, and the Board have required a showing that the employer breached the collective bargaining agreement before holding the union liable for backpay.[9]

In *NLRB v. Pacific Coast Utilities Service, Inc.,* 638 F.2d 73 (9th Cir.1980), we enforced a Board order granting backpay against both the employer and the union when substantial evidence in the record supported the Board's findings of both

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[5] Exclusive representation by the Union is the rule, and privately retained counsel the exception. *Castelli v. Douglas Aircraft Co.,* 752 F.2d 1480, 1484–85 (9th Cir.1985). Given the Union's breach of duty, the Board's order is within the exception.

[6] Tenorio and Fowler have established that the Union breached its duty of fair representation. *Tenorio,* 680 F.2d at 601–02.

[7] The Supreme Court cases involve section 301 suits. This case involves an unfair labor practice charge brought before the Board under section 10(c) of the NLRA. However, we may use the same analysis for fair representation claims brought before either tribunal. *NLRB v. Eldorado Manufacturing Corp.,* 660 F.2d 1207, 1215 (7th Cir.1981); *NLRB v. Local 485, International Union of Electrical Radio and Machine Workers,* 454 F.2d 17, 22 (2d Cir.1972).

[8] Section 301 suits are hybrid actions against the employer and the union, and normally an employee sues both. However, the reasoning and language of *DelCostello* apply to each defendant.

[9] The dissent erroneously assumed that, to establish the wrongfulness of a discharge, an employee must litigate directly against the employer. We impose no such requirement. An employee may use traditional discovery tools to obtain information from the employer. Thus, the Employees need not preserve their rights to sue the Employer, as the dissent states.

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wrongful discharge and breach of duty of fair representation. We treated the wrongful discharge finding as a prerequisite to the employer and union's backpay liability: "Given the determination that discharge was wrongful, it follows that the failure of the union to represent the employee was damaging to him and a contributing factor to his loss of pay." *Id.* at 74 (citing *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB No. 197 (1978)).

Other circuits have followed this rule. *See United Steelworkers of America v. NLRB*, 692 F.2d 1052 (7th Cir.1982) (denying enforcement of Board order awarding backpay against union for breach of duty because grievance not shown to have merit); *NLRB v. Eldorado Manufacturing Corp.*, 660 F.2d 1207, 1215 (7th Cir.1981) (Board should impose backpay liability against employer and union "only if the discharges were contrary to the collective bargaining contract and if the Union breached its duty of fair representation"); *NLRB v. Local 485, International Union of Electrical, Radio and Machine Workers*, 454 F.2d 17, 23 (2d Cir.1972) (denying enforcement of Board order awarding backpay against union for breach of duty because grievance not shown to have merit).[10]

The Board itself has used this rule. In *Glass Bottle Blowers Association*, 240 NLRB 324 (1979), the Board affirmed the ALJ's order to process a wrongful discharge grievance and to reimburse the employees for outside counsel at those proceedings, but rejected a backpay request. *Id.* at 325. The Board reasoned that, without a resolution of the underlying grievance against the employer, such an award would be punitive. *Id.*[11]

III.

We grant enforcement of that part of the Board's order compelling the Union to pursue the Employees' grievance and to hire outside counsel at the Union's expense. We deny enforcement of that part of the order awarding backpay in the event arbitration is impossible.

TANG, Circuit Judge, concurring in part and dissenting in part: I concur with the majority that the Board's arbitration order and the Board's order permitting the Employees to hire outside counsel at the Union's expense may stand. I respectfully dissent from the majority's conclusion that Union backpay liability is in each and every instance contingent upon a tribunal's determination of wrongful discharge by the employer.

Although the general rule is that the Board shall not hold unions liable for backpay without a finding by a tribunal (court, Board, or arbitration panel) that the discharge by the employer breached the collective bargaining agreement, *see, e.g., United Steelworkers of America v. NLRB*, 692 F.2d 1052, 1058 (7th Cir.1982); *Glass Bottled Blowers Association*, 240 NLRB 324, 325 (1979), the Board here ordered Union backpay liability in the event that arbitration is found to be time-barred. *Beverly Manor Convalescent Center*, 229 NLRB 692, 696 (1977). I believe this result is correct. Since we had already held the Union to have breached its duty of fair representation, *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982), the Board reasoned

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that as the wrongdoer, the Union should not be rewarded for its misconduct. The Board thus held that for the purposes of backpay liability, the grievance would be resolved in favor of the injured employee.[1]

If arbitration is found to be time-barred, the majority would leave the Employees without relief since no alternate tribunal would be available to adjudicate the wrongful discharge claim. A § 301 suit against the Union, the Employer, or both would be unavailable because the four-year statute of limitations would have long expired.

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[10] The courts rely on various reasons to support this conclusion. In *United Steelworkers of America*, 692 F.2d at 1058, and *Local 485*, 454 F.2d at 23, they concluded that a lack of a judicial or administrative finding of wrongful discharge rendered backpay speculative and punitive, and therefore outside the scope of the Board's remedial powers. Additionally, the court in *United Steelworkers of America*, 692 F.2d at 1058, observed that if the grievance is not meritorious, the employee would be rewarded for misconduct.

[11] A useful analogy with a requirement to show both a breach of duty and a harm caused or increased by that breach is attorney malpractice liability. *See, e.g., Weitzel v. Oil Chemical and Atomic Workers International Union, Local 1-5*, 667 F.2d 785, 787 (9th Cir.1982) ("[T]he standard in a malpractice suit should not be whether the NLRB attorney exercised ordinary skill and care, but whether the case could have been won. . . .") A client is not entitled to recover from the attorney just by showing a breach of duty alone.

[1] Ordinarily, the Board probably cannot pass on the merits of the discharge since its order could be construed as an attempt to remedy the Employer's breach of contract. Such an attempt would very likely overstep the Board's authority to act. *See Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967); *NLRB v. Electrical Workers IUE Local 485*, 454 F.2d 17, 23-24 (1972).

Thus, the practical result of the majority approach is to force employees filing an unfair labor practice complaint with the Board (alleging breach of duty of fair representation) to file simultaneously a § 301 suit against the union, the employer, or both *simply to preserve their right* to damages against the Union. Such a requirement is not only unfair, but also flies in the face of national labor relations policy. Congress has specified, and the Supreme Court has recognized, that a dispute resolution method agreed upon by the parties—in this case arbitration—is the desirable method for settlement of grievance disputes. § 203(d), 61 Stat. 154, 29 U.S.C. § 173(d); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562–63, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). *See also Clayton v. Automobile Workers,* 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981) (national labor policy encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements).

If arbitration is found to be time-barred, the Board is faced with a situation where it may be impossible to know with certainty what would have happened in the absence of the Union's unfair labor practice. These uncertainties are the "direct products of Respondent Union's unlawful action," *King Soopers, Inc.*, 222 NLRB 1011, 1020 (1976), and the Board has consistently held that when a Union breaches its duty of fair representation under Section 8(b)(1)(A) of the Act by failing to process a grievance, "it is proper to resolve the question [concerning the validity of the grievance] in favor of the injured employee and not the wrongdoer." *Beverly Manor Convalescent Center,* 229 NLRB at 696. *See also Henry J. Kaiser Company,* 259 NLRB 1 (1981); *Electrical Workers IBEW 2088 (Federal Electric Corp.),* 218 NLRB 396 (1975).

The Board's view is in accord with well-established equitable principles. Indeed, the Supreme Court has made clear that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946).[2] In short, the Board, in seeking to uphold the public interest and restore the status quo, is entitled to place the burden of any uncertainty on the Union as the wrongdoer in this case.

Faced with such a situation, the Board correctly resolved the uncertainty in favor of the injured employees and not the wrongdoers, and presumed that Tenorio and Fowler's grievance, if fully and fairly processed, would have been found meritorious and that they would have been reinstated with backpay.[3] In this instance I believe the Board's order was correct and for the foregoing reasons I would affirm that order.

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[2] See also *Leeds & Northrup Co. v. NLRB,* 391 F.2d 874, 880 (3d Cir.1968) ("the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act."); *NLRB v. Swinerton,* 202 F.2d 511, 516 (9th Cir.1953).

[3] In *Steelworkers v. NLRB,* 692 F.2d 1052 (7th Cir.1982), the court failed to enforce the Board's finding that the union violated its duty of fair representation. Thus, the court technically did not need to face the question of the proper remedy for such a violation. However, the court there further stated that the Board's proposed backpay remedy could not be enforced because there was no finding the discriminatee's grievance had merit, and thus it could not be said that the union had caused any damage since there was no finding of breach of contract. On the other hand, the court conceded that in the event the arbitration order is found to be time-barred, the Board may pass on the merits of the contract claim to the extent that it effects the union's liability. *Id.* at 1057.

In *NLRB v. Electrical Workers IUE Local 485,* 454 F.2d 17, 22 (2d Cir.1972), the court enforced the Board's initial order which, like the order in this case, required the offending union to "take [the discriminatee's] grievance to arbitration if necessary." The court explicitly noted that "if a section 301 suit against the employer is required in order to obtain arbitration . . . it will be deemed necessary for the purpose of complying with the order" (footnote omitted). The court, however, found it "premature to deal with" the "problem" addressed by the Board in this case—the respondent's liability for backpay if it is finally unable to obtain arbitration of the discriminatees' grievance. *Id.* at 24. The court further noted that "[u]ntil some tribunal determines the validity of the [discriminatees] discharge, any assessment of back pay might well be regarded as speculative and punitive." *Id.* at 23.

However, since the Board did reach a final determination that the Union breached its duty of fair representation, we find nothing speculative or inconsistent with the above-discussed principles of equity, in assigning the Union with backpay liability should it be unable now to pursue the remaining stages of the grievance.

International Brotherhood of Electrical Workers Local 1466, AFL–CIO v. NLRB

795 F.2d 150 (D.C. Cir.), July 8, 1986; rehearing denied Sept. 12, 1986—270 NLRB 686

On petition to review Board Order

Before BORK and SCALIA, Circuit Judges, and MACKINNON, Senior Circuit Judge

Opinion for the Court filed by Circuit Judge **Bork**

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Bork, Circuit Judge: Petitioner International Brotherhood of Electrical Workers Local 1466, AFL–CIO ("IBEW" or "the union") appeals a decision by the National Labor Relations Board dismissing the union's complaint that Columbus and Southern Ohio Electric Company ("Columbus" or "the company") committed an unfair labor practice by refusing to bargain over its unilateral termination of the employees' Christmas bonus. We agree with the NLRB's conclusion that the integration sentence of the 1982 collective bargaining agreement eliminated the Christmas bonus as a term or condition of employment. Because the union, for that reason, had no right to bargain over the Christmas bonus when the company announced the discontinuation of the bonus, we affirm the Board's order dismissing the union's complaint.

I.

Approximately forty years ago, Columbus began paying its employees an annual Christmas bonus. The bonus has never been the subject of a collective bargaining agreement between the company and the union. In mid-1982 the Company and IBEW renegotiated their collective bargaining agreement. In a letter dated April 19, 1982, the company's representative notified IBEW that, upon the expiration of the current contract, Columbus wished to "terminate all other agreements, written or oral, between the parties, whether such agreements be in the form of letters, memoranda, grievance settlements or in any other form." Joint Appendix ("J.A.") at 162.

At the first renegotiation meeting, Columbus proposed a "zipper clause":

> Section 2. It is the intent of the parties that the provisions of this Agreement will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of all rights or claims which may be asserted in arbitration hereunder or otherwise.
>
> The Union for the life of the Agreement hereby waives any rights to negotiate, or to negotiate or bargain with respect to any matters contained in this Agreement.

J.A. at 167. By letter of May 7, 1982, the union sought to clarify the scope of the first sentence, asking the company for "a list and summary of all prior agreements and understandings, oral or written, expressed or implied, which the Company believes to have contractual affect [sic] between the parties." *Id.* at 169. The company answered in a letter of May 14, 1982, that it did not have such a list, and that the number of side agreements made by the parties over the years made it "virtually impossible to draw up an accurate list." *Id.* at 170. Columbus stated that it sought to terminate all existing agreements in order to "wipe the slate clean before the new contract went into effect." *Id.* During a contract negotiation meeting on May 19, 1982, the IBEW representative stated that he understood the intent of the zipper clause but indicated the union would complain to the NLRB about the company's refusal to offer a list of the agreements affected. *See Columbus & Southern Ohio Electric Co.,* No. 9–CA–19066 (Sept. 7, 1983), J.A. at 205.

IBEW filed an unfair labor practice charge with the Regional Director of the NLRB, claiming that Columbus' failure to provide the requested list of side agreements constituted a breach of the company's duty to bargain. J.A. at 191. The Regional Director refused to issue a complaint on the ground that Columbus could not give IBEW information it did not possess. The Regional Director stated in a letter to the union that the employer sought "to clear the table so that all matters were subject to inclusion within one written agreement." *Id.* at 192. The union appealed to the General Counsel of the NLRB. IBEW argued that Columbus' position with respect to the zipper clause was broad, even including "past practices" within its scope, and that IBEW was entitled to know "specifically what the Company want[ed] . . . removed" in the new contract. *Id.* at 195–96. But, on July 29, 1982, the appeal was denied. *Id.* at 200.

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On August 25, 1982, after twenty-six separate bargaining sessions, Columbus and IBEW reached agreement on a new contract. J.A. at 205. The contract did not mention the Christmas bonus but did contain the zipper clause exactly as it had appeared in Columbus' original proposal. *Id.* At no time during the negotiations did either party make express reference in the issue of how the contract would affect the Christmas bonus. *Id.*

The company announced on November 23, 1982, that it intended to discontinue the Christmas bonus. J.A. at 205. IBEW filed a grievance on November 29, 1982, protesting the elimination of the bonus. When management did not accept the grievance, the union filed an unfair labor practice charge with the Regional Director of the NLRB, asserting that Columbus had unilaterally altered the Christmas bonus in violation of its statutory duty to bargain over terms and conditions of employment. *Id.* at 206.

Relying on authority that the waiver of statutory rights under the National Labor Relations Act ("NLRA") must be "clear and unmistakable," *see* J.A. at 208, the ALJ held for the union. The ALJ found that the issue of the Christmas bonus had never arisen during negotiations and that the company had admittedly not contemplated discontinuing the bonus until after the contract was executed. *Id.* at 210. The zipper clause, he therefore concluded, did not apply to the longstanding "unilateral[ ]" provision of the Christmas bonus, *id.*, and he recommended that the company be ordered to cease and desist and to make the employees whole for the period during which Columbus was in violation of its duty to bargain. *Id.* at 214.

The Board, acting through a three-member panel, reversed the ALJ's decision. *See Columbus & Southern Ohio Electric Co.,* 270 N.L.R.B. 686 (1984). The Board reviewed the "complete contract" and found that the agreement addressed "an entire spectrum of issues," including a large number of specific provisions covering wages and compensation. *Id.* at 687. This fact, coupled with the sweeping language of the zipper clause itself (*e.g.*, "supersede all prior agreements and understandings," "shall govern the[ ] [parties'] entire relationship," "sole source of any and all rights or claims which may be asserted in arbitration here or otherwise"), led the Board to conclude that the zipper clause constituted a "clear and unmistakable waiver of the Union's right to bargain over the elimination of the Christmas bonus." *Id.*

II.

A.

Before we address the Board's holding that the zipper clause constituted an effective waiver of the union's right to bargain about the termination of the Christmas bonus, some statutory background is in order. Section 7 of the National Labor Relations Act guarantees employees the right to "bargain collectively through representatives of their own choosing," *see* 29 U.S.C. § 157 (1982), and section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [that] right[ ]." 29 U.S.C. § 158(a)(1) (1958). More directly, section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1982). Section 8(d) of the Act defines this bargaining obligation as requiring the union and employer to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 20 U.S.C. § 158(d) (1982).

In *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), the Supreme Court announced that an employer's "unilateral change" in a subject matter within the scope of section 8(d) amounted to "a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much

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as does a flat refusal [to bargain]." *Id.* at 743, 82 S.Ct. at 1111 (footnote omitted). *Katz* dealt with an employer's unilateral changes in the terms and conditions of employment during an ongoing contract negotiation, *see id.* at 737, 82 S.Ct. at 1108, but it is clear as well that making unilateral changes in the terms and conditions of employment during the pendency of an existing collective bargaining agreement also violates the duty to bargain. *See Office & Professional Employees International Union, Local 425 v. NLRB,* 419 F.2d 314 (D.C.Cir.1969).

An employer's "[p]ast practice" can become "clearly established as a term and condition of employment" subject to the duty to bargain. *See* 419 F.2d at 321. Specifically, a Christmas bonus, if tied to other remuneration and paid regularly over an extended period, becomes an element of wages and, therefore, a term and condition of employment that cannot be altered unilaterally. *See* 5 T. Kheel, *Labor Law* § 19.04, at 19–17 to 19–19 & n. 5 (1984); *compare NLRB v. Niles-Bement-Pond Co.,* 199 F.2d 713, 714 (2d Cir.1952) (upholding a Board finding that a Christmas bonus paid "over a substantial period of time and in amount . . . based on the respective wages earned by the recipients" were "wages"), *with NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399, 400–01 (9th Cir.1974) (approving NLRB's finding that infrequent, sporadic Christmas bonuses unrelated to the size of the employee's salary were not "wages, hours, or other terms and conditions of employment"). In the case before us, no one disputes that the Christmas bonus, a regular practice going back some forty years, constituted a part of the employees' wages and could not have been eliminated unilaterally by Columbus prior to the 1982 collective bargaining agreement. The NLRB concluded, however, that the parties, by that agreement, had effected "a clear and unmistakable waiver of the Union's right to bargain over the elimination of the Christmas bonus." 270 N.L.R.B. at 687; *see Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 832 (D.C.Cir.1982) (holding that waiver of statutory rights must be "clear and unmistakable"). We do not need to decide the appropriate degree of deference, if any, to give to the NLRB's interpretation of a contract, for, upon examination of the contract, we find that our interpretation of the agreement is the same as that of the NLRB.

B.

The Board's analysis relied upon the sweeping language of the first part of the zipper clause, the integration sentence, and not upon the second part, the waiver sentence. The Board emphasized the great breadth of the integration sentence stating:

> An examination of the contract language reveals that the parties clearly agreed that the provisions of the collective-bargaining agreement will "supersede all prior agreements and understandings" and that the collective-bargaining agreement would govern the parties' "entire relationship" and be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder *or otherwise.*" (Emphasis added).

270 N.L.R.B. at 687. Then, reasoning that the contract covered "an entire spectrum of issues," including many provisions on "wages" and other "types of compensation," the Board concluded that the zipper clause waived the union's right to bargain over the elimination of the Christmas bonus. *Id.*

The Board's reasoning suggests that the integration sentence of the zipper clause extinguished the practice of giving a Christmas bonus by limiting the union's rights to compensation to those provisions found within the agreement. Because the adoption of the integration sentence "wipe[d] the slate clean," the bonus no longer amounted to a term or condition of employment. Thus, by agreeing to the integration sentence, the union clearly and unmistakably lost any further right to bargain over the elimination of the bonus.

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In light of the entire record, we believe that the Board correctly read the integration sentence of the agreement. The language of that sentence is both strong and sweeping, and the bargaining history makes it clear that the scope of its coverage is wide. The opening clause states that the collective bargaining agreement would "supersede all prior agreements or understandings, oral or written, express or implied." Given the comprehensive provisions on compensation contained within the agreement, this clause serves to set aside all prior elements of compensation and replace them with the explicit compensation provisions contained in the contract. Thus, if the Christmas bonus clearly amounted to an "agreement[ ] or understanding[ ], oral or written, expressed or implied," the first clause of the integration sentence set it aside in favor of the comprehensive compensation provisions of the new agreement.

The bargaining history shows that this was precisely the case. After the company announced its intention to include a comprehensive zipper clause in the new agreement, the union asked for "a list and summary of all prior agreements and understandings, oral or written, expressed or implied, which the Company believes to have contractual affect [sic] between the parties." J.A. at 169. The company refused to provide the list requested, but rather sent a letter clarifying the scope of its proposal. That letter stated in relevant part:

> [T]o avoid any misunderstanding as to the Company's intention, our letter . . . notified you that we wish to terminate all agreements [when the new collective bargaining agreement takes effect]. . . . By specifying "all" agreements, we

> feel we have made our notice clear and unambiguous. "All" means just that—all. What we have [proposed] . . . was to wipe the slate clean before the new contract goes into effect. Of course, both parties are free to make proposals during the present negotiations; and these proposals could, of course, include matters that have been included in a side agreement. Presumably, if the Union wishes to continue an agreement, it knows of the existence of that agreement, as it would have been a party to it.

J.A. at 170. Thus, the company viewed its proposal as comprehensive and unambiguously expressed that view to the union prior to any agreement on the proposal. Columbus sought by its inclusion of such a provision to "terminate" every preexisting "agreement[ ] or understanding[ ]" between itself and the union and to "wipe the slate clean" by the adoption of a new agreement. We must conclude, therefore, that the integration sentence terminated the bonus if the practice of paying the bonus amounted to an "agreement[ ] or understanding[ ]" under the company's proposal.

The company argues that its proposal did cover "practices" and that the union understood this to be the case during the negotiations leading up to the adoption of the integration sentence of the zipper clause. Brief for Columbus at 18. The bargaining history bears the company out, for it provides a clear and unmistakable indication that the union understood the bonus to be within the category of "agreements or understandings." After receiving the letter described in the previous paragraph, IBEW filed a complaint with the Regional Director of the NLRB requesting that the company be required to provide the desired list, but the complaint was dismissed. The union appealed to the NLRB General Counsel, explaining that it sought to find out which "specific agreements and understandings" were within the proposal and, therefore, wanted the employer to supply "a list of such material . . . believed to be of contractual effect." J.A. at 195. In that same notice of appeal, the union described in great detail what it understood that "material" to be, and what Columbus, therefore, proposed to "terminate." Specifically, IBEW stated:

> *The Employer's position is broad. It covers past practices,* arbitrators' awards as to the interpretation and scope of contract language, grievance settlement[s] which may bear relevance to the contract language, oral agreement[s] which over the course of years have been perpetuated into practices, and written understanding[s] which also over the course of years have been perpetuated into practices.

J.A. at 195–96 (emphasis added). The General Counsel rejected the appeal, but the union still accepted the company's proposed integration sentence, notwithstanding the concededly broad scope of intended coverage. Thus, because the union unambiguously equated "past practices" with "agreements and understandings" and understood the company's proposal, therefore, to sweep in all such practices, IBEW, by agreeing to the company's proposal, accepted the "terminat[ion]" of all such practices, among which the Christmas bonus must plainly be counted.

Other parts of the integration sentence independently require the conclusion that the practice of giving a Christmas bonus was terminated. Following the initial clause just analyzed, the integration sentence continues by asserting that the collective bargaining agreement "shall govern [the parties'] entire relationship." This evinces a clear intent to do away with any element of that relationship not found within the four corners of the agreement, and, in the process, eliminates the Christmas bonus, which is nowhere to be found within that agreement. Finally, leaving no doubt about the intention to do away with anything not found within the new agreement, the parties included a clause stating that the contract was to be "the sole source of any and all rights or claims which may be asserted in arbitration . . . or otherwise." By their plain terms, therefore, each of the three clauses of the integration sentence is sufficiently broad and comprehensive to have extinguished any right the union had to a Christmas bonus and terminated that bonus. The matter could not have been plainer.

The Board, therefore, correctly determined that the employer did not commit an unfair labor practice when the company announced on November 23, 1982, almost three months after the adoption of the new collective bargaining agreement, that the Christmas bonus was being discontinued, even though Columbus afforded the union no prior opportunity to bargain at that time. The Board's analysis might have begun and ended with the observation that "[i]t is the unilateral *change* in a matter which is a mandatory subject of bargaining that constitutes a violation of the Act," *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 411 (9th Cir.1978) (emphasis added), and that, because the collective bargaining agreement terminated the practice of giving a Christmas bonus, announcing the discontinuation of that bonus did not amount to a change in any such matter. The company merely implemented the change over which it and the union had bargained and to which they agreed in the adoption of the collective bargaining agreement. The Board's opinion, however, speaks of a "waiver" which might make it appear that it rested upon the second sentence of the zipper clause rather than, as we do, the first sentence. We think, however, that this was merely a question of loose usage rather than a different rationale. For that reason, no problem is created by *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

The NLRB said that the "zipper clause agreed to by the parties constituted a clear and unmistakable waiver of the Union's right to bargain over the elimination of the Christmas bonus." 270 N.L.R.B. at 687. But the Board's opinion cannot be taken to rely in any way upon the second sentence of the zipper clause, that which "waives any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in the agreement." Indeed, that waiver, being confined to matters in the agreement, could not apply to the Christmas bonus since the bonus was not in the agreement. The Board's analysis rests entirely on the first, or integration, sentence, and entirely disregards the second, or waiver, sentence. Thus, the Board's analysis cannot be read as depending upon the union's waiving its statutory

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rights per se, but clearly depends instead upon the union's waiving its right to bargain by agreeing to forgo a necessary predicate to the exercise of that right. Because the effect of this is the same as the waiver of statutory rights, the agreement must meet the statutory standard that waiver be "clear and unmistakable." *Road Sprinkler*, 672 F.2d at 832. And it does. The union explicitly and unmistakably agreed to eliminate the Christmas bonus as a term or condition of employment when it accepted the integration sentence of the zipper clause and, therefore, lost any bargaining rights regarding its elimination.

That the company, by its own admission, did not decide to terminate the bonus until after the execution of the collective bargaining agreement does not alter the analysis. Columbus' express purpose was to rid itself of all obligations outside the contract, including obligations it could not identify or had not thought about. The zipper clause's integration sentence accomplished that. The slate being wiped clean, the company had an option. It could have paid a bonus and, perhaps, put itself on the road to reestablishing the bonus as a term or condition of employment, or it could not pay the bonus. It chose the latter course.

Accordingly, the order of the NLRB is *Affirmed.*

NLRB v. Dane County Dairy

795 F.2d 1313 (7th Cir.), July 9, 1986—269 NLRB 218

On petition to enforce Board Order

Before BAUER, WOOD and COFFEY, Circuit Judges

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COFFEY, Circuit Judge: The National Labor Relations Board granted summary judgment against the respondents' holding that the respondents failed to demonstrate good cause excusing an untimely answer and finding that several affiliated companies were alter egos of Dane County Dairy. We grant the petition of the Board for enforcement of its order.

I

On April 11, 1984, the Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local 695 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") filed with the Milwaukee Regional Office of the National Labor Relations Board a charge against Dane County Dairy ("DCD" or "the Dairy"). The Union alleged that the Dairy had laid off employees represented by the Union and transferred the work performed by them to Bowman Enterprises, Inc.; MAJJAJ Bowman, Inc.; Bowman Farms, Inc.; Mary Ann Bowman, An Individual; Mary Ann Bowman d/b/a MAJJAJ Frigid Freight; Duane Bowman, Jr., An Individual; Duane Bowman, Jr., d/b/a Bowman Enterprises, Inc.; Duane Bowman, Jr., d/b/a Duane Bowman, Jr. & Associates; Duane Bowman, Jr., d/b/a Duane Bowman, Jr. & Family ("affiliated enterprises") [1] with the intent to discourage membership in the Union and evade its collective bargaining obligations, in violation of Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157.

Subsequently, the Union filed three amended charges; the first and second charges alleged that the affiliated companies were alter egos of the Dairy and named the affiliated companies as parties. The third charge alleged that the layoffs and the transfer of work were also in retaliation for prior NLRB proceedings instituted against Dane County Dairy. After the charges were filed, a field investigator from the NLRB interviewed various parties and received affidavits from the employees. DCD filed the sworn affidavit of Mary Ann Bowman with the Board disputing the alter ego status of MAJJAJ Frigid Freight and MAJJAJ Bowman, Inc.

On June 13, 1984, the Acting Regional Director of the NLRB Milwaukee Office issued a complaint against the Dairy and the affiliated entities contending that: (1)

Dane County Dairy and the affiliated companies constituted a single integrated business enterprise and a single employer within the meaning of the Act; (2) the Dairy laid off union employees without notice to or bargaining with the Union as to the layoffs or their effect; (3) utilized its affiliated companies to perform the work previously done by the laid off employees; (4) refused to give information to the Union necessary to fulfill its role as the exclusive collective bargaining representative for the bargaining unit; and, (5) refused to attend a meeting with the Union, all in violation of Section 8(a)(1), (3) and (5) of the Act (29 U.S.C. § 158(a)(1), (3) and (5)).

The complaint contained a notice of the answer required by 29 C.F.R. 102.20, which provides:

> "*Answer to complaint; time for filing; contents; allegations not denied deemed admitted.* The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

Each of the respondents were served with the complaint via the United States mail service and Donald Hue, then attorney for the respondents, was served via certified mail. Additionally, Duane Bowman (the owner of Dane County Dairy, Duane Bowman, Jr. & Family, and Duane Bowman, Jr. & Associates, who was also the manager or agent of MAJJAJ Bowman, Inc., MAJJAJ Frigid Freight, Bowman Enterprises, Inc. and Bowman Farms, Inc.) was personally served by an employee of the Milwaukee office of the NLRB.

The respondents failed to file an answer within the 10 day deadline; consequently, a Field Examiner for the NLRB sent both Duane Bowman and Attorney Hue letters notifying them that if an answer was not filed by July 12, 1984 the regional office would proceed as if the allegations in the complaint were admitted as true:

> "On June 13, 1984, the Acting Regional Director issued a Complaint and Notice of Hearing in the above matter. This document points out the requirement that the allegations in the Complaint are to be answered within 10 days and, if they are not, then the allegations in the Complaint shall be deemed to be admitted as true. To date no answer has been received. Please be advised that if no answer is filed by July 12, 1984, the Region will proceed in this matter on the basis that the allegation[s] in the Complaint are being admitted as true."

In addition, on or about July 17, 1984, an attorney with the General Counsel's office of the NLRB telephoned Donald Hue and repeated the requirement that an answer must be filed. Despite the notice in the complaint, the letter, and the phone call, respondents still failed to file an answer.

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[1] Stop-N-Go of Madison, Inc. was named as a joint employer. Because the Board deleted Stop-N-Go from the caption in the summary judgment proceeding, we do not include it as an "affiliated enterprise."

On July 18, 1984, the NLRB filed a petition for a temporary injunction pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), in the United States District Court for the Western District of Wisconsin naming DCD and the affiliated companies as respondents. The NLRB submitted the depositions of Duane and Mary Ann Bowman to the court which, after a review of the same and a hearing, made findings of fact that:

> "8. On or about March 27, 1984 (or shortly thereafter), Dane County Dairy transferred functions it had previously performed to Majjaj Bowman, Inc. and Majjaj Frigid Freight.
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> 9. Mary Ann Bowman, Duane Bowman, and Duane Bowman, Jr., d/b/a Duane Bowman, Jr. & Family, are other non-distinct entities engaged in businesses identical or complementary to the businesses engaged in by Dane County
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> Dairy, Majjaj Bowman, Inc., and Majjaj Bowman Frigid Freight."

As a conclusion of law, the district court held:

> "2. Petitioner has reasonable cause to believe that: (1) Dane County Dairy, Majjaj Bowman, Inc.; Mary Ann Bowman, an individual; Mary Ann Bowman, dba Majjaj Frigid Freight; Duane Bowman, Jr., an individual; Duane Bowman, Jr., dba Duane Bowman, Jr. & Family were and are an employer within the meaning of Section 2(2) of the Act;
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> * * * * * *
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> (d) The respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these unfair labor practices will impair the policies of the Act as set forth in Section 1(b) thereof."

Although Bowman Enterprises, Inc.; Bowman Farms, Inc.; Duane Bowman dba Bowman Enterprises; and Duane Bowman dba Duane Bowman, Jr. & Associates were listed as respondents by the court, the court failed to make any findings of fact or conclusions of law as to these entities. The court granted a temporary injunction ordering "respondents, their officers, representatives, agents, servants, employees, attorney and all members and persons acting in concert or participation with them," to restrain from "the commission, continuation or repetition" of the alleged unfair labor practices (terminating the members of the bargaining unit for the purpose of discouraging employees from engaging in collective bargaining; transferring work previously performed by the bargaining unit to employees of Dane County Dairy's affiliated enterprises; refusing to provide the Union with information necessary to fulfill its role as the sole designated collective-bargaining representative for the bargaining unit; failure to bargain over the decision to lay off all bargaining until employees or the effect of the decision; and, failure to bargain over the transfer of the bargaining unit's work to Dane County Dairy's affiliated enterprises.)

On October 23, 1984 the General Counsel of the NLRB filed a motion for summary judgment with the National Labor Relations Board. The General Counsel based his contention that there was no material issue of fact on two grounds: (1) because the respondents failed to file an answer, the allegations in the Complaint must be deemed to be true; (2) the evidence and depositions submitted with the motion demonstrate that there is no material issue of fact. The General Counsel urged the Board to find that the Dane County Dairy and its affiliated companies were in fact alter egos and a single employer under the Act and that the respondents violated the Act "by terminating its delivery routes and driver-employees and re-establishing those routes with an alter ego entity;" "by failing and refusing to furnish the Union with necessary and relevant information;" and "by failing and refusing to meet and bargain with the Union."

The respondents filed a brief in response to the summary judgment motion along with an undated answer to the complaint on December 11, 1984. The respondents argued, *inter alia,* that they should be allowed to file their untimely answer "on the ground of excusable neglect;" that a grant of summary judgment would be improper; and, that "a Hearing [should] be scheduled to sort out the complex issues presented before the Board in this proceeding." As to their failure to file an answer within the 10-day deadline or by July 12, 1984, the extension the regional office unilaterally granted, the respondents argued:

> "[T]he failure to file an Answer to the Amended Complaints was due to excusable neglect and

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> that General Counsel was always aware that respondents denied the Unfair Labor Practice Charge and that the NLRB is no way prejudiced by a failure to file an Answer to the Complaint; that the Respondent has complied with the Injunctive Relief requested by the General Counsel. The respondents were surprised by the late cancellation of the scheduled Board Hearing on Septem-
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> ber 10, 1984; that the respondents be permitted to interpose their Answer to General Counsel's Complaint at this time."

The respondents also disputed the General Counsel's contention that the affiliated companies were in fact alter egos of DCD and that Dane County Dairy and the affiliated entities were a single employer under the Act. However, the Dairy and the alter ego companies failed to offer affidavits, depositions or documentary evidence on this issue to rebut the deposition evidence presented by the General Counsel; instead the respondents merely contended that "a Board Hearing would be appropriate to sort out the entities and their relationship to DCD, the real party in interest. Evidence adduced at the Board Hearing would reveal that [the] General Counsel has simply included all entities having the name 'Bowman' as a Respondent in this case and every time a 'Bowman' surfaces the occasion calls for an amended complaint."

The Board rejected respondent's good faith argument:

> "The Respondent does not deny that it was properly served with the complaint. Nor does it deny the further assertions in the Motion for Summary Judgment that it was informed of the necessity of answering on two subsequent occasions. Moreover, we note that the Respondent neither filed an answer nor requested an extension of time in which to do so until approximately 6 months after the complaint issued and 6 weeks after the motion was filed. In these circumstances we find the Respondent has not shown good cause why it failed to file a timely answer."

However, the Board in its grant of the Motion for Summary Judgment did not rely solely on the allegations in the complaint, deemed to be true by the respondent's failure to answer, but also relied on the entire record before them:

> "In asserting jurisdiction over the Respondent here in addition to relying on the allegations of the complaint, we rely on certain admissions of Respondent Duane Bowman in the testimony which he gave in a proceeding closely related to the present case in the United States District Court for the Western District of Wisconsin, transcripts of which were attached as exhibits to the Motion for Summary Judgment."

As to the question of the affiliated companies, the Board "omitted Stop-N-Go of Madison, Inc. from the caption. We note that our Order binds, among others, agents of the respondents." In asserting jurisdiction over the affiliated companies, the Board found:

> "that, as alleged in the complaint, Bowman is sole stockholder and registered agent of Dane County Dairy; agent for Bowman Enterprises, Inc.; agent for each of his sole proprietorships named in the caption of this decision and supervisor and consultant for MAJJAJ Bowman, Inc. and the sole proprietorships of Mary Ann Bowman named in the caption of this decision."

The Board found "in accordance with the allegations of the complaint" that Dane County Dairy and the affiliated enterprises "are alter egos, and that they constitute a single integrated enterprise and constitute a single employer within the meaning of Section 2(2) of the Act." The Board concluded that the respondents laid off their employees for unlawful reasons, in violation of Section 8(a)(3) and (4) of the Act, and without bargaining with the Union in violation of Section 8(a)(5) of the Act. The Board ordered the Respondents to cease and desist from the unfair labor practices and from infringing "in any other manner" upon their employee's rights, as guaranteed by Section 7 of the Act. Moreover the Board ordered the respondents to reinstate the laid off employees with backpay; bargain with the Union before implementing any future layoff; and post a notice drafted by the Board.

After the Board issued its Order, respondents, represented by new counsel, filed a motion for reconsideration, rehearing and reopening of the record with the Board. The respondents alleged that they had not

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filed a timely answer because of "the confusion that arose in the fact of numerous amended charges and the extensive correspondence which was mailed to the various entities alleged to be alter egos." Additionally, the respondents contended that, "[t]he method of service of process, i.e., on Mr. Hue and Duane Bowman, with copies sent by common mail to the other entities, assumed that each of the entities was an alter ego. Some of the various entities were never properly served and never had a full opportunity to contest the allegations of alter ego status." Further, the respondents contended that the finding that the affiliated companies were alter egos of Dane County Dairy was not supported by the record and was "extraordinarily burdensome and should not have been made without evidentiary hearings." Moreover, the respondents alleged that they were:

> "prepared to submit evidence to the Board establishing that some and possibly all of these entities, especially MAJJAJ Bowman, Inc., Bowman Enterprises, Inc., and Bowman Farms, Inc., are distinct from Dane County Dairy in their business purposes, operations, equipment, customers, and supervision as well as their management and ownership. This evidence has not been previously submitted by any party. The respondents, however, did allude to this evidence in the Response to the Motion for Summary Judgment. . . . If addressed and credited, this evidence would require a different result with respect to the finding of alter ego status."

The Board denied the motion "as lacking in merit" and applied to this court for a judgment enforcing its Order. The respondents argue that their reasons for filing a late answer constitute good cause. In the alternative, the respondents contend that if we decide that they failed to demonstrate good cause for failure to file a timely answer, we should deny enforcement as to Bowman Enterprises, Inc., Bowman Farms, Inc., Duane Bowman, Jr. & Associates, and Duane Bowman, Jr. & Family because, in their view, these entities were not alter egos of DCD.

II

A. *Failure to File a Timely Answer*

On appeal, respondents limit their good cause arguments to two grounds:

> "1. Respondents' former counsel, an attorney acquaintance of Duane Bowman, Jr., was confused by the Board's procedures and did not appreciate the legal significance of filing an Answer in light of his concurrent defense of respondents in the temporary injunction proceedings in the federal court.
>
> 2. The Board and its agents had actual notice of respondents' position by previous filings and by defense of the temporary injunction proceedings, and the Board was not prejudiced by the delay in filing the Answer. Respondents fully expected to contest the allegations in the Complaint at the scheduled hearing, which was cancelled on short notice of the Board's own motion, apparently so that the General Counsel could file for default summary judgment."

According to the respondents, these two grounds justify a reversal of the Board's determination that good cause was not shown and dictates a remand of this case to the Board for a determination on the merits.

As was noted above, the rules and regulations of the NLRB require a respondent to file an answer to a complaint within ten days of service of the complaint. 29 C.F.R. § 102.20. The rules specifically provide: "All allegations, in the complaint, if no answer is filed . . . shall be deemed to be admitted as true and shall be so found by the Board unless good cause to the contrary is shown." *Id.* In enacting the National Labor Relations Act, Congress authorized the Board "to make such rules and regulations as may be necessary to carry out the provisions of the Act," 29 U.S.C. § 156, and "the Board is empowered to construe its own rules free of judicial review unless its construction is so arbitrary as to defeat justice." *NLRB v. Paper Art Co., Inc.*, 430 F.2d 82, 84 (7th Cir.1970).

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Therefore, the Board's determination of what constitutes "good cause" excusing a failure to file a timely answer must be upheld by the Court of Appeals unless its construction of the good cause standard "is so arbitrary as to defeat justice." *Id.*

The Board urges us to reject the argument that attorney Hue's alleged inexperience constituted good cause, noting that this inexperience of counsel argument was raised in neither the brief in opposition to the summary judgment motion nor in the motion for reconsideration, which was filed by new counsel. Pointing to the additional fact that the respondents offered no explanation for failing to raise the argument concerning inexperience of counsel before the Board in their brief to this court, the NLRB concludes that review of this argument is barred by § 10(e) of the Act (29 U.S.C. § 160(e)) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.") However, we need not reach the Board's waiver argument because an examination of the facts reveals that the inexperience of counsel argument is without merit. Initially, the Board attacks the inexperience of counsel argument by noting that on two occasions Duane Bowman has filed an answer, participated in a hearing and filed timely exceptions in proceedings before the National Labor Relations Board. [2] Indeed, Bowman's Answer in Case No. 30–CA–7966 was attached as an exhibit to the General Counsel's motion for summary judgment. Thus, the record demonstrates that Duane Bowman was familiar with NLRB proceedings, was aware of the requirement to file an answer, and had no need to rely on the expertise of attorney Hue. Secondly, the NLRB points out that the complaint contained a notice informing the respondents that they had ten days from the date of service to file an answer; that both Bowman and Hue received letters notifying them that if an answer was not filed by July 12, 1984, the regional office would proceed as if the allegations in the complaint were admitted as true; and, that on or about July 17, 1984, an attorney from the General Counsel for the NLRB telephoned Hue and repeated the requirement that an answer must be filed. Based upon the actual notice of the requirement given to Bowman and Hue (the notice in the complaint, the letters, and the phone call) and upon Bowman's familiarity with NLRB proceedings, we hold that the inexperience of counsel argument is without merit.

We turn to the respondents' second argument that "the Board and its agents had actual notice of respondents' position by previous filings and by defense of the temporary injunction proceedings, and the Board was not prejudiced by the delay in filing the answer." In effect, the respondents argue that their opposition to the temporary injunction order served as a substitute for a formal, signed, written answer, filed with the Board, specifically admitting or denying each allegation of the complaint. The Board's rule specifies that: "An original and four copies of the answer *shall* be filed with the regional director issuing the complaint." 29 C.F.R. § 102.21 (emphasis added). Moreover, the "respondent *shall* serve a copy thereof on each of the parties." *Id.* (emphasis added). The answer *shall* be signed by "at least one attorney of record in his individual name," or, if the party is not represented by counsel, the party *shall* sign the answer. *Id.* "The signature of an attorney constitutes a certificate by him that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." *Id.* Thus, this review of the Board's rule clearly reveals that the answer must be in writing so that notice of the answer may be given to the parties and, the answer must be signed to prevent the filing of sham or false answers. The exception the respondents urge us to adopt (that filings in opposition to a motion for a temporary injunction are a substitute for a written, formal answer before the Board) would directly contradict the rule's command that a written answer *shall* be filed and would undermine the rule's functions of providing notice and preventing sham answers; we reject the proposed exception. We hold that the respondent's filings and opposition to the petition for a temporary injunction were not a substitute for a written, formal answer before the Board.

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B. *Alter Ego Companies*

Respondents argue that in the event that we refuse to remand this case to the NLRB on the ground that they failed to show good cause excusing their untimely answer, that we should deny enforcement as to Bowman Enterprises, Inc.; Bowman Farms, Inc.; Duane Bowman, Jr. & Associates; and Duane Bowman, Jr. & Family because, in their view, these entities were not alter egos of DCD.

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[2] Duane Bowman represented Dane County Dairy in *Dane County Dairy*, 269 NLRB 218 (1984) and *Dane County Dairy*, 273 NLRB No. 209 (1985). In both cases, Bowman filed an answer, participated in a hearing, and filed timely exceptions.

The alter ego doctrine (*i.e.*, treating two nominally separate business entities as if they were a single, continuous employer) is applied to "prevent[ ] an Employer from gaining an unearned advantage in his labor activities simply by altering his corporate form. . . ." *Alkire v. NLRB*, 716 F.2d 1014, 1018 (4th Cir.1983).

> "The National Labor Relations Board has [found] an alter ego relationship where the new employer is a 'disguised continuance of the old employer' . . .; or was in active concert or participation in a scheme or plan or evasion . . .' or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . .; or so integrated or intermingled its assets and affairs that 'no distinct corporate lines are maintained.' The Board has also found an alter ego relationship based on substantially identical business purposes, equipment, type of customers, actual joint day-to-day operations, joint labor relations, a favorable lease agreement, and the transient nature of the relationships between the companies. In some instances the criteria have been equated with the 'basic indicia for finding a single employer, i.e., interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control; although 'more must be shown to establish that one organization is the alter ego of another.' We have also found an alter ego relationship to exist 'even though no evidence of actual common ownership was present.' "

NLRB v. Mineworkers District 23 (Kentucky Lake Dock Co.), 271 NLRB 461 (1984) (citations omitted). An alter ego company may be held derivatively liable for the back-pay obligation of the company committing the unfair labor practice. *NLRB v. Southeastern Envelope Co., and Southeastern Expandvelope, Inc.*, 246 NLRB 423 (1979). "Similarly, personal liability has been imposed where the owner and chief operating officer of one employer closes it and commences doing business in the name of a new entity to avoid the effects of the Act or of labor contracts." *NLRB v. Commercial Carthee Corp.*, 268 NLRB 1036, 1041 (1984).

Summary judgment proceedings before the NLRB are equivalent to summary judgment under Fed.R.Civ.P. 56. *See NLRB v. Western Electric Co.*, 198 NLRB 623, 623–24 (1972). The NLRB may grant summary judgment in an unfair labor practice proceeding if no material issue of fact exists. *NLRB v. W.S. Hatch Co.*, 474 F.2d 558 (9th Cir.1973). The party seeking to avoid the summary judgment may not rely on a mere denial of the allegations contained in the complaint but must present specific facts that demonstrate that there are material factual issues requiring a hearing. *NLRB v. The Samurai, Inc.*, 229 NLRB 404, *enforcement den. on other grnds.*, 609 F.2d 864 (6th Cir.1979); *NLRB v. Western Electric, Co.*, 198 NLRB 623 (1972). *Cf. FDIC v. Meyer, Meyer & Meyer*, 781 F.2d 1260, 1267 (7th Cir.1986) ("If a moving party makes out a prima facie case

that would entitle them to a directed verdict if uncontroverted at trial, summary judgment will be granted unless the party opposing the motion offers competent evidence showing that there is a genuine issue as to material fact.") Our review of the NLRB decisions is deferential. *NLRB v. Bliss and Laughlin Steel Co., Inc.*, 754 F.2d 229, 234 (7th Cir.1985). The finding that the affiliated companies are alter egos of DCD must be upheld if it is reasonable and supported by substantial evidence on the record as a whole. *Id.* "We may not, as a reviewing court, displace the Board's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*." *Id.* Because the Board deemed the allegations in the complaint to be true, an action that we have affirmed, and also based its summary judgment decision of the evidence submitted with the summary judgment motion, the record we must review includes both the allegations in the complaint and the evidence submitted with the summary judgment motion.

Both the complaint and the summary judgment motion alleged that the affiliated companies and DCD "are affiliated business enterprises and are a single integrated business [and] are alter egos of one another." Noting that: "All the entities that can be described as respondents have actually described themselves on DCD stationery as 'an Activity of Duane Bowman, Jr. & Family,' " the General Counsel presented evidence to establish the elements of: (1) substantially identical ownership and/or control; (2) substantially identical management including control of labor relations; (3) identical and unchanged business operations including purpose, facilities, equipment, customers and supervision; and (4) unlawful motivation. To establish common ownership or control, the General Counsel presented deposition testimony by Duane and Mary Ann Bowman, his wife, demonstrating that all of the affiliated businesses are owned by Bowman family members. Familial control constitutes common ownership and control. *Advance Electric, Inc.*, 268 NLRB No. 151 slip op. at 9 (1984). Moreover, Duane Bowman testified in his deposition that he controlled all of the affiliated enterprises. Common control of nominally distinct entities establishes alter ego status. *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982). Furthermore, Duane Bowman's deposition testimony confirmed that he managed all of the affiliated companies and controlled their labor relations. As to the third element (identical and unchanged purpose, facilities, equipment, customers and supervision) the General Counsel directed the Board to statements in Duane Bowman's deposition supporting a finding that:

> "Respondents, without interruption, have engaged in an unchanged integrated enterprise with an identical business purpose—the wholesale purchase, storage and distribution of dairy products under the DCD name. Respondents operate out of the same facility; they share and exchange equipment and employees. They also have a common administrative staff. No change in operations occurred when DCD ceased distributing products. Essentially, the same customers were serviced with the same equipment, only without union drivers."

Finally, to establish the last element, improper motivation, the general counsel provided the Board with documentary and deposition evidence demonstrating that DCD and Duane Bowman, individually, were openly hostile to the Union and the Board. Moreover, Dane County Dairy was involved in two unfair labor practice proceedings and Bowman testified that he considered the Union's insistence on compliance with a prior Board decision, finding that DCD violated Section 8(a)(5) and (1) of the Act, and the Board's efforts to secure compliance with the Act to be harrassment. Further, Bowman admitted that he attempted to rid himself of the Union portion of his operations to terminate this "harassment":

> "Q. Now, with respect to your decision to cease routes service and terminate the employees, would it also be true that your motive was to end
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>
> the harassment of the Teamsters and the National Labor Relations Board? Is that true?
>
> A. Yes, it is. I felt I was being harassed. You are right."

In their response to the summary judgment motion, the respondents stated:

> "Testimony adduced at a Board Hearing which showed that DCD was until July 1983 in the business of distribution of dairy related products; that from July 1983 to the present time, DCD remained local contract hauler; that the Respondent Majjaj Bowman Frigid Freight (MBFF) is a sole proprietorship of Mary Ann Bowman, wife of Duane Bowman; MBFF is separate and distinct from DCD. Majjaj Bowman, Inc. (MBI) is separate and distinct from DCD. MBFF is a licensed contract hauler from 1981–82 to the present; Majjaj Bowman, Inc. (MBI) is a Wisconsin corporation. Mary Ann Bowman and her minor children are the sole stockholders; MBI operates a frigid warehouse servicing DCD and others and that MBI are separate and distinct from DCD; Bowman Enterprises, Inc. (BEI) is a holding company of which Bowman Farms, Inc. (BFI) is a totally owned subsidiary. Neither BEI nor BFI are engaged in the distribution, warehousing or in any way connected with DCD, MBFF, or MBI."

However, the respondents failed to offer affidavits, depositions or documentary evidence to establish these allegations. Similarly, the respondents failed to present evidence supporting their denial of alter ego status in their motion for reconsideration:

> "The respondents are prepared to submit evidence to the Board establishing that some and possibly all of these entities, especially MAJJAJ Bowman, Inc., Bowman Enterprises, Inc., and Bowman Farms, Inc., are distinct from Dane County Dairy in their business purposes, operations, equipment, customers, and supervision as well as their management and ownership. This evidence has not been previously submitted by any party. The Respondents, however, did allude to this evidence in their Response to the Motion

for Summary Judgment. . . ." If addressed and credited, this evidence would require a different result with respect to the finding of alter ego status. The record should be reopened and a hearing should be held on the issue of whether the entities are alter egos."

A party seeking to avoid summary judgment in a proceeding before the NLRB may not rely on a mere denial of the allegations contained in the complaint but must present specific facts that demonstrate that there are in fact material factual issues requiring a hearing. *NLRB v. The Samurai, Inc.*, 229 NLRB 404 (1977). Because the respondents failed to present evidence rebutting the deposition and documentary evidence presented by the General Counsel, the Board was justified in concluding that the evidence supported a finding of alter ego status. Moreover, as we have affirmed, the allegations of alter ego status in the complaint were deemed to be admitted as true by the respondents' failure to file a timely answer. Based upon the allegations in the complaint, the evidence submitted with the summary judgment motion, and the respondents' failure to present rebutting evidence either with their motion in opposition to the summary judgment motion or with their motion to reconsider, we hold that the Board's determination that all of the affiliated companies were alter egos of DCD is supported by substantial evidence on the record as a whole.

The order of the NLRB is ENFORCED.

NLRB v. Auto Fast Freight, Inc.

793 F.2d 1126 (9th Cir.), July 10, 1986—272 NLRB 561

On petition to enforce Board Order

Before GOODWIN and BOOCHEVER, Circuit Judges, and SPENCER WILLIAMS, [*] District Judge

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SPENCER WILLIAMS, District Judge: Respondent, Auto Fast Freight, Inc. ("Auto Fast"), is charged by the petitioner, National Labor Relations Board ("Board") with violating sections 8(a)(1), (3) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1), (3) and (5) (1982). The Board found that Auto Fast committed several unfair labor practices, and ordered corresponding relief. 272 N.L.R.B. 561 (1984). The matter is before the court on the Board's application for enforcement of its order. Auto Fast seeks review of the Board's decision and order, on the ground that the Board's decision is

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not supported by substantial evidence. Because we find ample support in the record for the Board's findings and factual conclusions, we grant the Board's petition for enforcement, and deny Auto Fast's request for review.

FACTS AND PROCEEDINGS BELOW

Since 1962, Auto Fast has been a signatory to a series of collective bargaining agreements with three union locals, involving a single unit of drivers, driver helpers, dockworkers and mechanics employed at Auto Fast's facilities in Montebello, San Bernardino and San Diego, California. [1] The most recent collective bargaining agreement was signed in 1979, for a term expiring on March 31, 1982. That contract was a "short form" agreement, adopting the National Master Freight Agreement and the Western Master Area Freight Agreement, as well as all supplements thereto.

Beginning in 1979, Auto Fast began to incur substantial operating losses, due to the effects of inflation and the deregulation of the trucking industry. In January, 1982, Auto Fast's financial advisor recommended immediate action to reduce costs. In the meantime, in November, 1981, Auto Fast and the Western Conference of Teamsters began exchanging letters proposing the commencement of bargaining for a new contract. Both sides indicated a desire to meet, but they failed to reach agreement as to the date and location for such a meeting. 272 N.L.R.B. at 562. The parties did not meet until

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[*] The Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

[1] The locals are the Package and Utility Drivers Local No. 396; General Truck Drivers, Warehousemen and Helpers Union Local 467; and Teamsters, Chauffeurs, Warehousemen and Helpers Local 542. Each is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Auto Fast dealt directly with the Western Conference of Teamsters ("Western Conference"), a branch of the International union, on most, if not all, of the matters at issue in this case. Except where otherwise noted, these entities will be referred to collectively as the "union".

April 9, 1982, nine days after the collective bargaining agreement expired.

As a result of its deteriorating financial condition and its inability to meet with the union, Auto Fast decided to act on its own to reduce costs. On April 5, 1982, five days after the expiration of the collective bargaining agreement, Auto Fast discontinued its payments to the union's health and welfare fund (substituting a health insurance plan of its own), and reduced the wages of all unit employees by approximately $2.00 an hour. These actions were taken without notification to, or bargaining with, the Western Conference or any local. 272 N.L.R.B. at 562.

In late March, 1982, two members of Local 542, John Sloan and Manuel Garza, were allegedly told by a company manager that Auto Fast was about to "go non-union," and that they would have to discontinue their union membership in order to continue working there. When Sloan and Garza refused to relinquish their membership in the union, they were allegedly forced to resign from their jobs. Auto Fast contends that these employees voluntarily submitted their resignations because of the uncertainty surrounding the expiration of the collective bargaining agreement.

The Board adopted the findings of its administrative law judge, that the company refused to bargain, in violation of sections 8(a)(5) and (1) of the NLRA, by unilaterally discontinuing payments to the union's health and welfare fund, by unilaterally instituting a new medical insurance plan for employees, and by unilaterally decreasing the wages of unit employees. The ALJ and Board also found that the company constructively discharged Sloan and Garza because of their union membership, in violation of sections 8(a)(3) and (1) of the NLRA.

STANDARD OF REVIEW

On review in this court, the NLRB's findings of fact "if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). *See Walla Walla Union-Bulletin, Inc. v. NLRB,* 631 F.2d 609, 612 (9th Cir.1980). A court reviewing the Board's factual findings "may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*' " *NLRB v. Walton Manufacturing Co.,* 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951)).

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ANALYSIS

I. Unilateral Change of a Term or Condition of Employment

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." Collective bargaining is defined in § 8(d) as requiring an employer and union "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 210, 85 S.Ct. 398, 402, 13 L.Ed.2d 233 (1964). There is no dispute that subjects such as wages, health care plans and insurance plans are within § 8(d)'s definition of mandatory subjects of bargaining. Unless and until the parties to a collective bargaining agreement "bargain to impasse" on a mandatory subject of bargaining, an employer's unilateral action with respect to such a matter will constitute a refusal to bargain. *NLRB v. Katz,* 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). Even after the collective bargaining agreement has expired, the employer is prohibited from taking unilateral action until the parties have bargained to impasse. "The employer is required to maintain [the] status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse." *NLRB v. Carilli,* 648 F.2d 1206, 1214 (9th Cir.1981). *See also Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 729 (9th Cir.1980), *cert. denied,* 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981).

There exists a narrow exception to the bargain to impasse rule: where, upon expiration of a collective bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse. *Stone Boat Yard v. NLRB,* 715 F.2d 441, 444 (9th Cir.1983), *cert. denied,* 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984).

Accord, M & M Building & Electrical Contractors, Inc., 262 N.L.R.B. 1472, 1476–77 (1982).

Auto Fast acknowledges that it acted unilaterally, without first bargaining to impasse. Auto Fast contends, however, that its dire financial condition and the union's unwillingness to meet justified its unilateral action. Although there is some evidence in the record that would support Auto Fast's position, the Board rejected Auto Fast's interpretation of the facts. The question on this appeal, then, is whether substantial evidence existed for the Board to reach its conclusion.

As to Auto Fast's argument that its precarious financial position made immediate action imperative, the Board, noting that the company had been aware of its severe economic problems at least since January, 1982, found that "there was no reasonable basis for taking such action so soon after expiration of the contract" on March 31, 1982. 272 N.L.R.B. at 563. Although Auto Fast protests that the evidence *it* presented to the ALJ showed a high degree of urgency, the Board's resolution of this factual dispute is fully supported by substantial evidence. The Board had before it evidence of the company's mounting losses beginning in 1979 and the increasing financial pressure on the company in January and February of 1982. The Board could reasonably conclude from this evidence that Auto Fast's financial difficulties did not, on April 5, 1982, suddenly rise to the level of urgency that would justify taking unilateral action.

As to Auto Fast's contention that the union was avoiding the bargaining ta-

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ble, the Board concluded that "there is nothing in the record to show that the Unions intentionally were ducking Respondent. . . . It does appear that the Unions were not well coordinated, and possibly were uncertain of their administrative responsibilities, but those facts do not justify Respondent's unilateral actions." *Id.* Again, substantial evidence supports this conclusion. In the exchange of letters between the parties beginning in November, 1981, both sides clearly indicated a desire to meet, and each proposed dates and locations; however, no meeting occurred until April 9, 1982. 272 N.L.R.B. at 562. On the record before the Board, it would have been possible to place the blame for the failure to meet on either or both of the parties. Although the letters written by Auto Fast's attorney could lead to an opposite conclusion, the Board's determination of this matter is based on substantial evidence.

Auto Fast contends in addition that its unilateral action was justified by its confusion over which branch of the union to bargain with. Auto Fast argues that it was notified by the Western Conference of Teamsters that only the Teamsters National Freight Industry Negotiating Committee was authorized to represent the union, while at the same time it was told by Local 396 to negotiate with that local. However, the record does not demonstrate any confusion on Auto Fast's part. The company's efforts to communicate with the union during the late 1981 to early 1982 period were all directed to the Western Conference. In addition, Auto Fast's attorney testified that despite the local's assertions, "[w]e took direction from the western conference and felt that we should meet only with the western conference of Teamsters. . . ." Although, as the Board stated, the different branches of the union may not have been well coordinated, and possibly were uncertain of their responsibilities, there is ample support for the Board's determination that any confusion experienced by Auto Fast was insufficient to excuse its failure to bargain with *any* branch of the union prior to taking unilateral action.

Auto Fast also argues that decertification petitions filed in April, 1982 with respect to the three locals cast doubt upon the authority of the union to bargain for the employees. However, according to Auto Fast, these petitions were filed on April 6, 1982, one day *after* the company's unilateral actions. The petitions thus could not have caused the confusion which allegedly made it impossible to negotiate with the union during the time leading up to the company's unilateral actions. *See NLRB v. Carmichael Construction Co.*, 728 F.2d 1137, 1140 n. 2 (8th Cir.1984). Moreover, an employer may not use the filing of a decertification petition in the context of unfair labor practices as a defense to a refusal to bargain charge. *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 999 (9th Cir.1981). The decertification petitions here were filed a day after Auto Fast unilaterally implemented changes to its wage and benefits packages, and several days after it constructively discharged two of its employees because of their union activities. *See infra* Part II. Having thus unlawfully undermined the union, it would be inequitable to allow Auto Fast to assert now that the uncertainty for which it was in large part responsible should excuse it from its collective bargaining duties. *See Clear Pine Mouldings,* 632 F.2d at 730. These factors distinguish the instant case from *Ellex Transportation, Inc.,* 217 N.L.R.B. 750 (1975), which involved a decertification petition filed *before* the employer's unilateral action. Indeed, *Ellex Transportation* expressly recognized that a question as to representation will excuse an employer from bargaining only where that employer " 'has engaged in no antecedent unfair labor practice.' " *Id.* at 758 (quoting *National Carbon Division, Union Carbide and Carbon Corp.,* 105 N.L.R.B. 441, 442–43 (1953). Auto Fast, as noted above, does not meet this criterion.

The other cases relied upon by Auto Fast do not alter this conclusion. *NLRB v. Cone Mills Corp.,* 373 F.2d 595 (4th Cir.1967) held only "that there might

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be circumstances which the Board could or should accept as excusing or justifying unilateral action.' " *Id.* at 599 (quoting *NLRB v. Katz,* 369 U.S. at 748, 82 S.Ct. at 1114). Auto Fast would read *Cone Mills* for the proposition that unilateral action is justified whenever a union has a "reasonable opportunity" to bargain over the unilateral change. This contention is essentially a reiteration of its charge that the union was avoiding the bargaining table even though it had the "opportunity" to negotiate with Auto Fast. We have already disposed of this contention, finding substantial evidence to support the Board's conclusion that the union was not intentionally avoiding negotiations. Moreover, wholly apart from the issue of the union's willingness to bargain, Auto Fast never provided the union with the "opportunity to bargain" that was present in *Cone Mills.* To come within the narrow exception to the bargain to impasse rule, an employer must give the union detailed advance notice of the proposed changes, prior to unilateral implementation. *Stone Boat Yard,* 715 F.2d at 444; *M & M Building & Electrical Contractors,* 262 N.L.R.B. at 1472. Here, it is undisputed that Auto Fast failed to present its proposed changes to the contract to the union prior to implementing them. Thus, even if the union had been avoiding the bargaining table, Auto Fast has failed to satisfy a basic pre-condition for excusing it from the duty to bargain. *Stone Boat Yard,* 715 F.2d at 444–45.

For these same reasons, *AAA Motor Lines, Inc.,* 215 N.L.R.B. 793 (1974), does not support Auto Fast's position. There, the Board excused an employer's unilateral action where the union was "insistent on not meeting" with the employer, and where the union had received the employer's proposals for a new contract two and one-half months prior to the expiration of the collective bargaining agreement. 215 N.L.R.B. at 794. By contrast, Auto Fast did not provide the union with its contract proposals before implementing them. Moreover, we have already decided that substantial evidence supports the Board's conclusion that the union was not intentionally avoiding bargaining, and that the "urgency" of implementing changes was not as great as Auto Fast suggests. The *AAA Motor Lines* case found unilateral action to be justified only in a narrow set of circumstances, which are simply not present in the instant case.

II. Constructive Discharge of Sloan and Garza

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to discriminate with respect to "tenure of employment or any term or condition of employment" so as to "discourage membership in any labor organization. . . ." An employer violates this provision when it creates "working conditions so intolerable that an employee is forced to resign," and it appears that the employer "acted to encourage or discourage membership in [a] labor organization." *NLRB v. Haberman Construction Co.,* 641 F.2d 351, 358 (5th Cir.1981) (en banc). *See NLRB v. Holly Bra of California, Inc.,* 405 F.2d 870, 872 (9th Cir.1969). Auto Fast's argument is essentially that the Board should have believed the testimony of Auto Fast's manager, John Traina, who testified that Sloan and Garza voluntarily resigned from their employment, choosing not to work under the expired collective bargaining agreement. However, there was substantial evidence, in the form of the testimony of Sloan and Garza, to the effect that the two employees were informed that they would have to choose between continued employment and the continued exercise of the right to belong to a union. 272 N.L.R.B. at 562. When the employees refused to relinquish their union membership, they were constructively discharged, according to the Board's findings. The

Board expressly credited the testimony of the employees, and found that Traina was not a convincing witness. *Id.* at 563. Auto Fast has not demonstrated that such factual findings are "inherently incredible or patently unreasonable." *Photo-Sonics, Inc. v. NLRB,* 678 F.2d 121, 123 (9th Cir.1982) (quoting *NLRB v. Anthony Co.,* 557 F.2d 692, 695

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(9th Cir.1977)). Substantial evidence thus supports the Board's determination that Sloan and Garza were constructively discharged because of their desire to remain in the union, in violation of sections 8(a)(3) and (1) of the NLRA.

In sum, substantial evidence supports the decision and order of the Board. The Board's petition for enforcement is therefore GRANTED, and Auto Fast's request for review is DENIED.

Westvaco, Virginia, Folding Box Division v. NLRB

795 F.2d 1171 (4th Cir.), July 14, 1986—268 NLRB 1203

On petition to review and cross-application for enforcement

Before ERVIN and WILKINSON, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation

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MICHAEL, District Judge: This matter is before the court on a petition for review and a cross-application for enforcement of an Order of the National Labor Relations Board. The petition for review is filed by Westvaco, Virginia, Folding Box Division [hereinafter "petitioner"], with the cross-application being filed by the National Labor Relations Board [hereinafter "the Board"].

This controversy arose from an Order of the Board affirming the decision of the Regional Director in a unit clarification proceeding. In that proceeding, the Regional Director found that certain utilities technicians should properly be treated as an accretion to an existing bargaining unit of the petitioner.

I.

For many years, the petitioner has operated three plants in Richmond, Virginia, which manufacture printed folding cartons, engraved by the Rotogravure process. The production and maintenance employees of the petitioner have been represented for a number of years by Local 670 of the Bellwood Printing Pressmen, Assistants and Speciality Works [hereinafter "the Union"]. The collective bargaining agreement is standard in nature, but sets forth with particularity the terms and conditions of employment of those within the existing bargaining unit.

In December, 1981, the petitioner began operations in a recently completed addition known as the Cofer Road Gravure Addition [hereinafter "the Addition"]. The Addition used Rotogravure printing presses, but was equipped with a system to filter out and to recover various solvent vapors. The solvents were added to the ink at the time of printing, and, when dried out, left the ink in a solid condition on the boxes. For both economic and environmental reasons, petitioner concluded that it should undertake a solvent recovery process at the Addition, though the other plants of petitioner did not have such a mechanism.

While the power for the solvent recovery process is drawn from the same steam boilers which power the remainder of the plant, the testimony indicates clearly that the solvent recovery process is independent of the manufacturing process, in the sense that the plant could operate without the solvent recovery process, as is the case with the other three plants of the petitioner. In other words, the ultimate end prod-

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uct of the manufacturing operation would not be changed, whether or not there was a solvent recovery process installed.

In order to operate the solvent recovery equipment, petitioner hired four additional personnel, which it classified as "utilities technicians". The work of the utilities technicians involves primarily monitoring, operating, and troubleshooting the solvent recovery process. The Union sought to include by accretion these utilities technicians within the existing bargaining unit of production and maintenance employees.

II.

As is so often the case in an accretion proceeding, the resolution of the controversy turns strongly on the fact pattern presented. However, the Board has in previous cases laid down some reasonably definite guidelines to determine the propriety of granting an accretion petition.

Our first step is that of determining the standard which should be applied by this court in reviewing the action of the Board. Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) indicates that any findings of fact shall be conclusive "if supported by substantial evidence on the record considered as a whole." [1] The cases decided under that section—and for that matter under many sections of the National Labor Relations Act—indicate that Board determinations involving the discretion of the Board are reviewed for abuses of discretion. This is particularly apt in the matter of bargaining unit accretion decisions. *See Universal Security Instruments, Inc. v. NLRB,* 649 F.2d 247 (4th Cir.1981), *cert. denied* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380. Even so, the Board's discretion is not unfettered. The Seventh Circuit described this "narrowing" of discretion as follows:

> Although broad, the Board's discretion in accretion cases is not without limit. In particular, when the Board adopts a policy to guide it in the exercise of its discretion, the original very broad discretion is to some extent narrowed, and subsequent decisions must be reasonably consistent with the expressed policy. If the Board chooses to depart from established policy, it must explicitly announce the change and its reasons for the change.

Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 757 (7th Cir.1982) (citations omitted).

The Board has determined that the accretion of employees to an existing bargaining unit can be made "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Safeway Stores, Inc.,* 256 N.L.R.B. 918 (1981) (footnotes omitted). *See also, Universal Security Instruments, Inc. v. NLRB,* 649 F.2d at 253.

Furthermore, the Board has adhered for a number of years to a "policy of not joining technical and non-technical employees in the same unit where the unit placement of the technicals is in issue." "Technical employees" are those employees who perform work of a technical nature, requiring specialized training, to be acquired in colleges or technical schools or through special courses, and involving the use of independent judgment. *Litton Industries of Maryland, Inc.,* 125 N.L.R.B. 722, 725 (1959).

Since *Litton,* the Board has modified its approach in that case, by providing a multifactor approach to decision-making in the accretion cases. The propriety of accretion is determined as set out in *Universal Security Instruments v. NLRB,* 649 F.2d 247, 253–54 (4th Cir.1981); *cert. denied,* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380,

> In making its [accretion] determination the Board must closely analyze the cir-
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> cumstances of the workers to determine whether the new and old employees truly share a "community of interests." To do this several factors are scrutinized. These are: (1) similarity of working conditions; (2) job classification; (3) skills and functions; (4) similarity of products; (5) interchangeability of employees; (6) geographical proximity; (7) centralization of managerial control; (8) functional integration of the business; (9) collective bargaining history.

In a 1974 case, and before the standard of review set forth in *Universal Security Instruments,* the Board has held in *New Orleans Public Service, Inc.,* 215 N.L.R.B. 834 (1974) that employees who performed qualitative tests on power equipment, who found and investigated abnormal voltage conditions, and who undertook to adopt measures to correct those conditions were in fact "technical employees". A further finding in that case was that these employees worked alone, were required to determine the cause of a problem and how it should be corrected, and to take the steps to correct the problem.

While the decision in *New Orleans Public Service, supra,* does not track the elements to be considered as set out in *Universal Security, supra,* the two cases, when read together, provide the needed guidance in applying the law to the facts in this case, though it may be conceded, *arguendo,* that *Universal Security, supra,* as the latest pronouncement on the issue, is the stronger precedent in this area.

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[1] In this case, the findings of fact are those of the Regional Director, since it appears conceded from the briefs that the Board itself did not make an independent review of the record in affirming the decision of the Regional Director.

While this review is in no way intended to be a comprehensive review of the cases, it is believed that it does set out the boundaries within which the controversy now before the court must be resolved.

III.

Keeping in mind the definition of "technical employees" and the touchstone "community of interests" standard, a review of the facts adduced below is critical to a resolution of the question before us. It should be noted that the only evidence produced was that of the petitioner. Thus, the reviewing officer, the Board, and this court must necessarily have considered the evidence as it was presented by petitioner.

From the testimony of Mr. John Murphy, the supervising engineering, it is clear that the four utilities technicians were required to have had prior work experience in chemical processes and in various pneumatic and electrical controls, together with proficiency in math and chemistry. [2] In addition, the technicians were put through an extensive and specialized training course lasting approximately four months. The petitioner constructed a scale model solvent recovery plant on which the technicians were required to perform the appropriate functions in operating the solvent recovery process. They were given detailed instruction on the operation and function of each of the items of equipment for which they were responsible. The training was not solely a matter of "hands-on" training; classroom time was devoted to how to perform chemical analyses, to the review and study of the various manuals governing the recovery equipment and the utility equipment, and to their general areas of responsibility. The record is silent as to any identical or similar training period required for the members of the production and maintenance force in the bargaining unit.

There are cases militating against a finding that the utilities technicians here are "technical" employees. Although some facts tend to support a "technical" designation, other facts indicate that the utilities technicians are not sufficiently specialized to warrant technical status. A four-month period of on-the-job training, for example, does not necessarily meet the Board's standard of "specialized training usually acquired in colleges or technical schools or through special courses." *Litton,* 125 N.L.R.B. at 725. In previous decisions, the

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Board has found training periods of one year of technical school plus two years of experience, *see General Electric Co., Pinellas Peninsula Plant,* 127 N.L.R.B. 919, 921 (1960) (electronic engineering technicians), and two to three months of classes plus two years of on-the-job training, *see New Orleans Public Service, Inc.,* 215 N.L.R.B. 834, 838 (1974) (gas dispatchers), insufficient to meet the "specialized training" requirement. Similarly, the use of some independent judgment in evaluating test deviations does not make an individual a "technical" employee. The "technical" label is particularly inappropriate when evaluations are closely prescribed by manuals and when the employee spends substantial time merely recording measurements. *Id.* at 838–39 n. 12; *see also Folger Coffee Co.,* 250 N.L.R.B. 1, 2 (1980).

Nonetheless, the aggregate weight of the various factors enumerated, *e.g., Universal Security, supra* at p. 1173, tends toward a finding of "technical employee" status for these utilities technicians, including particularly training on a scale model of the solvent recovery plant, a factor not found in any of the cases dealing with this issue. While this resolution of the question is not free from doubt, particularly in light of the Board's policy of requiring a strong affirmative case before labelling a particular job "technical", *See Vapor Corp.,* 242 N.L.R.B., at 776, the decision on this issue is not essential to a resolution of the problem presented in this case, as set out *infra.*

The evidence discloses that the line of authority in relation to the utilities technicians, as it bears on the centralization of management control, *supra* at p. 1173, is direct to the Supervisory Engineer-Solvent Recovery and not related to the line of authority for the production and maintenance workers. The utilities technicians are responsible to John Murphy, the Supervisory Engineer—Solvent Recovery. Mr. Murphy has training and a degree in chemical engineering, and he was responsible for interviewing, hiring, and training the four employees who became the utilities technicians. Mr. Murphy's only supervisory authority is that over the four utilities technicians, and he reports directly to the Plant Engineer, who in turn reports to the Plant Manager. No member of the production and maintenance unit is to be found under the supervision of the engineering department or any of its supervisors. It is clear that the utilities technicians are not in the same line of authority as the members of the production and maintenance unit employees.

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[2] The utilities technicians were not required to have had prior experience in the solvent recovery process.

The utilities technicians devote the principal portion (approximately 75 to 80 percent) of their time to the solvent recovery operation, with the remainder of their time on work in the boiler room and with the other items of utility equipment for which they have responsibility. So far as the record discloses, the only time that the production and maintenance employees deal with the items of equipment assigned to the utilities technicians is when one of the utilities technicians finds an item for which he is responsible in need of repair. When that happens, the lead maintenance man is advised of the situation, and undertakes the necessary repair, under the direction of the utilities technician.

Turning to the terms of employment, which here embrace the *Universal Security Instruments* factors of similarity of working conditions, job classification, skills and functions, similarity of products, interchangeability of employees, geographical proximity, and functional integration of the business, some major differences are found as between the utilities technicians and the production and maintenance employees covered by the Union contract. The utilities technicians are paid on a monthly salary basis, whereas the production and maintenance employees are paid on an hourly basis. There are significant differences in the employee benefits of the utilities technicians and the production and maintenance employees. For example, the production and maintenance employees are entitled to a vacation of three weeks after eight years of service, whereas the utilities technicians qualify for three weeks vacation after five

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years of service. The utilities technicians also participate in a savings and investment plan operated by the petitioner in which they have options to purchase petitioner's stock; production and maintenance workers do not have this eligibility of participation. The pension plan for the utilities technicians is based on salary and length of services, whereas the pension for hourly employees is based on a flat rate. Sickness benefit plans give to the utilities technicians full pay during sick leave, whereas production and maintenance employees have an accident and sickness plan which pays the sick employee at a reduced rate. The utilities technicians, as salaried employees, qualify for a long-range disability program, whereas production and maintenance employees do not have the benefit of such a disability plan. Further, the production and maintenance employees have a flat rate life insurance program, where the utilities technicians employees' life insurance program provides for two times their salary in life insurance. Major medical benefits also differ as between the utilities technicians and the production and maintenance employees. This comparison of the methods of payment and the employee benefits indicates that the utilities technicians are regarded as a different and higher grade employee than the production and maintenance workers.

The utilities technicians annual salary is $25,000 per year, with no provision for overtime. Certain of the production and maintenance employees may approach $25,000 a year, but only after computing in overtime. Of some significance in this consideration of the "congeries of facts" is the fact that the utilities technician is not replaced, when on vacation or sick leave, by a production and maintenance employee. Rather, the supervisory engineer, Mr. John Murphy, assumes the responsibilities of the absent technician.

Certain other, less important, differences between the utilities technicians and the production and maintenance employees also exist. For instance, the utilities technicians may use any door in the plant when coming to or leaving work, unlike the production and maintenance employees who are required to use a specified door. Utilities technicians may take their break and meal periods anywhere in the plant, while the members of the bargaining unit are required to take their breaks and meal periods in the plant cafeteria. [3] While these differences, in other contexts, might be of minimal or no importance, when added to the differences in terms of employment, fringe benefits, etc., they reinforce the view that the utilities technicians are a separate and distinct group, different in kind and degree from the production and maintenance employees in the bargaining unit.

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[3] The record indicates that the utilities technicians generally take such breaks in the solvent recovery control room—away from the production and maintenance employees.

The Appendix reveals the following relevant details as to the activities of the utilities technicians. First, it should be noted that the solvent recovery area is actually outside the plant, in the Addition. Only the utilities technicians work in the solvent recovery control room, where they use, in addition to the ordinary tools in such a room, the gas chromatograph, a Ph monitor, and a programmable microprocessor controller, all of which are covered by various manuals maintained in the solvent recovery control room and available for the use of the utilities technicians.

The only testimony relating to production and maintenance personnel working in the solvent recovery area is that relating to one maintenance person being responsible for walking through the solvent recovery area, once per shift, to look for anything that might be abnormal. The maintenance electricians are apparently responsible for checking the boiler's operation. They are "mainly responsible for looking at steam pressure, seeing [there is] steam pressure; very, very, elementary type checks." The other occasion when production and maintenance personnel might be in the solvent recovery area is when a breakdown has occurred, and a utilities technician has sum-

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moned the shift lead maintenance man to come in and make the repairs. This happens approximately once per shift, or once per day.

There are minimal references in the Appendix to the fact that employees in the production and maintenance unit are required to keep and fill out forms, but the record reveals that the forms maintained by the production and maintenance employees are relatively simple, whereas the forms maintained by the utilities technicians, as shown in the Appendix, are quite complex and detailed.

In short, it appears obvious that the utilities technicians and production and maintenance employees do not share the "overwhelming community of interest" required for accretion. *Safeway Stores, Inc.*, 256 N.L.R.B. 918, 918 (1981). Virtually none of the considerations identified as relevant in *Universal Security Instruments*, 649 F.2d at 253–54, and *Sheffield Corp.*, 134 N.L.R.B. at 1103–04, support accretion in this case. The utilities technicians perform unique tasks in a distinct area under separate supervision. They were specially trained for their positions and are not interchangeable with production and maintenance employees. They are paid differently, enjoy different fringe benefits, and have greater freedom in their work environment. Both break-time and job-related interaction between the technicians and production and maintenance employees is limited, and management becomes identical only several levels above these employees.

The last factor set out in *Universal Security*, namely, the collective bargaining history, is not applicable here, since the utilities technicians are new employees and have never been involved in any such bargaining in the past. The collective bargaining history at the plant has never dealt with these utilities technicians.

These differences, as recited *supra*, have been sufficient to bar accretion in the past, *see, e.g., Weatherite Co.*, 261 N.L.R.B. 667, 669–70 (1982); *Intermountain Gas Co.*, 231 N.L.R.B. 130, 131 (1977), and are sufficient to bar accretion in this case.

Further, the attempted accretion of the utilities technicians in this case represents an unexplained departure from the Board's cautious policy toward accretion generally. *See Safeway Stores*, 256 N.L.R.B. at 669–70. When substantial factors militate against accretion, the Board heretofore has refused the accretion petition and permitted a union election. *See, e.g., Weatherite Co.*, 261 N.L.R.B. at 669–70; *Safeway Stores*, 256 N.L.R.B. at 918–20. Refusing accretion in doubtful cases is preferable because it protects the employee's freedom to choose his bargaining representative. *See International Ass'n of Machinists and Aerospace Workers v. N.L.R.B.*, 759 F.2d 1477, 1480 (9th Cir.1985); *Westinghouse*, 506 F.2d at 673; *Safeway Stores*, 256 N.L.R.B. at 918. That right of self-determination deserves protection in this case.

As previously noted, no evidence was offered by the union in the course of the proceedings before the hearing officer. Consequently, the recitation of facts set out herein is taken from the evidence tendered in direct examination and in cross-examination of witnesses proffered by the petitioner.

IV.

This perhaps unduly laborious recitation of the facts derived from the Appendix seems necessary in order to determine whether there was in the narrower sense set out *supra,* at p. 1173, an "abuse of discretion" in finding a sufficient community of interest between the production and maintenance workers and the utilities technicians.

As stated *supra,* the Board has held that accretion to an existing bargaining unit is proper "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted". *See Safeway Stores, Inc.,* 256 NLRB [918] (1981)

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(footnotes omitted). *See also, Universal Security Instruments, Inc. v. NLRB,* 649 F.2d at 253.

Certainly, there is a "community of interest" in the limited sense that the utilities technicians and the production and maintenance employees are paid by the same employer, work in generally the same geographical area, and exert their efforts to serve the interests of their employer. However, consideration of only these factors in determining the necessary "overwhelming community of interest" required for accretion would mean that every employee, from the president to the janitor, would fit into a category deserving of accretion. Certainly, the case law looks to more than these factors in determining the extent of the community of interest. Beyond these named factors, the record reveals no further identity or close similarities of duties, working conditions, working area, status as employees, methods of compensation, or fringe benefits which could justify finding that required "overwhelming community of interest" between the production and maintenance employees and the utilities technicians.

Although the hearing officer concluded that the solvent recovery operation, rather than being a separate and distinct operation, "appears to be a step in the production process . . .," it appears unquestioned in the record that the production process itself could continue unabated, without the operation of the solvent recovery process. Economic and environmental considerations dictate the use of the solvent recovery process, but it cannot be regarded as a part of the production process, in the sense that the phrase "production process" is intended to cover the process by which the raw materials are brought in, processed, and the finished product brought out at the other end of the production process.

Not only are the utilities technicians employed in a separate operation from the production process, but, as illustrated in the recitation of facts, the utilities technicians share few interests with the maintenance and production employees. The utilities technicians are employed as salaried employees, with substantially greater fringe benefits than the production and maintenance employees. They are given a status which is obviously different from that of the production and maintenance personnel. Perhaps illustrative of the Board's difficulty in drawing from the record sufficient support for its decision is the recitation in the Board's brief that the utilities technicians "may" take their breaks in the cafeteria; this ignores the testimony in the Appendix to the effect that the utilities technicians practically always take their break in the solvent recovery control room. The fact that they "may" use the cafeteria room indicates again the status differential between the utilities technicians and the production and maintenance employees.

If the *Universal Security* standard is to be the test of propriety of accretion, then in the case at bar it is clear that the utilities technicians should not be brought by accretion into the maintenance and production employees bargaining unit. The utilities technicians have a separate group identity, and the court finds no basis for saying that an overwhelming community of interests between the utilities technicians and the production and maintenance personnel exists in this case.

Again, if the requirements of *Universal Security Instruments, Inc., supra,* at p. 1173, are to be applied, it is apparent that the Board in this case has chosen to depart from the policy established in *Safeway Stores, supra,* at p. 1173, without explicitly announcing the change and its reasons for the change. Such a departure, without explanation, from the rule announced in *Safeway Stores,* as applied in *Universal Security Instruments, Inc.,* is an abuse of discretion, in the narrower sense set out *supra.*

For the reasons set out, the prayer of the petition for review is granted and the cross-application for enforcement of the Order of the Board is denied.

DENIED.

NLRB v. Chicago Metallic Corporation

794 F.2d 527 (9th Cir.), July 17, 1986—273 NLRB 1677

On petition to enforce Board Order

Before WRIGHT and NELSON, Circuit Judges, and ROSENBLATT, * District Judge

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EUGENE A. WRIGHT, Circuit Judge: This application for enforcement of National Labor Relations Board orders [1] presents the question whether one perceived by employees as a supervisor, although not satisfying the statutory criteria of 29 U.S.C. § 152(11), nevertheless may be accorded supervisor status for purposes of unfair labor practice charges arising from union campaigning before a representation election. We consider the relevancy of employees' perceptions of supervisor status in the context of two Board decisions: one certified a representation election and the other prohibited the company from threatening employees with discharge for union campaigning on company time.

BACKGROUND

Chicago Metallic Corporation manufactures steel superstructure for ceilings in a plant in Vernon, California.

The Sheet Metal Workers' Union petitioned the Board for certification as the bargaining representative of the production and maintenance employees at the Vernon facility. The Company and Union agreed to an election to be held on November 5, 1981 among "[a]ll production and maintenance employees and shipping and receiving employees, including leadpersons. . . ."

Ralph Picazzo was an assistant production leadman and a maintenance leadman. Knowing of the Union's organizing campaign, he signed a Union authorization card, attended its meetings, and talked with other employees about supporting the Union.

About ten days before the election, shipping leadman Jerry Colvard, a Union opponent, and employee Steve Kofeik told plant manager Donald Moore that Picazzo was "campaigning for the Union on company time." Four days later, Moore told Picazzo

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to discontinue that activity or be subject to termination.

Four days before the election, Picazzo asked production helper, Brent Yankee, how he intended to vote and encouraged him to vote for the Union. Yankee did not agree with those suggestions. Picazzo threatened him, "If you tell anyone what I've told you, I'll get you, I'll kill you."

Yankee reported the threat to leadman Patterson, who told plant manager Moore. Moore assigned a security guard to Yankee's shift.

Two or three days before the election, Yankee told Larry Colvard of Picazzo's threat and Larry told his brother, Jerry. Employees Negron and Freeland also learned of the threat.

Larry Colvard testified that Picazzo told him, "If the Union wins, [Jerry Colvard] will be gone." Written on the bathroom wall was the threat, "Death to the Dog Brothers," referring to the Colvards. Finally, he testified that Yankee's car windows had been smashed. The date of that occurrence is unclear.

Picazzo told employee Freeland that Jerry Colvard would be fired if the Union won and he warned Freeland against voting against the Union. Moore reportedly assured both Freeland and Jerry Colvard that their jobs were secure.

The election resulted in a 19–10 vote for the Union. The Company challenged only Picazzo's ballot, on the ground that he was a supervisor. On November 10, Moore discharged Picazzo for threatening and intimidating employees before and after the election.

PROCEEDINGS BELOW

The Company filed election objections on November 12. The Union then filed an unfair labor practice charge alleging that the Company had unlawfully threatened and discharged Picazzo because of his Union activities. The Company's election objections were consolidated with the unfair labor practice allegations. Hearings were held on July 13 and 14.

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* Hon. Paul G. Rosenblatt of the District of Arizona.

[1] The Board's decisions and orders are reported at 273 NLRB No. 207 and 275 NLRB No. 122.

On January 30, 1985, the Board affirmed the ALJ's findings that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to discharge Picazzo if he continued to campaign for the Union. [2] It concluded that the election objections lacked merit and certified the Union.

The Board's General Counsel alleged that the Company had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with, or furnish information to, the Union. The Board granted the General Counsel's motion for summary judgment.

DISCUSSION

I. *Election Objections*

A. *Supervisor Status*

The enforceability of the order certifying the election hinges on Picazzo's status. We recognize that the Board has wide discretion in determining whether an employee is a supervisor. *NLRB v. Island Film Processing Co.,* 784 F.2d 1446, 1450 (9th Cir.1986). Its determination will be followed if supported by substantial evidence and it applies the law correctly. *Id.; NLRB v. Best Products Co.,* 765 F.2d 903, 906 (9th Cir.1985).

> Section 2(a) of the Act provides: The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

The existence of any one of the enumerated powers combined with "independent judgment" suffices to confer supervisory status. *Island Film,* 784 F.2d at 1451; *George C. Foss Co. v. NLRB,* 752 F.2d 1407, 1410 (9th Cir.1985). We look to actual duties, not merely job title or classification. *International Longshoremen's Association v. Davis,* —— U.S. ——, 106 S.Ct. 1904, 1915 n. 13, 90 L.Ed.2d 389 (1986).

In borderline cases, it is appropriate to consider "secondary indicia" in determining whether one is a supervisor. II C. Morris, *The Developing Labor Law* at 1454 (2d ed. 1983). One secondary factor recognized by the Board is whether the person is perceived as a supervisor. *Id.; see also Helena Laboratories Corp.,* 225 NLRB 257, 265 (1976) (lead lady accorded supervisor status where company held her out to employees as such), *modified,* 557 F.2d 1183 (5th Cir.1977); *Aurora & East Denver Trash Disposal,* 218 NLRB 1, 10 (1975) (foreman who claimed he was mere conduit for employer's orders to employees was supervisor where he led other employees to believe he was one); *Gerbes Super Market, Inc.,* 213 NLRB 803, 806 (1974) (department manager was supervisor where he was regarded by fellow employees as their "boss" and was considered person in authority); *Broyhill Co.,* 210 NLRB 288, 294 (1974) (foreman a supervisor where company placed him in a position such that employees reasonably believed that he spoke on management's behalf), *enf'd,* 514 F.2d 655 (8th Cir.1975).

The Supreme Court has recognized that, in election cases, acts of perceived supervisors are to be accorded the same weight as those of actual supervisors. *See International Association of Machinists v. NLRB,* 311 U.S. 72, 79–80, 61 S.Ct. 83, 88–89, 85 L.Ed. 50 (1940). We have such a situation here.

Whether Picazzo qualifies as a "statutory" supervisor is a close question. He assisted leadman Kreuger in maintaining proper production work schedules. He directed employees in their job performance. He was assigned no manual chores.

He wrote weekly employee evaluations and prepared and issued written disciplinary warnings and notices to employees, including suspension notices. When the merits of those notices were challenged, Picazzo referred the employee to plant manager Moore or superintendent Williams.

Moore testified that Picazzo and Kreuger had authority and discretion to take disciplinary action against employees. Picazzo's primary role in the disciplinary process was highlighted by the termination of O'Shaughnessey. Picazzo effectively recommended his firing by informing Kreuger that O'Shaughnessey had left his machine unattended repeatedly.

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[2] Not challenged in this appeal, the Board affirmed also the ALJ's conclusion that Chicago Metallic did not violate Section 8(a)(3) and (1) by discharging Picazzo.

When instructed, Picazzo transferred employees from one assignment to another. He made overtime assignments although the actual need for overtime was decided by Williams.

Picazzo trained new employees, served as plant safety representative and attended management meetings where production and expansion issues were discussed.

On this evidence alone, we cannot say that Picazzo meets the statutory criteria of Section 2(11). But there is more. Several employees testified to their belief that Picazzo had the authority to discipline and issue written reprimands that were signed by him as "company supervisor." They considered him to be in charge of inspection, training and supervision. Their contact with management was through Picazzo.

Plant manager Moore testified that Larry Colvard and Freeland believed that Picazzo had the power to fire them. Kosiek testified that he understood that Picazzo supervised production and completed warning slips and evaluations on employees.

Significantly, the ALJ concluded:

> The fact that the employees may perceive Picazzo as a supervisor when they receive the warnings from him, and see his signature on the line labelled 'Signature of Supervisor,' is not determinative because the facts herein show that Picaz-
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> zo is not exercising supervisory authority.

This conclusion cannot stand. In such borderline cases where satisfaction of the statutory criteria is fairly debatable, the perception of fellow employees weighs more heavily. An employee who technically may not satisfy the statutory criteria of Section 2(11) nevertheless may be accorded supervisory status when he is perceived to be a supervisor by other employees.

B. *The Election*

Chicago Metallic asserts that the Board erred in not setting aside the election. It argues that an atmosphere of fear and coercion disturbed the conditions necessary for a free election. We agree.

The Board retains broad discretion in determining the propriety of the election process. *Island Film,* 784 F.2d at 1450. We evaluate coercive conduct under the Board's "laboratory conditions" standard. *NLRB v. Hudson Oxygen Therapy Sales Co.,* 764 F.2d 729, 732 & n.2 (9th Cir.1985). "Coercive misconduct only warrants the setting aside of an election when it 'so influenced potential voters that a free choice [became] impossible.'" *May Department Stores Co. v. NLRB,* 707 F.2d 430, 432 (9th Cir.1983) (quoting *NLRB v. Advanced Systems, Inc.,* 681 F.2d 570, 575 (9th Cir.1982)).

The Board found expressly that: (1) Picazzo made threats of job reprisals and physical harm to employees who opposed the Union, (2) following one such instance, the threatened employee's car was vandalized, (3) graffiti on the plant's bathroom wall threatened physical harm against two anti-union employees, and (4) knowledge of these events was widespread throughout the unit. Even more telling is the closeness of the vote. A difference of only five votes could have changed the outcome of the election. *See Hickman Harbor Service v. NLRB,* 739 F.2d 214, 220 (6th Cir.1984) (selective misconduct in small unit and close vote persuade court to set aside representation election).

As the company asserts, Picazzo's supervisory role or appearance exacerbated the coercive effect of his threats.

> Active supervisory participation in a union organizing campaign destroys laboratory conditions and prevents employees from exercising an uncoerced vote. Such involvement requires an election to be set aside. . . . The courts, however, have never required actual proof of coercion. Supervisory activity need only 'reasonably tend' to have a coercive effect on or 'likely to impair' an employee's choice. . . . Implied threats of retaliation suffice to taint an election.

Island Film, 784 F.2d at 1451 (citations omitted). *See also NLRB v. Hawaiian Flour Mill, Inc.,* 792 F.2d 1459 (9th Cir.1986) (supervisors' prounion conduct did not reasonably tend to coerce employees).

The Board erred in classifying Picazzo's threats as third-party misconduct, which must be more aggravated than Union or employer misconduct to overturn an election. *See May Department Stores*

Co., 707 F.2d at 432. The threats against several employees were serious. Known anti-union employees were targeted. Effective debate was chilled by the unit's knowledge that those employees who expressed union views risked physical harm, property damage or job reprisal.

In sum, the totality of the circumstances demonstrates that the election was conducted in an atmosphere of fear and reprisal exacerbated by the fact that the threats were made by a domineering person perceived as a supervisor. The threats spread rapidly through the small unit. Finally, the vote was relatively close.

Given the Board's finding that Picazzo's threats "reasonably tended to coerce and intimidate [certain] employees in the exercise of their rights protected under the Act," the election must be set aside. *See Island Film,* 784 F.2d at 1451. Because the Board erred in certifying the Union, Chicago Metallic did not commit an unfair labor practice by refusing to bargain. *NLRB v. West Coast Liquidators, Inc.*, 725 F.2d 532, 534 (9th Cir.1984). Enforcement is denied for those parts of the Board's orders dealing with the election objections and refusal to bargain with the Union.

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II. *Threats to Discharge Picazzo*

Chicago Metallic argues that the Board erred in concluding that it violated Section 8(a)(1) when it warned Picazzo not to campaign for the Union on "company time". Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. Section 7 guarantees employees the right to self-organization. 29 U.S.C. § 157.

The right to self-organization must be balanced against an employer's right to control its business. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797–98, 65 S.Ct. 982, 985–86, 89 L.Ed. 1372 (1945); *Hughes Properties, Inc. v. NLRB,* 758 F.2d 1320, 1321 (9th Cir.1985). In *Republic Aviation,* 324 U.S. at 803 & n. 10, 65 S.Ct. at 987 & n. 10, the Supreme Court upheld the validity of the Board's rules defining the presumptive validity or invalidity of solicitation bans.

"A ban on all solicitation during working hours is presumptively valid, but a ban on all solicitation during non-working hours is presumptively invalid." *Hughes Properties,* 758 F.2d at 1322. Non-working hours include lunch or rest periods on company property. *Republic Aviation Corp.*, 324 U.S. at 803 n. 10, 65 S.Ct. at 988 n. 10.

The Company argues that a ban on solicitation during "company time" should be presumptively valid. Neither the Supreme Court nor this court has considered such a ban.

In *Florida Steel Corp. v. NLRB,* 529 F.2d 1225, 1231 (5th Cir.1976), the Fifth Circuit upheld the Board's findings that such a rule was overly broad and violative of Section 8(a)(1). It reasoned:

> The average . . . employee—through whose eyes the validity of the no-solicitation rule is measured . . .—could easily interpret a prohibition of solicitation 'on the company's time' as barring solicitation during the entire time the employee was 'clocked in', including such non-working times as rest periods and coffee breaks.

Id.; Accord James H. Matthews & Co. v. NLRB, 354 F.2d 432, 441 (8th Cir.1965) (rule forbidding union solicitation on company time held invalid), *cert. denied,* 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966); *NLRB v. Miller,* 341 F.2d 870, 873–74 (2d Cir.1965) (same).

Similarly, the Board has found bans on solicitations during company time violative of Section 8(a)(). *Cerock Wire & Cable Group, Inc.*, 274 NLRB No. 111, slip op. at 9 (1985); *Gemco,* 271 NLRB 1190, 1197 (1984).

The Company cites no cases, and we have found none, upholding a ban on solicitations during company time. The phrase is ambiguous and the context here does not save it. "[T]he risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it." *Miller,* 341 F.2d at 874.

The Company argues that it did not violate Section 8(a)(1) because Picazzo was a supervisor. Generally, threats directed at supervisors for pro-union activities or sympathy do not constitute unfair labor practices. *See International Longshoremen's Association,* 106 S.Ct. at 1908 n.4 (employer does not commit unfair labor practice when it fires supervisor for union-related reasons); *George C. Foss Co.*, 752 F.2d at 1409 n.1 (federal labor law protects employees but not supervisors from being discharged for their union activity or status).

Here, unlike the electioneering analysis, we look to Picazzo's actual duties. When considering Chicago Metallic's treatment of Picazzo, the perceptions of other employees are irrelevant. As we have noted, substantial evidence supports the Board's conclusion that Picazzo does not

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meet the statutory criteria of 29 U.S.C. § 152(11) for supervisor status. Thus, we hold that he is not a supervisor for purposes of the Union's Section 8(a)(1) claim.

Because Picazzo does not qualify for supervisor status, the Company's warnings for campaigning on company time constitute an unfair labor practice. That portion of the Board's order published at 273 NLRB No. 207 dealing with threats of discharge for Union campaigning will be enforced.

ENFORCEMENT GRANTED IN PART, DENIED IN PART.

NLRB v. General Tire & Rubber Co.

795 F.2d 585 (6th Cir.), July 21, 1986

On petition to enforce Board Order

Before MARTIN and GUY, Circuit Judges, and BROWN, Senior Circuit Judge

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PER CURIAM: The National Labor Relations Board (Board) is before this court seeking enforcement of its order finding the General Tire and Rubber Company (company) guilty of an unfair labor practice for refusing to negotiate with its employees' labor union over a mandatory subject of bargaining. The company has cross-appealed for review of the Board's order. On appeal, the company claims that the Board erred in failing to find language in the supplemental agreement to be a contractual waiver of the union's right to bargain over the payment of benefits. The company also argues that the Board erred in rejecting its alternative contention that the union waived its right to bargain by neglecting to demand negotiation on the issue of benefits following the company's announcement in December of 1982 of its intent to terminate benefits. Having found no error by the Board in either determination, we require enforcement of the Board's order.

I.

SUMMARY OF FACTS AND PROCEEDINGS BELOW

Between 1979 and 1982, the company and the International Union of United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 665 (union), were parties to a collective bargaining agreement and a supplemental agreement covering production and maintenance employees at the company's Mayfield, Kentucky plant. Unlike the bargaining agreement which addressed employee wages, hours and working conditions, the supplemental agreement concerned various benefit programs provided for the bargaining unit employees.

On August 26, 1982, the parties began negotiating a successor bargaining agreement and supplemental agreement. The existing contracts expired on October 15, 1982, but the supplemental agreement pro-

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vided that the benefits would be paid for ninety days after its termination. Although no accord had been reached on any successor agreements, the Mayfield employees continued to work. On December 16, 1982, the parties met for a negotiating session at which time a representative of the company informed the union that on January 15, 1983, the company would terminate the benefits provided under the supplemental agreement. A similar announcement was made by the company to its employees on January 13, 1983. On January 15, 1983, the company terminated supplemental benefits as announced, no agreement having been reached on any successor contracts.

On January 25, 1983, the union filed an unfair labor practice charge with the Board alleging that the company violated sections 8(a)(1) and 8(a)(5) [1] of the National Labor Relations Act (Act), 29 U.S.C. §§ 151 *et seq.* (1982), by discontinuing benefits provided by the supplemental agreement without affording the union the opportunity to negotiate or bargain over the issue. The company answered admitting the facts in the complaint but contending that it had not violated provisions of the Act. The sole defense raised by the company was that the union had contractually waived its right to bargain over the issue of benefits when the union agreed to certain language in the supplemental agreement. Thereafter, the parties filed a stipulation of the facts and waived hearing before an administrative law judge, preferring to transfer the case directly to the Board for disposition. The parties agreed that the complaint, answer and stipulation of facts would constitute the entire record in the case.

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[1] These sections make it an unfair labor practice for an employer to refuse to bargain collectively with a representative of a company's employees and to interfere with the exercise of employees' protected rights under the Act.

On February 28, 1985, the Board issued a decision and order finding that the company had violated the provisions of the Act by unilaterally terminating benefits provided by the supplemental agreement. The company filed a motion for reconsideration with the Board, arguing for the first time that the union waived its right to bargain by failing to demand negotiation on the issue following the company's announcement in December of 1982 that it intended to terminate benefits. On May 8, 1985, the Board denied the company's motion because of its failure to demonstrate "extraordinary circumstances" justifying reconsideration, as required by § 102.48(d)(1) of its rules and regulations. In addition to finding that the company had not advanced this legal argument earlier, the Board further found that the parties had not stipulated in their joint statement that the union had failed to demand bargaining following the company's announcement in December of 1982. Thereafter, the Board filed an application with this court for enforcement of the Board's order of February 28, 1985.

II.

DISCUSSION

The company concedes that the issue of benefits under the supplemental agreement was a mandatory subject of bargaining, and that the union had a statutory right to be consulted about any proposed changes in the payment of benefits. Nonetheless, the company argues that the language in Article IV, Section 5 of the supplemental agreement constituted a contractual waiver of the union's right to bargain or negotiate over the termination of benefits.

Section 5 of the agreement provides:

> The International Union or the Employer may request renegotiation of the provisions of this Agreement and termination of the Labor Agreement and Supplemental Labor Agreement by giving a written notice to the other party not more than 75 days nor less than 60 days prior to October 15, 1982, or any October 15, thereafter. In such event, if negotiations are not completed prior to the October 15 next following the giving of such written notice, this Agreement, together with the Labor Agreement shall termi-
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> nate unless otherwise agreed upon. *Notwithstanding the termination of the Agreement for Pension, Service Award, Insurance and Supplemental Workmen's Compensation Benefits, the benefits described herein shall be provided for ninety (90) days following termination.*

Joint Appendix at 15–16 (emphasis added). The company claims that the union gave it the right to terminate benefits unilaterally, i.e., without negotiation, when it agreed to the inclusion of the above language in the supplemental agreement. Conversely, the Board takes the position that the contract language is silent on the matter of payment of benefits following the ninety-day period and interprets the language to mean only that the company would provide an additional ninety days of coverage beyond the expiration of the agreement.

Initially, we note that the Board's findings are entitled to affirmance if supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Moreover, waiver of a collective bargaining right may only be established by "clear and unmistakable" evidence that the party intentionally yielded its right. *Federal Compress & Warehouse Co. v. NLRB,* 398 F.2d 631, 637 (6th Cir.1968). Equivocal, ambiguous language in a bargaining agreement is insufficient to demonstrate waiver. *Tocco Division of Park-Ohio Industries, Inc. v. NLRB,* 702 F.2d 624, 626 (6th Cir.1983).

The Board found the supplemental agreement silent on the treatment of benefits after the ninety-day period. Further, the Board held that no language in the agreement purported to divest the union of its statutorily-protected right to bargain over the issue of benefits. The Board also noted that extrinsic evidence of the parties' bargaining history presented by the company as indicative of the parties' intent was not probative on the issue of contractual waiver in the present dispute. The company had pointed to the fact that in 1973, ninety days after the expiration of the supplemental agreement, it had terminated supplemental benefits paid to striking workers in accordance with identical termination language in the existing supplemental agreement. The Board reasoned, however, that it was inappropriate to infer from the events in 1973 that the company had the contractual right to unilaterally terminate benefits in the present case. The Board pointed out: "Strikers are not ordinarily entitled to receive the type of fringe benefits at issue unless special provision is made by the parties."

We agree with the Board that the contract language and the prior conduct of the parties do not demonstrate a "clear and unmistakable" intent to waive the right to bargain.

The company next claims that the Board erred in ruling on its alternative contention that the union waived its right to bargain over the issue of benefits by failing to demand bargaining on the issue following the company's announcement in December of 1982 of its intent to terminate benefits. The company argues that the facts set forth in Paragraph 14 of the Joint Stipulation indicate clearly that the union did not attempt to initiate *any* discussions concerning the termination of benefits following the company's announcement in December of 1982.

> Paragraph 14 reads in pertinent part: During the bargaining sessions conducted by the parties in 1982, there were no discussions concerning the termination of such benefits under the supplemental agreement as of January 15, 1983, other than the above-mentioned announcement by Mr. Smith to the Union on or about December 16, 1982.

Joint Appendix at 4. The Board determined that this statement, interpreted in its most favorable light to the company, means only that no discussions were initiated by the union at the *formal* bargaining sessions, thus leaving open the possibility of a request by the union to bargain on this issue other than in the formal bargaining sessions. Adopting this position, the Board refused to infer from this statement in the stipulation the fact that the union had completely failed to demand barganing on the issue of benefits. The Board also pointed out that the company had not made this argument until it moved for reconsideration. Thus, the Board held that the company through its motion for reconsideration was improperly attempting to introduce a new theory and also to rely on facts outside the scope of the parties' stipulation. We agree with the Board that the company did seek, in support of its motion to reconsider, to rely on a new theory and on asserted facts not in the stipulation, and therefore we conclude that the Board did not err in denying the motion to reconsider.

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Accordingly, the decision of the National Labor Relations Board is affirmed and its order will be enforced.

Vokas Provision Co., d/b/a The Rich Plan of Western Reserve v. NLRB

796 F.2d 864 (6th Cir.), July 21, 1986—271 NLRB 1010

On petition to review Board Order

Before Engel, Keith and Kennedy, Circuit Judges

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Engel, Circuit Judge: The issue here is what right an employer possesses, consistent with the National Labor Relations Act, to discipline employees who absent themselves from work against the express order of the employer but upon the expectation that they will be subpoenaed by the union to appear at Board proceedings.

Vokas Provision Company petitions to review and set aside a decision and order of the National Labor Relations Board issued on August 15, 1984, and reported at 271 N.L.R.B. 1010 (1985). The Board found the Company in violation of sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act,

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29 U.S.C. § 158(a)(1), (4),[1] when it refused to permit six employees to attend a Board representation hearing during working time, and when it subsequently discharged those employees for attending the hearing contrary to the Company's instructions. The Board has cross-applied for enforcement of its order.

I.

The facts are essentially as found by the administrative law judge and were undisturbed by the Board which, however, reached an opposite conclusion on the issue of liability.

Vokas Provision Company is a small employer of approximately twelve full-time employees. The Company is engaged in the business of selling frozen foods and meats, freezers and microwave ovens to retail customers. This business is conducted at its Canton, Ohio, plant. The Company also maintains several sales offices scattered throughout the State of Ohio. The plant consists of four major departments: sales, meat processing, warehousing-truck driving, and office staff. Jerome Vokas is the Company's president and owner. Carl Bishop is the plant manager.

Since the mid-1970s, the Company has experienced rapid growth in its business operations. The meat processing department has played a particularly critical role in this growth. The Company has always delivered all meats frozen, which is the foundation upon which the Company has built its complete food service.

On or about March 10, 1981, District Union 427, United Food & Commercial Workers International Union began an organizing campaign at the Company's plant. Shortly thereafter, meatwrappers Gail Gelliarth and Janis Heckel, meatcutter Herb Cannon, and warehouseman/driver Walter Blakeway signed union authorization cards. On March 17, 1981, the Union filed a petition with the Regional Office seeking certification as exclusive bargaining representative of Vokas' twelve employees. In the latter part of March, 1981, the Board's attorney and the Company's attorney agreed to schedule a representation hearing for April 1, 1981,[2] although the election date was still open.

On March 30, 1981, Anthony Hackenberg, the Union's counsel, and Raymond DeSantis, a business representative for the Union, met with several meat processing employees after their shift had ended and asked them whether they would be willing to attend the April 1 representation hearing. The employees were informed that their testimony might be "useful for the Union." The employees who participated in this meeting were Gail Gelliarth, Janis Heckel, Herb Cannon and Sareth Has. During this meeting, it was decided that employees Frank Redling and Walter Blakeway should also be requested to provide testimony at the hearing. Redling and Blakeway were told the following day that the Union had requested their presence at the hearing.

On March 31, 1981, President Vokas learned, through his plant manager, that the six employees would be leaving work the following day to attend the hearing. At the end of the shift, Vokas called his employees together and read a prepared statement. He notified the employees that he could not permit all of them to attend the hearing unless they had subpoenas, but that they would be permitted to choose one of their number as a representative who

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would be allowed to attend the hearing. Vokas explained that he could not allow production to be stopped by the absence of six employees, and that if the six employees left to attend the hearing, without subpoenas, they would be discharged for insubordination. Later that evening, two of the employees conferred with Union representative DeSantis who informed them that subpoenas would be waiting for the employees at the federal building the following morning.

On the following day, April 1, when the six employees prepared to leave for the hearing, Vokas again informed the employees that they could not leave work without subpoenas, except that a single employee could attend the hearing as their representative. Vokas also told the employees that if they left they would be discharged and not rehired. The employees responded that they had subpoenas, but when Vokas asked to see the subpoenas he was told that the Union had instructed the employees that they would be served when they came downtown to the Board. At this point, Cannon and Redling apparently informed Vokas that the six employees involved were willing to return to work after the hearing. [3] Vokas then read from the written statement and again warned the employees that they would be discharged if they left to go to the hearing without subpoenas. Cannon informed Vokas that he believed the employees would be in contempt if they did not go to the hearing. The six employees then proceeded to punch out their time cards and leave the plant. Vokas collected the cards as they were punched, and all six employees were discharged. Upon their arrival at the federal building, Union counsel Anthony Hackenberg served the six employees with subpoenas which had been issued that morning. The representation hearing was not held on that date due to the filing of the unfair labor practice charges.

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[1] Sections 8(a)(1) and 8(a)(4) provide:

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

[2] By March 31, 1981, as a result of a stipulation reached between the parties, the only issues remaining to be resolved at the representation hearing were the eligibility of two new employees and the election date. In addition, the parties also had some differences as to whether they had agreed concerning the eligibility of part-time employees and the status of employee Frank Redling. 271 N.L.R.B. at 1022.

On May 29, 1981, a complaint was issued against the Company charging violations of sections 8(a)(1), (3), and (4) of the NLRA. A hearing was held on the merits before an administrative law judge who issued a decision dismissing the complaint in its entirety. [4] According to the ALJ, in the absence of a subpoena or a showing that the attendance of all six employees at the hearing was necessary, the Company's legitimate interests in maintaining its business operations prevailed over the employees' interests in voluntarily attending the hearing without the Company's permission. [5]

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In a 2–1 decision, a majority of the Board reversed the ALJ and found that the Company's refusal to permit the six employees to attend the representation hearing, and the Company's subsequent disciplinary action against the employees for disobeying its instructions, were in violation of sections 8(a)(4) and 8(a)(1) of the Act. [6] In reaching this conclusion, the majority emphasized that on April 1 it was evident that the employees "reasonably believed that they were legally bound to obey the subpoenas which the Union was obtaining to compel their appearances at the hearing." 271 N.L.R.B. at 1011. Therefore, according to the majority:

> In these circumstances where the employees felt as compelled to appear as if they had been served and the Respondent did not advise them concerning any infirmity based on lack of service, we would not require the employees to have subpoenas in hand in order to be within the protection of section 8(a)(4). Rather, it was sufficient that the subpoenas were awaiting the employees at the Board Offices, and that Respondent was not informed.

Id. [7] The Board majority therefore ordered the six discharged employees reinstated with full backpay and seniority. The majority further ordered the Company to cease discharging employees for leaving work during working hours to attend a Board hearing for the purpose of testifying.

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[3] The ALJ noted that, although this statement was corroborated by another employee, witnesses for the Company specifically denied that such a statement to return to work after the hearing was made. 271 N.L.R.B. at 1024 n. 11.

[4] Only the 8(a)(4) and 8(a)(1) allegations were addressed by the Board and are appealed by the General Counsel. The Company was also charged with a separate violation of 8(a)(1) for unlawfully interrogating its employees. However, the Board agreed with the ALJ that the Company's conduct in this respect was not unlawful. 271 N.L.R.B. at 1010.

[5] The ALJ summarized his findings and conclusions as follows:

> In essence, the employees in the instant case insisted on attending a Baord hearing during working hours and did so in the face of respondent's explicit prohibition against their leaving work because of needed production requirements, and further without demonstrating to Vokas any substantial reasons for attending the hearing. There are also reasons in this case, as has been noted, for finding that the employees' attendance at the hearing was not in any realistic sense at all necessary. In the first place, the employees had not yet been actually subpoenaed and thus were under no compelling legal obligation to attend, and secondly as I have emphasized, the employees in the instant case were discharged for leaving work contrary to express orders not to do so, rather than for going to the hearing. Additionally, the employees' interests were represented at the hearing by their Union and its counsel at all times. In circumstances such as these, I fail to see how any statutory purpose would be served by holding that the employees were protected by the Act in leaving work to attend the hearing in defiance of the respondent's order that they stay on the job, and especially so in the presence of a rapidly growing business, and also strong evidence by management of actual and probably consequential economic loss of serious business disruption and production resulting from their absence.
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> Under the controlling circumstances here, and balancing the interest of the alleged discriminatees with the interest of respondent, I am unable to conclude that the Company violated section 8(a)(4) of the Act.

271 N.L.R.B. at 1030.

[6] The majority was composed of Members Zimmerman and Hunter. The dissent by Chairman Dotson would have upheld the dismissal of the complaint for the reasons given by the ALJ.

[7] The Board also found that because the employees had "substantially complied" with the Company's requirement of obtaining subpoenas, it was unnecessary to inquire into the Company's business justification for discharging the six employees. 271 N.L.R.B. at 1011 n. 4.

In the instant case, it was not found, and it is not contended, that the Company's action against the six employees was motivated by any desire to interfere with the Board's processes or to otherwise discriminate against the employees because they participated in Board proceedings. Nor is there any dispute that the Company's refusal to grant permission to the six employees to attend the Board hearing was not in fact based upon legitimate business needs. [8] Rather, the only question is whether sections 8(a)(4) and 8(a)(1) prevent an employer from taking disciplinary action against a group of employees who absent themselves from work without subpoenas or permission, thereby disrupting production, whenever they "reasonably believe" that they are under a duty to attend a Board proceeding. The Board opinion cited no authority for its holding that a violation had occurred and, in fact, the Board's ruling is incompatible with its own prior rulings and with well established precedent in this and in other circuits. We therefore deny enforcement.

II.

At the outset, we recognize that because of the Board's "special competence" in the field of labor relations, its interpretation of the Act is entitled to substantial deference. *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 496, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979); *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975). Nor should we reject a ruling merely because we might prefer another view of the statute. *Pattern Makers' League of North America v. N.L.R.B.*, ––– U.S. –––, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985). We also recognize that a reviewing court should be particularly hesitant to disturb the Board's conclusions where "[t]he ultimate problem is the balancing of the conflicting legitimate interests." *N.L.R.B. v. Truck Drivers*, 353 U.S. 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676 (1957).

In reviewing the Board's interpretation and application of the Act, therefore, our primary function is to determine whether the Board's conclusions are rational and whether they are consistent with the underlying policies of the Act as well as with prior precedent. Although the Board's determinations are subject to "limited judicial review," this does not mean that they are immunized from judicial scrutiny:

> When we use the phrase "limited judicial review" we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act as amended, §§ 10(e), (f), 29 U.S.C. §§ 160(e), (f) (1958 ed.). Courts should be "slow to overturn an administrative decision," *Labor Board v. Babcock and Wilcox Co.*, 351 U.S. 105, 112 [76 S.Ct. 679, 684, 100 L.Ed. 975 (1956)], but they are not left "to 'sheer acceptance' of the Board's conclusions," *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803 [65 S.Ct. 982, 988, 89 L.Ed. 1372 (1945)]. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co. v. Labor Board, post* [380 U.S. 300] at 318 [85 S.Ct. 955 at 967, 13 L.Ed.2d 855 (1965)].

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[8] Indeed, as noted, the ALJ found "strong evidence by management of actual and probably consequential economic loss of serious business disruption and production resulting from their absence." 271 N.L.R.B. at 1030. Since the Board declined to reach this issue the ALJ's fact-findings remain undisturbed.

N.L.R.B. v. Brown, 380 U.S. 278, 290–92, 85 S.Ct. 980, 987–88, 13 L.Ed.2d 839 (1965). Likewise, in *N.L.R.B. in Pipefitters Union Local No. 120,* 719 F.2d 178 (6th Cir.1983), we observed:

> Although we are not free to substitute our judgment for that of the Board simply because we would have made a different decision had we heard the case *de novo,* . . . we are also not "to stand aside and rubber-stamp" Board determinations that run contrary to the language or tenor of the Act. *N.L.R.B. v. Weingarten, Inc.,* 420 U.S. at 266, 95 S.Ct. at 968.

Id., at 181. And, in *N.L.R.B. v. Engineers Constructors, Inc.,* 756 F.2d 464, 467 (6th Cir.1985), we emphasized that: " '[c]areful judicial scrutiny of the Board's action is necessary . . . in the face of the accusations of failure to abide by precedent since the courts have an obligation to ensure that administrative agencies adhere to enumerated policies and procedures.' " (Citation omitted). It is with these principles in mind that we review the Board's ruling here.

III.

A.

Since the enactment of the National Labor Relations Act in 1935, the Supreme Court has recognized the employer's "undoubted right" to discharge an employee for any reason, so long as that reason is not improper under the Act. As early as 1937, the Supreme Court observed:

> The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent [employee]. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible.

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Associated Press v. N.L.R.B., 301 U.S. 103, 132, 57 S.Ct. 650, 655, 81 L.Ed. 953 (1937). The Supreme Court has also recognized that because " 'working time is for work,' " the Act " 'does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time,' " so long as such a rule is not adopted for a discriminatory purpose. *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 803 n. 10, 65 S.Ct. 982, 988 n. 10, 89 L.Ed. 1372 (1945) (quoting with approval from *Matter of Peyton Packing Co.,* 49 N.L.R.B. 828, 843–44); *see also Beth Israel Hospital v. N.L.R.B.,* 437 U.S. 483, 510, 98 S.Ct. 2463, 2478, 57 L.Ed.2d 370 (1978) (Powell, J., concurring in judgment).

Although the cited Supreme Court decisions did not involve the discharge of employees who absented themselves from work contrary to the employer's instructions, the Sixth Circuit has specifically upheld the right of an employer to discharge an employee under such circumstances, provided the discharge was not otherwise improper under the Act. *N.L.R.B. v. Mylan-Sparta Co.,* 166 F.2d 485 (6th Cir.1948); *N.L.R.B. v. Superior Co.,* 199 F.2d 39 (6th Cir.1952); *Grief Brothers Corp. v. N.L.R.B.,* 635 F.2d 531 (6th Cir.1980).

In *Mylan-Sparta,* the Board found the employer in violation of sections 8(a)(1) and 8(a)(3) when it discharged a number of employees for engaging in union activities. Although the Sixth Circuit agreed that some of the discharges were discriminatorily motivated, it modified the Board's order as it affected at least one of the employees who was discharged for leaving work contrary to the employer's instructions:

> It is settled that the National Labor Relations Act does not furnish a guarantee against discharge by an employer merely because the discharged employee is a member of a union. The Act does not take from the employer the right to make and enforce reasonable rules for the conduct of the business and to take disciplinary action against employees who either violate the rules, are inefficient or malcontent, or for reasons are generally not suitable for efficient production. The Act does not authorize the Board to substitute its own ideas of discipline or management for those of the employer, except barring discrimination or discharge for union membership.

166 F.2d at 490–91. (Citations omitted).

Our court reached a similar result in *N.L.R.B. v. Superior Co.,* 199 F.2d 39 (6th Cir.1952). The Board in *Superior* found the company in violation of sections 8(a)(1) and (3) of the Act when it refused the requests of five employees for a day off to attend an informal conference with the Board's representative and when it subsequently imposed a penalty upon the members of the committee for taking the day off contrary to the company's instructions. The Board also found that the company violated section 8(a)(1) by threatening to lay off an employee should he attend a scheduled Board representation hearing. This court, however, refused to enforce the Board's order, finding that the company's conduct was not in violation of the Act. Initially, we observed:

> It is conceded by the Board that the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them for any reason except union activity or relationship. If a discharge is not arbitrarily made with a purpose, or as an excuse, to avoid the statute, it is not unlawful. (Citations omitted). The employer's right to hire and fire includes the right to make reasonable rules and regulations and to discipline employees for violation thereof.

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Id. at 42 (citing *N.L.R.B. v. Mylan-Sparta Co.*, 166 F.2d 485, 491 (6th Cir.1948)). We further noted:

> If the refusal of the [company] to grant the requested leave of absence was valid, disciplinary action which followed for a violation of the order was not improper. However, if the refusal to grant the requested leave of absence was invalid under the Act, the disciplinary action which followed was likewise invalid.

Id. (citing *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945)). Applying these principles, we concluded that the company did not violate sections 8(a)(1) and (3) when it refused to permit the five employees to attend the informal conference and when it subsequently laid off the employees for leaving work without permission for the purpose of attending an informal Board conference. [9]

Quite clearly, our holding in *Superior* supports the proposition that an employer may take disciplinary action against an employee who absents himself from work without permission and contrary to the employer's instructions, even though the employee desires to attend Board proceedings. In reaching this conclusion, our court engaged in a balancing of the respective interests, similar to that undertaken by the ALJ here. Thus, with respect to the company's refusal to permit the employees to attend the informal conference, we noted that the company was "fully justified in refusing to grant the request." *Id.* at 43. In this respect, we observed that the Board proceeding was an informal conference at which attendance was not required. We also emphasized that there was no evidence that the employees' attendance was "either necessary or advisable, or that any information was obtained which the Board representative did not already have, or could not have acquired by either correspondence or by a telephone conversation." *Id.*

In all candor there are certain points of differences between *Superior* and the case here. Unlike the charges here, which involve alleged violations of sections 8(a)(1) and (4) of the Act, *Superior* was analyzed in the context of alleged violations of sections 8(a)(1) and (3) of the Act. Moreover, although the same conduct may give rise to a violation of sections 8(a)(1), 8(a)(3), and 8(a)(4), the standards for determining a violation under these sections are not identical. [10]

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[9] With respect to the second incident in *Superior*, i.e., the threatened layoff of an employee should he attend a formal hearing held by the Board, our court also found that the company's conduct in this respect was not in violation of section 8(a)(1). In so finding, we stated:

> We agree with the Board's contention that it would be a violation of the Act for the respondent to refuse to permit an employee to attend a formal hearing of the Board where his presence was requested by the Board. *N.L.R.B. v. Fulton Bag & Cotton Mills*, 180 F.2d 68, 70 (10th Cir.1950). But, in our opinion, the incident between Paul Baker and General Manager Nicholas in the plant cafeteria was not of that nature. The trial examiner treated the incident as a trivial one referring to it in a footnote and not making it the basis of any violation of the Act. Nicholas' statement was made as part of some general "banter" at the time between him and Baker. Baker had not asked permission to attend the hearing. The Board had not requested his presence at the hearing. Nicholas' statement was to the effect that if Baker *did the same thing he did before*, he would again receive disciplinary action. What he did before was to absent himself contrary to orders, for the purpose of making a useless and unnecessary trip. Strictly analyzed, this was not a statement of the respondent's policy with respect to formal meetings of the Board where his presence would be required. Since no such situation has presented itself, it is entirely conjectural to predict what the respondent would do under such circumstances. In any event such casual and isolated remarks of a supervisory employee are not chargeable to the employer in the absence of supporting evidence that they reflect the views of management.

Id. at 44. (Citations omitted).

[10] Whereas section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act," section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition

Continued

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It is also true that, in contrast to *Superior,* which involved an informal Board conference, the employees here attended a formal Board representation hearing. However, here, as in *Superior,* the ALJ found that the employees' attendance at the Board representation hearing was not "in any realistic sense at all necessary." Moreover, the employees attended the Board representation hearing not at the request of the Board but at the Union's request. Finally, in *Superior,* we observed that when the employer's legitimate business interest in maintaining discipline was balanced against the employees' relatively insignificant interests in attending the informal conference, the employer's disciplinary action was justified even though the absence of the employees did not create a production problem. Here, of course, the ALJ found "strong evidence" of economic loss and "serious business disruption." Thus, although *Superior* involved attendance at an informal rather than a formal Board proceeding, the factors which justified the employer's action in *Superior* are even more applicable here. [11]

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B.

While acknowledging our decision in *Superior,* the General Counsel nevertheless argues that section 8(a)(4) should be liberally applied to protect the employees from being discharged here, especially since subpoenas were supposedly awaiting them at the federal building. Of course, we recognize that an employer may not discharge an employee because he has testified under the Act. Such an action would be a literal violation of section 8(a)(4).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

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of employment to encourage or discourage membership in any labor organization." A finding of anti-union animus is ordinarily an essential element of a section 8(a)(3) violation. As the Supreme Court stated:

> Under that section both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of anti-union animus is necessary.

N.L.R.B. v. Brown, 380 U.S. 278, 286, 85 S.Ct. 980, 985, 13 L.Ed.2d 839 (1965). *See also N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 398, 103 S.Ct. 2469, 2472, 76 L.Ed.2d 667 (1983); *N.L.R.B. v. Great Dane Trailers,* 388 U.S. 26, 33–34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967); *American Shipbuilding Co. v. N.L.R.B.,* 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965). It is only when the employer's discriminatory conduct is " 'inherently destructive' of important employee rights, [that] no proof of anti-union motivation is needed. . . ." *Great Dane Trailers,* 388 U.S. at 34, 87 S.Ct. at 1798.

Unlike section 8(a)(3), the Board has held that a section 8(a)(4) violation does not require a finding of anti-union animus. *See, e.g., Block-Southland Sportswear, Inc.,* 170 N.L.R.B. 936, 981 (1968), *enforced,* 420 F.2d 1296 (D.C.Cir.1969). *See also Service Employees International Union, Local 250 v. N.L.R.B.,* 600 F.2d 930, 939 (D.C.Cir.1979). The reason anti-union animus is not an element of a section 8(a)(4) violation is that section 8(a)(4) protects employees against retaliatory action for filing unfair labor practices or giving testimony under the Act even though they are not union members or otherwise engaged in union activities. Although not always explicitly stated, a section 8(a)(4) violation ordinarily requires a finding of adverse action plus discriminatory intent; that is, it must be found that the employer has retaliated against an employee *because* he filed unfair labor practices or otherwise participated in the Board's processes. *See, e.g., N.L.R.B. v. Scrivener,* 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972); *Pacemaker Corporation v. N.L.R.B.,* 260 F.2d 880 (7th Cir.1958); *N.L.R.B. v. Fulton Bag & Cotton Mills,* 180 F.2d 68 (10th Cir.1950); *see also N.L.R.B. v. Retail Store Employees Union, Local 876,* 570 F.2d 586 (6th Cir.1978). Although some cases have found an 8(a)(4) violation even in the absence of an employer's discriminatory intent, such cases appear to be relatively rare and invariably involve an employee who has already been subpoenaed [sic] and who is thus under a present legal obligation to attend a Board proceeding. *See, e.g., Western Clinical Laboratory, Inc.,* 225 N.L.R.B. 725 (1976), *enforced in part and denied in part,* 571 F.2d 457 (9th Cir.1978).

In contrast to a section 8(a)(3) or section 8(a)(4) violation, a section 8(a)(1) violation does not require a finding of any kind of discrimination. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Although section 7 does not provide an employee with the express right to file unfair labor practices or to give testimony under the Act, it is clear that this right is implicit under section 7 as well as under section 8(a)(4). *See E.H. Limited, d/b/a Earringhouse Imports,* 227 N.L.R.B. 1107, 1108 (1977), *enforcement denied,* 600 F.2d 930 (D.C.Cir.1979); *Better Monkey Grip Company,* 115 N.L.R.B. 1170, *enforced,* 243 F.2d 836 (5th Cir.1957), *cert. denied,* 355 U.S. 864, 78 S.Ct. 96, 2 L.Ed.2d 69 (1957).

[11] The most recent case in the Sixth Circuit to uphold the right of an employer to take disciplinary action against an employee for absenting himself from work is *Grief Brothers Corp. v. N.L.R.B.,* 635 F.2d 531 (6th Cir.1980). In *Grief Brothers,* the Board found that the employer applied its previously established leave policy in a discriminatory manner when it refused to grant employees from twenty-one plants leave from work to attend a conference at the union's international headquarters. The conference was designed to explore the feasibility of developing a coordinated bargaining program among the various units of the employer company. The employer's refusal to grant leaves from work to attend the conference was found to violate section 8(a)(1) of the Act, and the discharge of an employee who absented himself from scheduled work to attend the conference after being denied leave was found to violate section 8(a)(3). In refusing to enforce the Board's order, we concluded that "this case is controlled by our decision in *N.L.R.B. v. Superior Co.,* 199 F.2d 39 (6th Cir.1952)," 635 F.2d at 532, emphasizing that "since the employee who was discharged for absenting himself from work to attend the meeting did so in the face of a denial of his request for leave and a warning that his absence from work would result in disciplinary measures, we conclude that the discharge did not violate the Act." *Id.*

> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

We also recognize that section 8(a)(4) is to be broadly construed. *N.L.R.B. v. Scrivener,* 405 U.S. 117, 121, 92 S.Ct. 798, 801, 31 L.Ed.2d 79 (1972). In *Scrivener,* the Supreme Court held that section 8(a)(4) prohibits an employer from discharging an employee for giving written sworn statements to a Board field examiner. Although the employee had not literally "filed charges or given testimony," the Court emphasized that broad protection is necessary " 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.' " *Id.* at 122, 92 S.Ct. at 801 (quoting *John Hancock Mut. Life Ins. Co. v. N.L.R.B.,* 191 F.2d 483, 485 (D.C.Cir.1951)).

Scrivener was followed by our circuit in *N.L.R.B. v. Retail Store Employees Union, Local 876,* 570 F.2d 586 (6th Cir.1978). There, we held that section 8(a)(4) protects an employee from retaliatory discharge for *refusing* to testify voluntarily for the union in an earlier unfair labor practice proceeding. Noting that the Supreme Court had interpreted section 8(a)(4) to afford "broad rather than narrow protection" in order "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses," we concluded that:

> Similar considerations militate in favor of extending statutory protection to the activity involved in this case. Although [the employee] was not prevented from reporting information to the Board, the coercion applied against her had a direct bearing on a pending Board proceeding. . . . Coercing employees to give untrue testimony just as surely undermines the integrity of Board proceedings as does coercing employees to give no testimony at all.

Id. at 590. Thus, like the Supreme Court in *Scrivener,* our court focused on section 8(a)(4)'s broad protection in terms of how an employer's improperly motivated action against an employee might interfere with the integrity of Board proceedings. *See also N.L.R.B. v. Overseas Motor, Inc.,* 721 F.2d 570 (6th Cir.1983); *Pacemaker Corp. v. N.L.R.B.,* 260 F.2d 880, 883 (7th Cir.1958). That factor, present in the Supreme Court's ruling in *Scrivener* and in our circuit's ruling in *Retail Stores,* is altogether missing here and the Board does not claim otherwise.

We note that there are cases which hold that once a subpoena is served upon an employee the employer's motivation is irrelevant and the employer's obligation is one of noninterference with the employee's duty to respond to the subpoena. *See E.H. Limited, dba Earringhouse Imports,* 227 N.L.R.B. 1107, 1110 n. 10 (1977), *en-*

forcement denied, Service Employees International Union, Local 250 v. N.L.R.B., 600 F.2d 930 (D.C.Cir.1979); *Walt Disney World,* 216 N.L.R.B. 836 (1975); *Neptune Meter Co.,* 212 N.L.R.B. 87 (1974); *Newland Knitting Mills,* 165 N.L.R.B. 788 (1967); *East Tennessee Undergarment Company,* 139 N.L.R.B. 1129 (1962), *enforced,* 53 L.R.R.M. 2461 (6th Cir.1963); *Winn-Dixie Greenville, Inc.,* 128 N.L.R.B. 574 (1960). *But see Item Co.,* 113 N.L.R.B. 67 (1955).[12] In each of these cases, however, it was emphasized that a subpoena had actually been served upon the employee. Here, the employees had not been served with subpoenas at the time they left work against Vokas' instructions.

C.

The General Counsel insists, and the Board majority held, that for purposes of 8(a)(4) the employees' reasonable belief that they are under a duty to respond to issued but unserved subpoenas is equivalent to actual service of a subpoena. As the Board majority stated: "We do not deem it appropriate to countenance these discharges based solely on the technical lack of service of the subpoenas." 271 N.L.R.B. at 1011 n. 4. This position, however, is simply inconsistent with the Board's own procedures and regulations as well as its own prior rulings.

Both the NLRA and the Board's Rules and Regulations set out detailed procedures to govern the issuance, service and revocation of subpoenas. Section 11(1) of the Act empowers the Board to issue subpoenas compelling the attendance of witnesses upon the application of any party to the proceedings. 29 U.S.C. § 161(1); *see also* 29 C.F.R. § 102.31(a) (1985). Once a subpoena is issued, the Board's Rules and Regulations provide for only four methods of service: "[S]ubpoenas of the Board . . . may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served." 29 C.F.R. § 102.111(a) (1985); *see also* 29 U.S.C. § 161(4). Additionally, it is only after a person has been served that he can seek a revocation of the subpoena, and then he must do so "within 5 days after the date of service of the subpoena upon him. . . ." 29 C.F.R. § 102.31(b). Further, a person is under a duty to obey a subpoena only when that person has been validly served. As the Supreme Court observed in *United States v. Bryan*, 339 U.S. 323, 330, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950), "when the government introduced evidence that respondent had been *validly served* with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a *prima facie* case of willful default." (Emphasis added). In *N.L.R.B. v. C.E. Strickland*, 321 F.2d 811, 814 (6th Cir.1963), our court reiterated this principle in the context of N.L.R.B. proceedings when we stated: "In *United States v. Bryan* . . . the opinion recognizes that the obligation of a witness to testify in response to a subpoena is conditional upon being 'properly summoned.'"

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[12] In *Item Co.,* the Board adopted the ALJ's findings and conclusions and held that the employer did not violate section 8(a)(4) even though it refused to permit two employees, who had been subpoenaed, to attend a Board hearing at the same time, and even though the employer subsequently discharged one of the employees for leaving the plant without first obtaining permission. In reaching his conclusion, the ALJ found it significant that there was no evidence of anti-union animus on the part of the employer. More importantly, however, the ALJ noted that the employer had made efforts to "release employees for the hearing one at a time to avoid undue disruption of operations." 113 N.L.R.B. at 86. The ALJ also emphasized that "the employer cooperated in arranging to have all necessary employees available to testify at the hearing." *Id.*

The Board, too, has recognized that "the obligation to honor the subpoena arises immediately when the subpoena is *duly issued and served*. It is only when the person served fails to fulfill this obligation that the necessity arises to seek enforcement of the obligation in the District

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Court." *Winn Dixie*, 128 N.L.R.B. 574, 579 (1960) (emphasis added); *see also Babcock and Wilcox*, 114 N.L.R.B. 1465, 1469 (1955). Further, in *Nestle Company*, 248 N.L.R.B. 732, 740 (1980), *enforced*, 659 F.2d 252 (D.C.Cir.1981), the Board adopted the ALJ's findings as follows:

> While employees have a statutorily protected right to file and support unfair labor practice charges and objections, they do not have a statutorily protected right to leave work without permission, thereby disrupting production, *at least in the absence of having been served with a subpoena.*

(Emphasis added).

The Board's ruling here is also inconsistent with its Rules and Regulations relating to the payment of witness fees. Section 11(4) of the Act provides that "Witnesses summoned . . . shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. . . ." 29 U.S.C. § 161(4); *see also* 29 C.F.R. § 102.32 (1985).[13] The Board's regulations provide that "Witness fees and mileage shall be paid by the party at whose instance the witnesses appear. . . ." 29 C.F.R. § 102.32. In addition, Rule 45(c) of the Federal Rules of Civil Procedure provides that the tendering of such fees shall accompany the service of the subpoena. In this regard, the Board has held: "The Administrative Law Judge found, and we agree, that the subpoenas were defective because they were not accompanied by witness and mileage fees as required by Section 102.32 of the National Labor Relations Board Rules and Regulations, Series 8, as amended." *Rolligon Corp.*, 254 N.L.R.B. 22 (1981). *See also O.K. Machine & Tool Corp.*, 279 N.L.R.B. No. 69 (1986).[14]

Finally, we note that the Board's ruling is inconsistent with the underlying purposes of the Board's subpoena power. The purpose of the subpoena power granted under the Act is two-fold. While protecting the integrity of Board proceedings on the one hand, it also protects the potential witness from at least some abuse. At the best, the employees affected here were bound to lose time from work and their paychecks would be correspondingly affected. A rule which requires that, if the Union wishes the employee to attend, the Union observe the formality of a subpoena, including the payment of witness fees (unless waived by the witness), assures that the process of the Board is thus respected and the subpoena power itself is less likely to be abused. It surely was not unreasonable here for the Union, if it genuinely needed the attendance of these people, to have served subpoenas upon the employees, along with witness and mileage fees, and it is acknowledged that it had nearly a full two weeks' notice of the hearing in which to do so. Had the subpoenas actually been served at the time the employees sought to be excused, the employer could have contacted the Board and presumably have made arrangements to schedule the appearance in an orderly fashion and thus minimize disruption to its business. It is not difficult, however, to foresee that the Board would be wary of making such arrangements where in fact no such subpoenas at the time had been issued or served, for to do so would have placed itself between the two litigants without any appropriate basis for action. Likewise the Company, in our view, was not obligated to accept at face value the assertions of the Union and to honor them when indeed the entire purpose of the proceedings was to determine whether the Union should in fact be the representative of the employees involved.

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[13] 28 U.S.C. § 1821(b) provides:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

[14] Although such fees may be waived, the Board has stated that the mere fact that employees support the union does not constitute such a waiver. *Rolligon Corp.*, 254 N.L.R.B. at 22 n. 4.

We are fully satisfied, therefore, that a person's reasonable belief that he or she is under a duty to obey an issued but un- **876** served subpoena simply cannot be treated as the equivalent of actual service; nor do we believe that the lack of such service is a mere "technicality." Plainly, if a party were able to avoid complying with the Board's subpoena formalities, which is the effect of the Board's conclusion here, the Board's subpoena power could become subject to much abuse to the detriment of the employee. We conclude, therefore, that the Board's rule here is not only inconsistent with the policies and procedures relating to the Board's subpoena power, but it is also in conflict with the Board's own precedent which recognizes that a subpoena becomes effective only upon compliance with the formalities of the Board's statutory and regulatory requirements. Indeed, as other courts have observed in a similar context: " 'Congress has made elaborate provisions for obtaining and enforcing [N.L.R.B.] subpoenas,' and '[i]t was obviously its intention that this machinery be utilized.' " *N.L.R.B. v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1116 (9th Cir.1981) (quoting *N.L.R.B. v. C.H. Sprague of Son Co.*, 428 F.2d 938, 942 (1st Cir.1970)); *see also Hydro Conduit Corp.*, 274 N.L.R.B. No. 190 (1985). *Cf. N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1, 78 S.Ct. 1024, 2 L.Ed.2d 1097 (1958); *Lewis v. N.L.R.B.*, 357 U.S. 10, 78 S.Ct. 1029, 2 L.Ed.2d 1103 (1958).

D.

In the absence of a subpoena, it is well established, both under appellate authority and Board precedent, that an employee does not have a statutorily protected right to absent himself from work without permission even though he seeks to voluntarily testify at a Board proceeding; rather, a balance must be struck between the interests of the employee in attending the proceeding and the interests of the employer in maintaining production and discipline over his work force.[15] *See Service Employees International Union, Local 250 v. N.L.R.B.*, 600 F.2d 930 (D.C.Cir.1979); *N.L.R.B. v. Superior Co.*, 199 F.2d 39 (6th Cir.1952); *E.H. Limited, dba Earringhouse Imports*, 227 N.L.R.B. 1107 (1977); *Montgomery Ward & Co., Inc.*, 220 N.L.R.B. 373 (1975), *enforced*, 554 F.2d 996 (10th Cir.1977); *Standard Packaging Corporation, Royal Lace Paper Division*, 140 N.L.R.B. 628 (1963); *see also Supreme Optical Company, Inc.*, 235 N.L.R.B. 1432 (1978), *enforced*, 628 F.2d 1262 (6th Cir.1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981); *Johns-Manville Products Corporation*, 100 N.L.R.B. 508 (1952). Here, the Board, unlike the administrative law judge, altogether failed to engage in a balancing of the respective interests finding instead that the employees' reasonable belief was equivalent to actual service. As already explained, this, in our view, was error and is plainly inconsistent with prior authority both of the Board and of the Sixth Circuit.

Indeed, in *Standard Packaging Corp.*, 140 N.L.R.B. 628 (1963), the Board found that the employer did not violate sections 8(a)(1), (3), and (4), when it refused to grant two employees advance permission to absent themselves from work for the purpose of attending a Board representation proceeding and when it thereafter discharged these employees when, in disregard of the employer's directions, they absented themselves from work to attend the hearing. In balancing the respective interests, the Board noted that on the one hand, the employees were unable to demonstrate "any real need for their appearance at the hearing" while, on the other hand, the employer's asserted reliance upon its work schedule for its unwillingness to release more than two employees to attend the hearing was supported in the record. In addition, the Board noted that the subsequent disciplinary action "was motivated solely by the [employees'] absence from the plant in disregard of orders." Therefore, on balance, the employer's action was not in violation of the Act.[16]

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[15] Of course, this balancing of interests is not required if the employer's action against the employee is discriminatorily motivated. *See supra* n. 10.

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E.H. Limited, dba Earringhouse Imports, 227 N.L.R.B. 1107 (1977), in our view, is the closest Board decision supporting its position here. After the union began organizing the employer's plant, a representation hearing was scheduled for August 8. When eleven of the employer's employees requested to attend the hearing, Pellerito, a corporate officer, told them that she had learned from counsel that it was not necessary that all the employees attend the hearing and in consequence stop production. On the day before the hearing, the employees again requested permission to attend the hearing. Pellerito, however, informed them that the company would not allow them to attend the hearing but that they could select one of their number to attend as their representative. Sometime later in that day, one of the employees contacted the union agent and informed him about the employer's position. The union agent told the employee that it was probably too late to subpoena the employees, that their testimony might prove necessary and that, in any event, the Act protected their right to attend the hearing. On the day of the hearing, the employees notified the employer that they were going to attend the hearing and thirteen of them signed out. Although all of the employees attended the hearing, they were told that they need not testify in light of the morning's testimony. When the employees returned to work later that afternoon, they were informed that they were being discharged for insubordination.

In addressing the issue of whether the employer's conduct was in violation of sections 8(a)(4) and (1) of the Act, a majority of the Board applied the following test:

> In our view, under a proper construction of section 8(a)(4) an employee may not lawfully be discharged after participation in any Board proceeding during his regular working hours (a) where an employer can establish no business necessity justifying a requirement that the employee stay on the job or (b) where a business justification is established but which in the particular circumstances is not on balance sufficient to overcome the employee's assertion of his right to attend or participate.

E.H. Limited, 227 N.L.R.B. at 1108–09. Applying this test to the facts of *Earringhouse Imports,* the Board majority held that, although "there were no terribly important reasons or exigencies crying out for employee attendance at the hearing," the employer failed to demonstrate that its refusal to permit the employees to attend the Board hearing was justified by sufficiently valid business reasons. According to the majority, therefore, the burden of justification should be on the employer under these circumstances.[17]

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The majority's analysis and conclusion in *Earringhouse Imports* were expressly rejected on appeal by the D.C. Circuit in *Service Employees International Union Local 250 v. N.L.R.B.,* 600 F.2d 930 (D.C.Cir.1975), which refused to enforce the Board's order. A majority of the D.C. Circuit held that, in the absence of a subpoena or call from the

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[16] *Standard Packaging* was subsequently distinguished on the ground that the employer there was not motivated by any desire to interfere with the N.L.R.B.'s processes or with the employees' right to attend the proceeding as prospective witnesses, but was merely attempting to provide itself with a sufficient workforce without preventing anyone from attending the hearing. *See Billen Shoe Co.,* 166 N.L.R.B. 57 (1967), *enforcement denied in part and granted in part,* 397 F.2d 801 (1st Cir.1968).

[17] In support of its view that the burden of justification should be placed on the employer, the Board majority cited to the Supreme Court's decision in *N.L.R.B. v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33–34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967). According to the Board:

> The Supreme Court has stated in effect, though in a context different from that here before us, that where an employer's conduct interferes with the employees' rights—and no explicit discriminatory motive is shown—the burden is nevertheless on the employer to come forward with evidence of "legitimate and substantial business justification" for its conduct if it is not to be found to have violated the Act. And so it is here that the burden should not be, as the dissent would have it, on the employees to come forward with evidence of "compelling circumstances" to justify their exercise of their right to attend a Board hearing but rather the burden should be on the employer to justify interfering with the exercise of that right.

227 N.L.R.B. at 1110. The two dissenting Members strongly disagreed with the majority's analysis and conclusion. In their view, the burden should be on the employees to "demonstrate substantial reasons for attending the Board hearing." *Id.* at 1112–13.

Board to attend a hearing, the burden was on the employee to "'demonstrate substantial reasons for attending a Board hearing, [and] unless there are compelling reasons urging their attendance, the employer's right to maintain normal operations should, and does, take precedence over the employer's right to leave work during regular working hours for such attendance or for any other purpose except that of legitimate strike activity'. . . ." *Id.* at 938. The majority of the D.C. Circuit was particularly concerned with the disruptive effect that the Board's approach would have on the employer's business operations:

> To uphold the Board majority in this case would result in complete disruption of the employer's productive ability. Presumably, business enterprises are operated in the expectation of some profit. The Board majority has invited employees—indeed all employees—to attend Board representation hearings during normal working hours and in violation of an express prohibition against leaving work at that time without the benefit of a subpoena or other showing that the employee's presence is required, unless the employer, upon whom the burden of proof is placed, can show substantial and legitimate business justification for requiring the employees to remain on the job. We cannot sanction such a pronouncement even though we acknowledge the Board's expertise in the field. In effect, as in this case, even where the employer's entire production line is shut down by reason of a mass exodus of employees, the Board majority suggests that this is not a substantial and legitimate business justification.[18]

Id. at 938.

In the instant case, the ALJ concluded that even under the *Earringhouse* approach, Vokas' refusal to permit the six employees to attend the representation hearing and the subsequent discharge of these employees were not in violation of section 8(a)(4) or section 8(a)(1) of the Act. The ALJ found that, whereas in *Earringhouse* there was no evidence that the employer informed the employees about the economic consequences that would result from their absence, the employees here "were well aware of the plant expansion and new facilities, the increase in sales, the increased number of employees, and of [the company's] numerous production problems which had been the subject of talks and meetings by Vokas in January, February and on March 30, 1981." 271 N.L.R.B. at 1028. The ALJ also noted that unlike *Earringhouse,* where the Board relied upon an offer by employees to make up lost time, the testimony on this issue in the instant case was vague and inconsistent and, in any event, could not have been made in good faith because "there was no time left in which to hardly make anything up." *Id.* Finally, the ALJ noted that in *Earringhouse,* the Board found it significant that the employees were not discharged until after they returned from the Board hearing and two hours before their quitting time, and that such sequence did not show any concern about an adverse affect upon production. In the instant case, however, the ALJ found it "clear that Vokas was concerned not only in operating his business without disruption due to demands of increased sales, but also with his legitimate right to control absenteeism and to maintain discipline." *Id.* at 1029. Based on these and additional findings which were supported in the record, the ALJ concluded

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that the Company's conduct was not in violation of sections 8(a)(4) or 8(a)(1). It is also apparent that if, as the ALJ concluded, the Company's conduct is not unlawful under the Board majority's analysis in *Earringhouse Imports,* the Company's conduct is *a fortiori* not unlawful under the D.C. Circuit's analysis in *Service Employees International Union.* Since we conclude that the ALJ's factual findings and conclusions are supported by substantial evidence, and were left undisturbed by the Board, it is not necessary to the decision here that we make a specific choice between the two views.

IV.

In conclusion, the Company did not violate sections 8(a)(1) and 8(a)(4) of the Act when it refused to permit six employees to voluntarily attend a Board representation hearing during working time without a subpoena, and when it subsequently discharged those employees for leaving work contrary to the Company's explicit instructions. In reaching this conclusion, we emphasize that there is no evidence that the Company was in any way motivated by any desire to intimidate, coerce, or otherwise retaliate against the employees because they participated in a Board proceeding. Nor is there any evidence that the Company desired to interfere with the Board's processes. Rather, it appears from the undisputed evidence that the Company was concerned solely with avoiding a disruption of its business operations and with maintaining discipline over its workforce. We also note that at the time the Company refused the employees' request, and at the time the employees were discharged for disobeying the Company's instructions, the employees had not actually been served with a subpoena and were therefore under no compelling legal obligation to attend the hearing. Although the employees may have reasonably believed they were under a legal obligation to attend the hearing, we do not believe that this is an adequate substitute for actual service in the circumstances of this case. It is also evident, as found by the ALJ, that the attendance of all six employees at the representation hearing was simply not necessary. Indeed, of the six employees who attended the representation hearing, four worked in the meat processing department and two worked in the warehousing/truck driving department: however, as of March 31, 1981, as a result of a stipulation reached between the parties, there was no real issue about including meat cutters, wrappers, drivers and warehousemen in the proposed bargaining unit. Moreover, the Company was willing to permit the employees to choose one of their number to attend as a representative of the employees. Finally, it is significant that although the Union had ample opportunity to serve the employees with subpoenas, it waited until the morning of the representation hearing to do so and only after the employees had arrived at the representation hearing. Neither the Union nor the employees themselves made the slightest effort to accommodate the Company's legitimate interest in maintaining its business operations. Under these circumstances, the Board's order is not supported by substantial evidence; nor is the Board's interpretation of the Act consistent with the underlying policies of the Act, with the Board's own pronouncements, or with prior precedent in this and in other circuits. Enforcement is therefore DENIED.

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[18] The majority of the D.C. Circuit also criticized the Board majority for relying on *Great Dane Trailers* to place the burden of justification on the employer. According to the majority of the court, *Great Dane Trailers* was intended to be limited to section 8(a)(3) violations, and the majority did not think it prudent to extend that rule to an alleged section 8(a)(4) violation.

NLRB v. Local 139, International Union of Operating Engineers

796 F.2d 985 (7th Cir.), July 22, 1986; rehearing and rehearing en banc denied Sept. 22, 1986—273 NLRB 992

On petition to enforce Board Order

Before BAUER and POSNER, Circuit Judges, and MOODY, District Judge *

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MOODY, District Judge: In this petition for enforcement of an Order of the National Labor Relations Board ("NLRB") we must decide whether a union violates § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1) ("NLRA") by initiating internal union charges against a union member and reporting him to unemployment compensation authorities in retaliation for activity

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protected by § 7 of the NLRA and whether a union breaches its duty of fair representation by refusing a union member's request for referral list information from the union hiring hall.

This court has jurisdiction pursuant to 29 U.S.C. § 160(e). We set out the facts in some detail as they provide insight into the motive for Local 139's conduct toward union member William Evans and, with regard to the referral list information, demonstrate an intent that is inconsistent with the union's duty to fairly represent all employees within the bargaining unit.

William Evans, a member of Local 139 of the International Union of Operating Engineers, has been an open and vocal critic of the current administration of Local 139. Donald W. Shaw, the president and business manager of the union, has responsibility for administration of the union hiring hall. Evans previously held the position of union business agent but resigned because of a disagreement with Shaw over union referral practices shortly after Shaw took office in 1977.

Since his resignation, Evans has protested, reported, and filed internal union charges alleging Shaw engaged in unfair election practices and hiring hall referral abuses. Evans publishes a newspaper, the *Ethical Engineer,* to expose what he believes to be corruption in the Shaw administration and to encourage fellow Local 139 members to oppose Shaw's policies and practices.

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*The Honorable James T. Moody, District Judge for the Northern District of Indiana, is sitting by designation.

I. *Internal Union Charges and Report to WDILHR*

Shortly after Evans' resignation in 1977, the Shaw administration embarked on an effort to quiet Evans by thwarting his efforts to express publicly his disapproval of the Shaw administration. In August of 1982, Shaw initiated internal union charges against Evans alleging that Evans had violated union bylaws and the international union constitution by slandering union officers, creating dissension among the members, and disclosing the business transactions of Local 139 to persons outside the local. Shaw admits that he filed the charges because of information Evans had published in the *Ethical Engineer.* The union membership found Evans guilty as charged. Although the International Union had told Shaw that Local 139 could not fine Evans for the conduct with which Evans was charged, Shaw convinced the union members that Evans' dissension had required Local 139 to spend thousands of dollars defending itself against Evans' charges and that an appropriate penalty would be to require Evans to pay a token "reimbursement" of $5,000, with $3,000 to be returned to Evans on the condition that he attend the next twelve meetings. Evans was then required to travel to Washington, D.C. at his own expense, to appeal the conviction. The International Union reversed both the conviction and the penalty.

In another effort to harass Evans, Local 139 referred a job to him knowing that it would conflict with the date of the NLRB hearing in this matter and then reported him to the Wisconsin Department of Industry, Labor and Human Relations (WDILHR) for refusing to accept the job referral. Consequently, the WDILHR terminated Evans' unemployment compensation benefits. Prior to this incident, Evans had not received a job referral from the union in three years. Shaw testified that prior to reporting Evans to the WDILHR the union had consistently adhered to a policy of refusing to release referral information to any union member or governmental agency without a court order. The NLRB found that by charging, trying, and fining Evans on internal union charges and by reporting him to the WDILHR, Local 139 violated § 8(b)(1)(A) of the NLRA by restraining him in the exercise of protected activity within § 7 of the NLRA. *Operating Engineers, Local 139,* 273 N.L.R.B. No. 126 (1984).

On petition for enforcement of an NLRB order, this court upholds findings of fact if they are supported by substantial evidence in the record as a whole. *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675, 691–692, 71 S.Ct. 943, 952–53, 95 L.Ed. 1284 (1951); *NLRB v. Chauffeurs, Teamsters, Warehousemen & Helpers,* 773 F.2d 921, 923 (7th Cir.1985). Moreover, we substantially defer to the NLRB's interpretation and application of the NLRA because of its "special competence" in the field of labor relations. *Pattern Makers' League of North America, AFL–CIO v. NLRB,* —— U.S. ——, 105 S.Ct. 3064, 3068, 87 L.Ed.2d 68 (1985).

The NLRB found that Evans' publication of the *Ethical Engineer* qualified as concerted activity within the protection of § 7 and that the union's motive in bringing internal union charges against Evans and in reporting him to the WDILHR was to retaliate against Evans for publishing the *Ethical Engineer.* Local 139 argues that Evans' complaints about union leadership were not "concerted activities."

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to self-organization, "to form, join, or assist labor organizations, to bargain, collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection", and the right to refrain from such activities. Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by § 7. 29 U.S.C. § 158; *Local 1384, United Automobile, Aerospace and Agricultural Implement Workers of America, v. N.L.R.B.,* 756 F.2d 482, 487 (7th Cir.1985).

The NLRB found two alternative grounds for deciding that Evans' publication of the *Ethical Engineer* was protected by § 7 activity. First, it adopted the Administrative Law Judge's finding that the activity was concerted activity because Russell Retzack, a fellow union member of Evans, assisted

Evans in publishing the *Ethical Engineer* and in exposing what they believed to be corrupt practices of the union administration. Second, the NLRB adopted the Administrative Law Judge's conclusion that even if Retzack had not assisted Evans, § 7 rights include the right to participate fully and freely in internal union affairs by questioning the wisdom of union representatives or taking action to align the union membership with one's own position.

To fall within the scope of concerted activity, an employee's action must be taken "for the purpose of inducing or preparing for group action to correct a grievance or complaint." *United States Steel Corp. v. NLRB,* 711 F.2d 772, 775 (7th Cir.1983); *NLRB v. Town & Country L.P. Gas Service Co.,* 687 F.2d 187, 191 (7th Cir.1982). In *United States Steel Corp. v. N.L.R.B.,* we found that an employee had engaged in concerted activity protected by § 7 in honoring another union's picket line and distributing, to his fellow employees, leaflets in support of the picket line. Although he had written, typed, printed, and distributed his leaflets alone, his distribution of the leaflets was "concerted" activity because it was an attempt to induce group action on the part of his fellow employees. 711 F.2d at 775.

In *N.L.R.B. v. Town & Country L.P. Gas Service Co.,* an employee's individual act of filing a grievance concerning his own discharge was "concerted" because resolution of the grievance sufficiently related to collective union objectives as the grievance was essentially a challenge to the company's disparate treatment of employees. 687 F.2d at 191.

In the present case, we agree with the NLRB that Evans' conduct in publishing the *Ethical Engineer* falls within the definition of concerted activity. The NLRB found that Evans acted with another union member to publish the *Ethical Engineer* and that their purpose was to incite action against Shaw and his union practices. This is a clear example of concerted activity by employees for mutual aid and protection. We also would sustain the NLRB's alternative finding that an individual employee engages in concerted activity by taking action to align the union membership with his own position against the union representatives.

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Next we must consider whether disciplining Evans and reporting him to the WDILHR in retaliation for § 7 concerted activity is an unfair labor practice proscribed by § 8(b)(1)(A). Section 8(b)(1) makes it an unfair labor practice to "restrain or coerce (A) employees in the exercise of the rights guaranteed in [§ 7]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition and retention of membership therein . . ." 29 U.S.C. § 158(b)(1).

As explained above, when employee members of a union undertake to inform fellow members of what they believe to be corruption of union officials, they are engaging in "concerted activity." Therefore, imposing fines on these employees for their dissident activities "restrains" the exercise of their § 7 rights. However, the terms "restrain or coerce" in § 8(b)(1)(A) are not interpreted so literally as to make it an unfair labor practice for a union to enforce compliance with union rules and policies. *Pattern Makers' League v. N.L.R.B.,* —— U.S. ——, 105 S.Ct. 3064, 3068, 87 L.Ed.2d 68, 74 (1985). Section 8(b)(1)(A) was not intended to give the NLRB power to regulate internal union affairs, including union disciplinary charges and fines against members. *N.L.R.B. v. The Boeing Company,* 412 U.S. 67, 71, 93 S.Ct. 1952, 1955, 36 L.Ed.2d 752 (1973); Scofield v. N.L.R.B., 394 U.S. 423, 428, 89 S.Ct. 1154, 1157, 22 L.Ed.2d 385 (1969); *N.L.R.B. v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 195, 87 S.Ct. 2001, 2014, 18 L.Ed.2d 1123 (1967). Although any disciplinary charge or fine is "coercive" to some degree, the provisions of § 8(b)(1)(A) were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship. The Board has authority to pass on union rules affecting an individual's employment status but not rules affecting only his union membership status. *N.L.R.B. v. The Boeing Company,* 412 U.S. 67, 74, 93 S.Ct. 1952, 1956–57, 36 L.Ed.2d 752 (1973) (citing *Scofield,* 394 U.S. 428–430, 89 S.Ct. at 1157–58). Congress has not empowered the NLRB to pass judgment on the penalties a union may impose so long as the penalty does not impair the member's status as an employee.

In *Allis-Chalmers,* the court held that imposing fines against current union members does not "restrain or coerce" the workers in the exercise of their § 7 rights. 388 U.S. at 187, 87 S.Ct. at 2010. The court reasoned that since membership in the union is purely voluntary, it is not unlawful for a union to punish a member by fine, suspension or expulsion for an infraction of the union rules. The relationship between a member and his union is contractual and a member is free to resign to escape union discipline. *Pattern Makers,* —— U.S. at ——, 105 S.Ct. at 3068, 87 L.Ed.2d at 75.

The Supreme Court, this court, and the NLRB itself have in other cases concluded that § 8(b)(1)(A) has nothing to say about the reasonableness of union fines. *Boeing,* 412 U.S. at 74, 93 S.Ct. at 1956–57; *Norplex v. N.L.R.B.,* 445 F.2d 155, 158 (7th Cir.1971); *Booster Lodge No. 405,* 185 N.L.R.B. 380, 383 n. 16, 75 LRRM 1004, 1007 n. 16 (1970). Likewise, the Supreme Court has concluded that questions such as the union's motivation for imposing a fine "delv(e) into internal affairs in a manner . . . Congress did not intend." *Boeing,* 412 U.S. at 74, 93 S.Ct. at 1956 (citing *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 296, 91 S.Ct. 1909, 1923, 29 L.Ed.2d 473 (1971)). The NLRA does not undertake to protect union members in their rights as members from arbitrary conduct by unions and union officials. *International Association of Machinists v. Gonzales,* 356 U.S. 617, 620, 78 S.Ct. 923, 925, 2 L.Ed.2d 1018 (1958).

We recognize that by conferring on the NLRB the authority to implement and interpret the NLRA, Congress has narrowed our review of NLRB decisions. *N.L.R.B. v. Insurance Agents International,* 361 U.S. 477, 499, 80 S.Ct. 419, 432, 4 L.Ed.2d 454 (1960). We must sustain the NLRB's position so long as its explication of a rule is not "inadequate, irrational, or arbitrary,"

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N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308 (1963), but we must not make our review so deferential as to become a mere "rubber stamp" of the NLRB's decisions. *N.L.R.B. v. Harvstone Mfg. Co.,* 785 F.2d 570, 574 (7th Cir.1986).

The Administrative Law Judge found that the union's conduct of filing union charges against Evans and reporting him to the Wisconsin unemployment compensation authorities was "restraint and coercion . . . not privileged by the Section 8(b)(1)(A) proviso and therefore . . . a violation of that Section of the NLRA." Joint Appellate Appendix, p. 18. The NLRB affirmed the conclusion of the Administrative Law Judge without commenting on the issue of whether the union's imposition of fines and report to the WDILHR were purely internal union affairs outside the reach of § 8(b)(1)(A). The NLRB has interpreted § 8(b)(1)(A) to prohibit the union discipline and the report to the WDILHR in this case but has offered no explanation for its deviation from established precedent holding that internal union fines or discipline that restrain § 7 rights are not violations of § 8(b)(1)(A). The NLRB made no finding as to whether the union discipline and report to the WDILHR were matters affecting employment.

The record shows that the disciplinary charges, union trial and fine against Evans and the report to the WDILHR were unrelated to his status as an employee. There is no evidence that Local 139 sought to enforce the disciplinary fine by interfering with Evans' relationship with employers who used union labor. Even though Local 139's discipline of Evans was motivated by its desire to quiet Evans in his expression of dissident views, it did not extend its efforts beyond the use of internal union mechanisms to achieve this end. Because the union's action in charging and fining Evans did not touch the employer-employee relationship, the union did not commit an unfair labor practice in violation of § 8(b)(1)(A) by charging and fining Evans. *See Boeing,* 412 U.S. at 74, 93 S.Ct. at 1956–57.

Likewise, the union's report to the WDILHR was an internal union affair beyond the scope of § 8(b)(1)(A). Local 139 referred a job to Evans knowing that he could not accept the job because he was scheduled to appear before the NLRB on the same day. When Evans informed Local 139 that he could not take the job, Local 139 sent a letter to the WDILHR to report that Evans had refused a job referral. The NLRB found that "(b)y charging, trying, and fining Evans and reporting him to the State of Wisconsin's Department of Industry, Labor, and Human Relations on 7 June 1983 because Evans published the *Ethical Engineer,* the Respondent (Local 139) violated § 8(b)(1)(A) of the Act." The Administrative Law Judge recommended ordering Local 139 to inform the WDILHR that its June 7, 1983 letter was an error because Evans did not refuse a job offer. Rejecting this recommendation, the NLRB instead ordered Local 139 to send to the WDILHR a copy of the NLRB's decision and thus allow the WDILHR to decide whether Evans did or did not refuse a job referral.

The NLRB's conclusion that Local 139 violated § 8(b)(1)(A) by reporting Evans to the WDILHR does not rest on a finding that the letter to the WDILHR interfered with Evans' right to attend the NLRB hearing on his unfair labor practice allegations against Local 139. We know that sending the letter was contrary to the regular policy of Local 139 and that the letter was sent in retaliation for Evans' publication of the *Ethical Engineer.* We do not know whether Evans did or did not refuse a job according to the Wisconsin unemployment compensation rules and thus we do not know whether Local 139's letter, reporting that Evans had refused a job, was false or misleading. If the WDILHR does not consider attendance at an NLRB hearing to excuse an unemployed worker's refusal to accept a job, then Local 139 was accurate in its report that Evans had refused a job referral.

Accurate or inaccurate, the letter to the WDILHR neither had nor was intended to have any impact on an employer or Evans' relationship with an employer. The letter to the WDILHR did not interfere with Evans' "existing or prospective employment relations." If Local 139 implicitly or explicitly agreed with its members not to make such information available to outside agencies, then perhaps the union would be liable in a state court action for breach of its membership arrangement with union employees. *See Motor Coach Employers v. Lockridge,* 403 U.S. 274, 295–296, 91 S.Ct. 1909, 1922–23, 29 L.Ed.2d 473 (1971). Whether a union is free to report a member's conduct to an outside governmental agency is a matter between the union and its members so long as it does not impact on the member's relations with his employer. *U.O.P. Norplex, Division of Universal Oil Products Company v. NLRB,* 445 F.2d 155, 157 (7th Cir.1971) cited in *Boeing,* 412 U.S. at 74, 93 S.Ct. at 1956–57. We hold that the NLRB erred in concluding that the union breached § 8(b)(1)(A) by charging, trying, and fining Evans and reporting him to the WDILHR. This conduct had no impact on Evans' status as an employee or his relations with any employer and thus, were never intended to be prohibited by § 8(b)(1)(A).

II. *Job Referral List*

The union operated a job referral system whereby union employers contacted the hiring hall to obtain employees when they had work available. Local 139 maintains a referral list by which it assigns jobs to workers. Unless the employer requests a particular worker the collective bargaining agreement requires the union to refer jobs according to the relative positions of the names on the list.

Suspecting that his referral rights had been violated, Evans requested the names, addresses and telephone numbers of the 50 individuals before him and 50 individuals after him on the referral list of each of Local 139's four district offices. Local 139 refused, claiming that to release the information would violate the other members' rights to privacy and anonymity. It also asserted that it had a longstanding policy against the release of such information. The NLRB did not find evidence to support any allegations of discriminatory referral practices by the union. Nonetheless, the NLRB found that Local 139's duty of fair representation requires it to deal fairly with a reasonable request for referral information and that it breached its duty of fair representation by refusing to comply with Evans' request. The NLRB found Evans' reasonable request for referral information involved a matter affecting employment and that the refusal to supply the list deprived Evans of the only available means to determine whether the union was violating his referral rights.

Local 139 contends that its policy against releasing referral information is not "intentional misconduct" as required to show a breach of the duty of fair representation in this Circuit. *Hoffman v. Lonza, Inc.,* 658 F.2d 519, 522 (7th Cir.1981). It also argues that its policy against releasing the information is an internal union matter best left to the discretion of the union and its members.

The NLRA imposes on the bargaining representative an implied duty of fair representation. *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 909–10, 17 L.Ed.2d 842 (1967). The union's right under § 9 to act as the exclusive representative of the employee unit that selected it implies a correlative duty on the union to "serve the interests of all members without hostility or discrimination, to exercise its discretion with good faith and honesty and to eschew arbitrary conduct." *United Independent Flight Officers v. United Airlines,* 756 F.2d 1274, 1281 (7th Cir.1985); *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909–10, 17 L.Ed.2d 842 (1967).

The duty of fair representation extends to both the negotiation and administration of the collective bargaining agreement, although the standards applied in the two contexts may differ. *United Independent Flight Officers*, 756 F.2d at 1201; *Schultz v. Owens-Illinois*, 696 F.2d 505, 514 (7th Cir.1982). Thus, in negotiating a contract with the employer, the union is allowed a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048; *Schultz v. Owens-Illinois, Inc.*, 696 F.2d at 515. In administering a collective bargaining agreement, the duty of fair representation requires good faith by the union but the range of reasonable conduct is narrowed. *Schultz v. Owens-Illinois*, 696 F.2d at 515.

In *Vaca v. Sipes*, the Supreme Court indicated that arbitrary, discriminatory, or bad faith conduct by the union was a breach of the union's duty of fair representation. 386 U.S. at 190, 87 S.Ct. at 916–17. Thus, it expressly indicated that a union could breach its duty of fair representation by engaging in merely arbitrary conduct. Although it is arguable that some types of arbitrary conduct might not be "intentional misconduct," this court interprets *Vaca v. Sipes* as requiring intentional union misconduct to show a breach of the duty of fair representation. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.1986) (Union's perfunctory representation of employee at grievance hearing did not breach the duty of fair representation if the union's conduct was not motivated by wrongful intent. Careless or bone-headed conduct is not a breach of the duty of fair representation.); *United Independent Flight Officers v. United Air Lines*, 756 F.2d at 1282–83 (Absent substantial evidence of fraud, deceitful action or dishonest conduct, employee could not show union's breach of duty of fair representation in negotiating terms of employee benefit plan.); *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 294–95 (7th Cir.1983) (Even gross negligence in prosecuting an employee grievance is not a breach of the duty of fair representation where there is no indication that the union acted in bad faith.); *Graf v. Elgin, Joliet & Eastern Railway Co.*, 697 F.2d 771, 779 (7th Cir.1983) (Leaving open the question of whether extreme and reckless indifference may rise to the level of intentional misconduct, we found that a union's griever's negligent failure to preserve properly an employee's union appeal rights did not breach the duty of fair representation.); *Hoffman v. Lonza*, 658 F.2d 519, 521 (7th Cir.1981) (Union's negligence in failing to appeal a grievance was not a breach of the duty of fair representation.).

In the present case, the alleged breach of the duty of fair representation involves the administration of the collective bargaining agreement. Since 1976 the NLRB has held that inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall. *Teamsters Local No. 519*, 276 NLRB No. 94 (1985); *Bartenders, Local 165*, 261 NLRB No. 67 (1982); *Carpenters, Local 1080*, 255 NLRB No. 14 (1981), enf'd mem. 676 F.2d 699 (7th Cir.1982); *Operating Engineers, Local 324*, 228 NLRB 587 (1976). The NLRB rejects the argument that anonymity or privacy of union members justifies a union's refusal to provide referral list information.

Evans was completely dependent on the union for the protection of his job referral rights. As the NLRB found, Evans' request was not unduly burdensome. In light of Local 139's other retaliatory conduct and harassment of Evans, one could reasonably infer that its refusal to release the information to Evans was also motivated by bad faith. The NLRB found the union had no justifiable reason for refusing to provide a union member with the only available means to protect his job referral rights and that such refusal was intentional misconduct in breach of its duty to fairly represent employees in administering the collective bargaining agreement. The NLRB was correct in concluding that the union committed an unfair labor practice by engaging in such conduct. *See Hall v. Printing & Graphic Arts Union, Local No. 3*, 696 F.2d 494 (7th Cir.1982).

III. *Remedy*

As a remedy for Local 139's violations of the NLRA, the NLRB ordered the respondent to cease and desist from its illegal conduct. The NLRB also ordered the union to take affirmative corrective action. Among other things, the NLRB ordered the union to post a one-page notice stating the violations and the remedies. The NLRB also ordered the union to include a copy of the notice in the mailing of its newsletter and to reimburse Evans for the expenses he incurred in appealing the internal union charges. Because we refuse to accept the NLRB's conclusion that Local 139 violated § 8(b)(1)(A) by charging, trying and fining Evans and reporting him to the WDILHR, we accordingly refuse to enforce the NLRB's order to the extent that it purports to remedy that putative violation.

With regard to Local 139's improper refusal to provide Evans with the job referral list, Local 139 contends that the newsletter notice is an unwarranted extraordinary remedy that serves only to punish the union and therefore run afoul of the remedial purpose of the NLRA. The NLRB has broad authority to fashion appropriate remedial orders. *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 262–63, 90 S.Ct. 417, 419–20, 24 L.Ed.2d 405 (1969). Unless the NLRB's order is a "patent attempt to achieve ends other than these which can fairly be said to effectuate the policies of the Act" we will not disturb the NLRB's award. *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218–19, 87 L.Ed. 1568 (1943). The NLRA's purpose is remedial. *Local 60, United Brotherhood of Carpenters v. NLRB,* 365 U.S. 651, 655, 81 S.Ct. 875, 877–78, 6 L.Ed.2d 1 (1961). The NLRB has broad discretion to order remedial acts to dispel the consequences of the union's violations of the Act. *Farmers Energy Corp. v. NLRB,* 730 F.2d 1098, 1102 (7th Cir.1984).

In the present case, the NLRB has not abused that discretion in ordering the union to publish the NLRB's notice to individual employees through the union newsletter. The notice merely contains statements by the union as to the conduct it will and will not perform in the future. Requiring the union to include the notice in its next mailing is not so unduly burdensome so as to be considered punitive. The NLRB has not required payment of a fine or other punitive measures and has not abused its discretion in fashioning an appropriate remedy for the union's violations of the NLRA.

CONCLUSION

Because we find that the conduct of Local 139 in charging, trying and fining Evans and reporting him to the WDILHR was an internal union affair beyond the scope of § 8(b)(1)(A), we refuse to enforce the portion of the NLRB's order that relates to that alleged violation. Because we find that the NLRB's determination that Local 139 breached its duty of fair representation by refusing to comply with Evans' request for information as to his relative position on the referral list, we enforce the portion of the NLRB's order relating to that violation. The NLRB's Petition for Enforcement is GRANTED IN PART and DENIED IN PART.

Local 512, Warehouse and Office Workers' Union, International Ladies' Garment Workers' Union, AFL–CIO v. NLRB

NLRB v. Felbro, Inc.

795 F.2d 705 (9th Cir.), July 22, 1986; rehearing and rehearing en banc denied Sept. 4, 1986—274 NLRB 1268

On petitions to review and enforce Board Order

Before PREGERSON and BEEZER, Circuit Judges, and JAMESON,* Senior United States District Judge

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PREGERSON, Circuit Judge: The National Labor Relations Board ("NLRB" or "Board") found that Felbro, Inc. had violated the National Labor Relations Act ("NLRA") by laying off certain workers and refusing to execute a collective bargaining agreement negotiated with Local 512, Warehouse and Office Workers' Union ("Local 512"). Many of Felbro's employees are undocumented alien workers. Relying on its reading of *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), the NLRB conditioned its backpay order on proof at the compliance hearing that the workers whose labor law rights Felbro had violated ("discriminatees") are legally entitled to work in the United States. The NLRB petitions to enforce its order. Local 512 petitions for

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* Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

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review of the conditional remedy ordered by the NLRB. Felbro contests parts of both the liability and remedy sections of the order.

Substantial evidence in the record supports the NLRB's findings that Felbro violated the NLRA, and thus we enforce the liability portion of the NLRB's order. However, we also conclude that the NLRB's decision to condition Felbro's payment of backpay upon proof of each discriminated worker's legal status in the United States is inconsistent with both the NLRA and the immigration laws. For this reason, we deny enforcement of the remedy portion of the order and remand the order to the Board for appropriate modification.

FACTS

Felbro manufactures wire and tubular displays in South Gate, California. On August 5, 1981, Felbro's employees elected Local 512 as their bargaining agent in an NLRB-supervised election.

In a series of incidents immediately before and in the months after the election, Felbro supervisors changed working practices and laid off certain employees in ways that an Administrative Law Judge ("ALJ") found constituted several violations of sections 8(a)(1) and 8(a)(3) of the NLRA. The ALJ also found two violations by Felbro of both sections 8(a)(5) and 8(a)(1) of the NLRA. [1] First, in the period between the union election and the NLRB's certification of the result, Felbro temporarily laid off three employees without notifying Local 512 or giving it an opportunity to bargain over the layoff. Second, after extended discussions, negotiators for Felbro and Local 512 agreed on the terms of a three-year collective bargaining agreement, subject to ratification by the members of the bargaining unit. The ALJ found that the employees ratified the contract. Felbro contests the validity of the ratification, and asserts that, in any event, it repudiated the contract offer before Local 512 notified Felbro of the ratification. Felbro refused to execute the contract. The ALJ found this refusal a violation of section 8(a)(5). The Board affirmed the ALJ's conclusions with some modification. 274 N.L.R.B. No. 186 (Mar. 29, 1985). Felbro opposes only the finding of the two section 8(a)(5) violations.

Felbro reinstated all the laid-off employees before the ALJ's hearing. The discriminatees are all presently in the United States working for Felbro. As far as the record shows, no Felbro employee has been

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the subject of any INS deportation proceeding.

The ALJ recommended that the traditional NLRB remedy of reinstatement and backpay be afforded to those employees specifically discriminated against by Felbro, and that Felbro be required to implement retroactively the agreed collective bargaining agreement and to reimburse its employees for any loss in pay or benefits caused by Felbro's belated implementation of the contract's terms. The NLRB affirmed the ALJ's recommended remedy with respect to the two section 8(a)(5) violations, but amended the proposed remedy for the section 8(a)(1) and 8(a)(3) violations. In his opinion, the ALJ noted that several of the discriminatees were undocumented workers, and permitted them to testify under assumed names and to refuse to answer questions relating to their immigration status. Amending the ALJ's remedial order, the NLRB stated:

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[1] Section 8(a) of the NLRA, 29 U.S.C. § 158(a), states in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

On appeal, Felbro contests only the two section 8(a)(5) and the corresponding 8(a)(1) violations. Consequently, the portion of the Board's order referring to the other sections 8(a)(1) and 8(a)(3) violations, insofar as it concerns Felbro's liability, is entitled to summary enforcement. *See NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir.1981).

The Board found that Felbro violated section 8(a)(1) by: telling employees that some were being laid off because the union had won the election; telling employees that interdepartmental transfers would be discontinued because the employees had sought union protection; threatening employees with reprisals because of protected union activities; and informing an employee that the company was ending negotiations with Local 512. The Board found that Felbro violated both sections 8(a)(1) and 8(a)(3) by discontinuing its previous practice of temporary interdepartmental transfer and laying off employees because of their union activities.

The ALJ also found that Felbro violated section 8(a)(1) by laying off for one day five employees who protested the non-discriminatory layoff of another employee. The NLRB rejected this finding of the ALJ, concluding that the layoff was a legitimate disciplinary response by Felbro to the five employees' refusal to work. Local 512 does not contest on appeal this modification of the ALJ's findings.

> Subsequent to the issuance of the [ALJ's] decision, the Supreme Court issued its decision in *Sure-Tan, Inc. v. NLRB,* [467 U.S. 883], 104 S.Ct. 2803 [81 L.Ed.2d 732] (1984), in which it held, inter alia, that while undocumented alien workers are employees entitled to the Act's protection, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefor[e] tolled) during any period when they were not lawfully entitled to be present and employed in the United States." Because it appears that a number of the employees affected by the backpay order herein were undocumented aliens, we shall leave to the compliance stage the issue of the employees' entitlement to backpay consistent with the requirements of the Court's opinion in *Sure-Tan.*

274 N.L.R.B. No. 186, slip op. at 5.

Local 512 timely petitioned for review of the conditional terms in the remedy ordered by the NLRB. The NLRB timely cross-petitioned to enforce its order in its entirety. The Mexican-American Legal Defense and Educational Fund ("MALDEF") has filed a brief amicus curiae in support of Local 512.

STANDARD OF REVIEW

We will enforce an NLRB order if it correctly applies the law *and* its factual findings are supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *US Ecology, Inc. v. NLRB,* 772 F.2d 1478, 1480 (9th Cir.1985).

The NLRB has broad discretion in fashioning remedies that will "effectuate the policies" of the National Labor Relations Act. *See NLRB v. J.H. Rutter-Rex Manufacturing Co.,* 396 U.S. 258, 262–63, 90 S.Ct. 417, 419–20, 24 L.Ed.2d 405 (1969). We will defer to the NLRB's broad authority to construe the NLRA unless the NLRB's decision is "irrational or inconsistent with the Act," *NLRB v. Financial Institution Employees of America, Local 1182,* —— U.S. ——, 106 S.Ct. 1007, 1013, 89 L.Ed.2d 151 (1986). However, we must not allow our deference to the NLRB "to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" *Id.* (quoting *American Ship Building Co. v. NLRB,* 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965)).

DISCUSSION

SECTION 8(a)(5) VIOLATIONS

I. *Felbro's Failure to Bargain Over the Layoffs.*

On August 22 or 24, 1981, Felbro laid off employees Armando Castaneda, Ramirez, and Santizo. The layoff was not discriminatory. However, Felbro did not notify Local 512 of its intention to lay off the three employees.

An employer violates section 8(a)(5) of the NLRA when it institutes a material change in the terms and conditions of employment in an area that is a compulsory subject of collective bargaining without giving the bargaining agent both reasonable notice and an opportunity to nego-

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tiate about the proposed change. *NLRB v. Katz,* 369 U.S. 736, 747, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962); *NLRB v. Merrill & Ring, Inc.,* 731 F.2d 605, 608 (9th Cir.1984). A unilateral layoff by an employer violates section 8(a)(5). *See NLRB v. Carbonex Coal Co.,* 679 F.2d 200, 204 (10th Cir.1982); *cf. Peerless Roofing Co. v. NLRB,* 641 F.2d 734, 735 (9th Cir.1981) (unilateral change in pension provisions violates section 8(a)(5)). Such unilateral action violates section 8(a)(5) even when, as here, it occurs before the union's certification by the NLRB. *See Carbonex Coal,* 679 F.2d at 205 (citing cases).

Felbro asserts two defenses. First, Felbro argues that the union waived its right to bargain over the layoffs because it received advance notice from other sources and failed to request that Felbro bargain over that issue. Second, Felbro contends that the layoffs were consistent with Felbro's past practice, and thus cannot constitute a unilateral change. Neither defense is meritorious.

Felbro claims that "at least two employees" informed union steward Machuca about the layoffs. The record shows that employees Felipe Castaneda and Zacarias expressed "concerns" to Machuca that they "might" be laid off. Neither of these employees was in fact laid off by Felbro. Machuca was not informed of any *actual* layoffs until after they had occurred. "[M]ere suspicion or conjecture cannot take the place of notice where notice is required." *ILGWU v. NLRB*, 463 F.2d 907, 918 (D.C.Cir.1972); *see also NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191, 195 (3d Cir.1965) ("[P]land gossip, conjecture and rumors cannot take the place of formal notice when notice is required."); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir.1961) ("[C]onjecture or rumor is not an adequate substitute for an employer's formal notice.") [2]

Felbro also argues that it laid off the three employees in accordance with its established policy. Felbro relies on *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) and *Aaron Brothers Co. v. NLRB*, 661 F.2d 750 (9th Cir.1981). In *Katz*, the Court held that unilateral changes in working conditions would not violate section 8(a)(5) if they were "a mere continuation of the status quo." 369 U.S. at 746, 82 S.Ct. at 1113. The merit wage increases at issue in *Katz*, however, were unlawful because they were "in no sense automatic, but were informed by a large measure of discretion." *Id.* In *Aaron Brothers*, we emphasized that the "long-standing practice" exception suggested in *Katz* placed a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change. 661 F.2d at 753. Economic layoffs would seem to be inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work. Thus, we doubt that the *Katz* exception can ever apply to an economic layoff.

Even if the *Katz* "longstanding practice" exception might apply to an economic layoff, it is inappropriate here. Felbro offers no evidence that work was "slow" at seasonally predictable times. Rather, the layoffs were predictably episodic. Moreover, Felbro's layoff procedure was *ad hoc* and highly discretionary: before layoff, decisions were made whether to transfer employees to a busier department, to implement a permanent or part-week layoff, and to follow seniority or other methods in selecting the employee to lay off. In any event, Felbro apparently disregarded this procedure for the three layoffs of Ramirez, Santizo, and Armando Castaneda: Felbro

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had earlier abandoned interdepartmental transfers; Felbro made no effort to implement a reduced work week; and Felbro retained at least one employee who had less seniority and no greater skills than those employees it laid off.

II. *Felbro's Failure to Execute the Collective Bargaining Agreement.*

Prior to contract negotiations, the negotiators—Felbro attorney Cohen and Local 512 agent Strongin—stipulated that any agreement would be binding only if it was both ratified by Felbro's employees and approved by Felbro. After several meetings, the negotiators agreed on terms. Felbro contends that it never approved the offer made by Cohen and that the employees never ratified the contract. The NLRB found that Felbro's employees ratified the contract on January 5, 1982. The ratification vote was communicated to Strongin who unsuccessfully attempted to notify Felbro by telephone. On January 7, Strongin mailed Felbro a letter confirming the ratification. Felbro further asserts that it revoked its offer by mailgram before Strongin mailed the ratification letter to Felbro. The NLRB found that Felbro's efforts to revoke the agreement after Cohen and Strongin had agreed to its terms were immaterial because the agreement's implementation depended only on the employees' ratification of the terms. Substantial evidence supports the Board's findings.

An employer violates section 8(a)(5) if he refuses to execute a collective bargaining agreement whose terms have been agreed by both parties. *See H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–26, 61 S.Ct. 320, 324–26, 85 L.Ed. 309 (1941); *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 142 (9th Cir.), *cert. denied*, 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179 (1976). Whether the parties have reached agreement is a factual question to be determined by the NLRB. *NLRB v. Strong Roofing and Insulating Co.*, 393 U.S. 357, 361, 89 S.Ct. 541, 544, 21 L.Ed.2d 546 (1969).

The negotiations between Cohen and Strongin spanned seven sessions. On November 16, 1981 Cohen submitted a thirteen-page draft contract.

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[2] Felbro relies heavily on *NLRB v. Henry Vogt Machine Co.*, 718 F.2d 802 (6th Cir.1983). In *Vogt*, the employer notified the union negotiating committee in advance that certain cafeteria privileges would be revoked. The Board found that the union *consciously* chose not to raise the issue to avoid dissension among members who had long been deprived of cafeteria benefits. 718 F.2d at 809. Local 512's inaction in response to the speculative innuendo of the communication to Machuca is clearly not comparable to the deliberate waiver by the union in *Vogt*.

Cohen reaffirmed this proposal in the December 17 session and again by phone to Strongin on December 19. There is no evidence whatever to contradict the common-sense conclusion that Felbro approved the proposed terms.[3] Strongin accepted Felbro's terms in the December 19 phone conversation with Cohen and again by letter on December 23. In both these communications Strongin stated that the union would recommend acceptance but that the acceptance was subject to the employees' ratification. There is thus substantial evidence to support the Board's conclusion that the employees' ratification was the only condition to the execution of the contract as agreed.

The Board affirmed the ALJ's finding that Felbro's employees ratified the agreement. The ALJ heard the testimony of Local 512 agents Machuca and Zayas that seventeen employees attended a union meeting on January 5 and, in that meeting, ratified the contract. Both agents testified that they distributed leaflets advertising the ratification meeting, that a secret ballot was conducted at the meeting, and that most or all of those present voted for ratification. Felbro points to the testimony of a union witness, Montano, who stated that the election of officials was the only business conducted at the meeting. The ALJ did not expressly discredit Montano's testimony, but, in finding the ratification vote valid, he clearly credited the testimony of Machuca and Zayas. Credibility resolutions are the particular province of the ALJ, and we accord them "great deference," and will uphold them unless they are "inherently incredible or patently unreasonable." *Photo-Sonics, Inc. v. NLRB,* 678 F.2d 121, 123 (9th Cir.1982) (citing cases).

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It was reasonable for the ALJ to credit the mutually corroborative testimony of Machuca and Zayas.[4]

Finally, Felbro, citing California law and basic contract principles, claims that it revoked its offer on January 7 by delivering a mailgram to Strongin before Strongin mailed to Felbro notification of the ratification vote. We have observed that "technical rules of contract formation do not confine collective bargaining." *Presto Casting Co. v. NLRB,* 708 F.2d 495, 497–98 (9th Cir.), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983). Here, there is substantial evidence to support the NLRB's finding that any actions by Felbro after the December 19 agreement between Strongin and Cohen were immaterial. The ground rules established between Felbro and the union specified "ratification" as the critical act, not notification of the ratification vote. Even under traditional rules of contract law, the parties' own expressed intent would govern.

Thus, substantial evidence supports the Board's findings that Felbro violated sections 8(a)(5) and 8(a)(1) by failing to notify Local 512 of the three layoffs and by refusing to execute the agreed contract, and we affirm those findings.

BACKPAY REMEDY

I. *Court's Jurisdiction to Review the Board's Remedy*

As a threshold matter, the Board objects to the panel's review of the backpay remedy on two jurisdictional grounds. The Board argues: first, that appellate review is barred by section 10(e) of the NLRA; and second, that any review of the remedy should be delayed until the outcome of the Board's compliance hearing. We reject both arguments and thus reach the merits of the Board's backpay remedy.

A. *Section 10(e) Objection*

Section 10(e) of the NLRA, 29 U.S.C. § 160(e), states, in pertinent part, that "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The NLRB based its amended backpay order on its interpretation of *Sure-Tan v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), which the Supreme Court decided after the ALJ's opinion here. Thus, the NLRB argues, since neither Felbro nor Local 512 filed a motion for reconsideration of the Board's amended backpay order, section 10(e) bars us, as an appellate court, from considering Local 512's and Felbro's opposition to the backpay order.

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[3] Strongin testified that Cohen had stated on December 19 that he had confirmed the offer with his client. Cohen did not testify.

[4] Felbro objects that the individual votes are hearsay and may not be admitted through the testimony of the tellers, Machuca and Zayas. *See* Fed.R.Evid. 801(c). The ballots were apparently destroyed after the meeting and could not be admitted into evidence.

This testimony was not hearsay as it was *not* "offered in evidence to prove the truth of the matter asserted." Rule 801(c). The testimony as to the individual ballots was offered solely to prove that such a vote was cast. We are not concerned with the "truth" of any matter expressed by the individual casting the ballot. The casting of a vote is a verbal act, in which the statement itself has legal effect.

As stated in the advisory committee notes on proposed Rule 801:

If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.,* 181 F.2d 70 (7th Cir.1950), *rev'd on other grounds* 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 [1951], letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

Congress enacted section 10(e) to ensure that the NLRB has an opportunity to apply its special expertise to an issue before that issue is presented to an appellate court. *See Marshall Field & Co. v. NLRB,* 318 U.S. 253, 256, 63 S.Ct. 585, 586, 87 L.Ed. 744 (1943) (per curiam); *NLRB v. Best Products Co.,* 765 F.2d 903, 909 (9th Cir.1985). Section 10(e) bars judicial review when no objection has been filed, *see Woelke and Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665–66, 102 S.Ct. 2071, 2082–83, 72 L.Ed.2d 398 (1982); *NLRB v. IBEW, Local 952,* 758 F.2d 436, 439–40 (9th Cir.1985), or when only an ambiguous, general objection to the decision has been filed, *see Marshall Field,* 318 U.S. at 255–56, 63 S.Ct. at 586; *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 349–50, 73 S.Ct. 287, 290–91, 97 L.Ed. 377 (1953). However, an objection will meet the statutory requirement if it is not " 'so ambiguous as to be totally ineffective to adequately apprise the Board" that the issue is disputed. *Best,* 765 F.2d at 909 (quoting *NLRB v. Giustina Brothers Lumber Co.,* 253 F.2d 371, 374 (9th Cir.1958)). Once an issue is raised before the NLRB, another party may litigate the issue on appeal. *See Consolidated Freightways v. NLRB,* 669 F.2d 790, 794–95 (D.C.Cir.1981).

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Felbro's first affirmative defense to the General Counsel's complaint raised the issue whether undocumented workers were entitled to any remedy under the NLRA. [5] The ALJ explicitly rejected this defense in framing his recommended remedy. [6] Felbro excepted to the ALJ's remedy in its entirety and, in its supporting brief to the NLRB, argued at some length that the Board had no authority to order the payment of backpay to undocumented workers. [7] Felbro has thus adequately preserved the issue for judicial review. *See NLRB v. Wayne Transportation, a Division of Wayne Corp.,* 776 F.2d 745, 748–49 (7th Cir.1985) (change in law after ALJ decision does not require specific objection to preserve matter for appeal); *Universal Security Instruments, Inc. v. NLRB,* 649 F.2d 247, 260 (4th Cir.) (no motion for reconsideration needed to preserve for appeal general exception to backpay order based on new remedial theory), *cert. denied,* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981); *see also May Department Stores Co. v. NLRB,* 326 U.S. 376, 386 n. 5, 66 S.Ct. 203, 209, n. 5, 90 L.Ed. 145 (1945) (general objection sufficient to permit appeal to breadth of remedial order); *Hospital and Service Employees Union, Local 399 v. NLRB,* 743 F.2d 1417, 1425–26 (9th Cir.1984) (general exception to briefly discussed issue in NLRB order sufficient to preserve matter for appeal).

B. *Administrative Exhaustion*

The NLRB also argues that it is premature for us to review its remedial order. The Board asserts that appellate review of the Board's proposed treatment

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[5] Felbro's affirmative defense stated:

> Respondent is informed and believes and upon that basis alleges that a substantial number of employees are residing and working in this country in violation of federal civil and criminal laws. Therefore, the National Labor Relations Board (the "Board") is without statutory authority to issue a remedial order in respect to such employees.

[6] The ALJ stated:

> Most of the employee witnesses called by the General Counsel have used fictitious names while working for Respondent, apparently to protect their status as undocumented aliens. That status, of course, does not deprive them of protection under the Act, see *NLRB v. Apollo Tire Co.,* 604 F.2d 1180 (9th Cir.1979).

ALJ's decision attached to 274 N.L.R.B. No. 186 at 3 n. 4.

[7] Under the heading "THE ILLEGAL ALIEN ISSUE," Felbro's brief to the NLRB stated in part:

> This case illustrates the hypocrisy in utilizing polite terms such as "undocumented" to describe the status of persons whose very presence in this country, as well as day to day activities, constitute violations of federal law. . . .
>
> The issue is not whether an employer who arguendo may have engaged in conduct otherwise in violation of the Act should be insulated from the Board's remedial authority, but rather whether the protections of the Act and the overall scheme of federal law are to be used to aid and abet those who violate one federal statute by mere presence and will have no option other than to violate other federal laws in order to conceal that unlawful presence. Is the Board truly articulating federal policy when its processes are publicly pronounced to be available to any and all persons, so long as they can manage to enter the teritorial [sic] limits of the United States, by any means, and can evade those who are charged with the duty of enforcing the laws broken in the course of reaching the protective haven of the Board?

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of the discriminatees' back pay rights should await the litigation of these rights in a Board compliance hearing. The Board's Rules and Regulations provide generally for bifurcation of the liability and compliance phases of an unfair labor practice charge. *See 3 NLRB Casehandling Manual* §§ 10650, 10650.1. The employer may raise an affirmative defense, such as job elimination or failure to mitigate, at the compliance hearing, and the compliance decision is itself an appealable order. *See NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 433,* 600 F.2d 770, 778–79 (9th Cir.1979), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980).

The Board argues essentially for a doctrine of administrative exhaustion. The application of such a doctrine is not appropriate in the circumstances of this case. We have recognized that *factual* issues which relate to the details of the remedy should be delayed to the compliance hearing. *See e.g., NLRB v. Trident Seafoods Corp.,* 642 F.2d 1148, 1150 (9th Cir.1981) ("[Q]uestions relating to the exact amount of back pay owing . . . are prematurely raised in this enforcement petition. Those issues [of backpay, mitigation and job elimination] may be explored in a compliance proceeding.") (quoting *Great Chinese American Sewing Co. v. NLRB,* 578 F.2d 251, 255–56 (9th Cir.1978)). However, no exhaustion is required where the challenge on review is to the underlying *legal* basis of the Board's remedial order. *See e.g., Sure-Tan,* 467 U.S. at 898–905, 104 S.Ct. at 2812–2816 (reviewing, prior to compliance, Board's decision to award six months backpay to workers outside country and unable to reenter); *Seven-Up,* 344 U.S. at 346–48, 73 S.Ct. at 287 (reviewing, prior to compliance, Board's determination that computed remedy should discount certain earnings); *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 362–64, 71 S.Ct. 337, 338–40, 95 L.Ed. 337 (1951) (reviewing, prior to compliance, Board's determination that unemployment benefits should be disregarded in computing backpay).

We therefore reject both of the NLRB's jurisdictional arguments and reach the merits of the Board's conditional backpay remedy.

II. *The Sure-Tan Decision*

A.

In *Sure-Tan,* the employees of two small leather processing firms in Chicago elected Local 431, Chicago Leather Workers Union, as their bargaining agent. Most of the employees were undocumented workers. 467 U.S. at 886, 104 S.Ct. at 2806. The Board rejected the employer's contention that illegal aliens were not entitled to the protection of the NLRA. [8] The next day, Sure-Tan wrote to the INS requesting that the alien status of certain employees be checked at once. INS agents visited the workplace and arrested five Sure-Tan employees as illegal aliens. That day, each of the five arrested employees voluntarily signed an INS document acknowledging their illegal presence in the United States and accepting voluntary departure in lieu of deportation. Later that same day, all five departed for Mexico. *Id.* at 887, 104 S.Ct. at 2806.

The NLRB upheld the union's unfair labor practice charges against Sure-Tan, finding that notifying the INS in these circumstances constituted a retaliatory constructive discharge for the exercise of federally protected rights. The ALJ in *Sure-Tan* had recommended reinstatement, with the offer to be kept open for six months. However, the ALJ refused to award backpay, relying on the Board's doctrine of tolling backpay for any period when a discriminatee is not available for work. [9] The Board amended the ALJ's proposed reme-

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dy, ordering reinstatement and backpay with the issue of unavailability to be deferred until compliance. The Seventh Circuit enforced the Board's order, but proposed modifications to the remedy: reinstatement could only be proper if the discriminatees had legally re-entered the United States; the reinstatement offers should remain open for four years; and the Board should consider imposing a six-month minimum backpay award to effectuate the Act's policies even though the discriminatees were unavailable to work during this period. *Id.* at

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[8] This determination reflected the NLRB's longstanding view that undocumented alien workers were "employees" within the meaning of section 2(3) of the NLRA, 29 U.S.C. § 152(3). *See Sure-Tan,* 467 U.S. at 891 n. 5, 104 S.Ct. at 2808 n. 5; *NLRB v. Apollo Tire Co.,* 604 F.2d 1180, 1182 (9th Cir.1979); *Amay's Bakery & Noodle Co.,* 227 N.L.R.B. 214, 214 (1976).

[9] *See e.g., Gifford-Hill & Co.,* 188 N.L.R.B. 337, 338 (1971) (no backpay available to incarcerated discriminatee); *American Manufacturing Co.,* 167 N.L.R.B. 520, 522 (1967) (no backpay for certain periods of illness or accident incurred in interim employment); 3 *NLRB Casehandling Manual* §§ 10612, 10656.9.

887–90, 104 S.Ct. at 2806–08. The Board subsequently adopted the Seventh Circuit's proposed modifications. *Id.* at 890, 104 S.Ct. at 2808.

The Supreme Court affirmed in part and reversed in part. Finding no conflict between the NLRA and the Immigration and Nationality Act ("INA"), the Court accepted that "the provisions of the NLRA are applicable to undocumented alien employees." *Id.* at 894. However, the Court refused to enforce the modified remedy.[10] The six-month backpay award was based on "pure speculation and does not comport with the general reparative policies of the NLRA." *Id.* at 901, 104 S.Ct. at 2814. The award was "not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Id.* The Court noted that the NLRB could not ignore the INA, and approved the conditioning of reinstatement "upon the employees' legal readmittance to the United States." *Id.* at 903, 104 S.Ct. at 2815.

> By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

Id.

In its remedial order here in Felbro's case, the NLRB interpreted this last statement by the Court to mean that an undocumented alien worker would *never* be entitled to backpay, and required the compliance officer to determine the legality of each discriminatee's presence in the United States.[11] Local 512, supported by amicus MALDEF, argues that *Sure-Tan* bars NLRA remedies only to undocumented workers who are unavailable to work because they are outside the United States with no prospect of legal reentry. Felbro endorses the Board's reading of *Sure-Tan,* but argues that the Board erred in limiting the conditional award to the five employees against whom Felbro committed section 8(a)(1) and 8(a)(3) violations. Felbro argues that the conditional remedy should apply also to the victims of the two section 8(a)(5) violations: the three workers laid off without notice to the union, and the entire workforce (over sixty people) benefitting from retroactive application of the unexecuted contract.

B.

In *Sure-Tan,* the Court gave no indication that it was addressing any backpay

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issue wider than the six-month minimum backpay award made to the five *Sure-Tan* discriminatees who had left the United States. The five *Sure-Tan* discriminatees were clearly not available for employment at *Sure-Tan* for the period between their constructive discharges and the Board's order of reinstatement. They all agreed to voluntary departure on the day *Sure-Tan* committed the unfair labor practice, and were in Mexico throughout the backpay period without any indication in the record when they might legally *reenter* the United States to be reinstated as Sure-Tan employees. Thus, *Sure-Tan* does not address the question whether an undocumented worker who *remains* in the United States, and who has *not* been the subject of any INS deportation proceedings, is barred from receiving backpay to remedy an NLRA violation. *Cf. Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391, 1393–1394 (9th Cir.1986) (*Sure-Tan* does not bar arbitrator's award to undocumented workers who "have not been subject to any INS proceedings.").

The thrust of Justice O'Connor's opinion is directed at the speculative nature of the Board's remedy in *Sure-Tan. See* 467 U.S. at 900, 104 S.Ct. at 2813 ("a backpay remedy must be sufficiently tailored to expunge only the *actual,* and not merely *speculative,* consequences of the unfair labor practices.") (emphasis in original); *id.* at 901 (award "not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees."); *id.* (award "constitutes pure speculation"); *id.* at

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[10] The Court in *Sure-Tan* split three ways. Justice O'Connor, writing for herself, the Chief Justice, and Justice White, held that the NLRA protected undocumented workers, but rejected the Board's proposed remedy. Justice Powell, joined by Justice Rehnquist, construed the NLRA to exclude undocumented workers. 467 U.S. at 913, 104 S.Ct. at 2820. However, Justices Powell and Rehnquist stated a preference for the more limited remedy proposed by Justice O'Connor. *Id.* Justice Brennan, writing for himself, Justice Marshall, Justice Blackmun and Justice Stevens, agreed with Justice O'Connor that the NLRA protects undocumented workers, *id.* at 906, 104 S.Ct. at 2816, but would have upheld the six-month backpay remedy. *Id.* at 908–09, 104 S.Ct. at 2817–18. There was thus a majority of 7–2 upholding the liability portion of the NLRB's order, and a majority of 5–4 refusing to uphold the proposed remedy.

[11] The Board has ordered a similarly conditional backpay remedy to undocumented discriminatees in one subsequent case. *See Caamano Brothers,* 275 N.L.R.B. No. 38, slip op at 1 n. 1 (1985).

904, 104 S.Ct. at 2816 (Board cannot "impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work."). The Board's award in *Sure-Tan* was speculative because the discriminatees were indefinitely unavailable for work. However, Justice O'Connor's opinion also implies that backpay *would* have been available to the *Sure-Tan* discriminatees had they not left the United States at the INS' behest, *notwithstanding* their status as undocumented workers:

> In the instant case, the Court of Appeals "estimated" an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners [Sure-Tan] any opportunity to provide mitigating evidence. In the absence of relevant factual information or adequate analysis, it is inappropriate for us to conclude, as does Justice Brennan [in his dissent in *Sure-Tan*], that the Court of Appeals had estimated the proper minimum backpay award "with a fair degree of precision."

Id. at 902 n. 11, 104 S.Ct. at 2814 n. 11.

Unlike the five *Sure-Tan* employees, the Felbro discriminatees' lost wages can be determined precisely. The *Sure-Tan* discriminatees left for Mexico on the day of the unfair labor practice. The laid-off Felbro discriminatees have all returned to work at Felbro. The Felbro bargaining unit members (about sixty people) who will benefit from retroactive application of the unexecuted contract have worked at Felbro continuously throughout the backpay period. In contrast to the *Sure-Tan* discriminatees, the Felbro discriminatees' wage loss is easily and accurately calculated by multiplying the loss per day per employee by the number of days in the backpay period. The backpay owing here is thus "actual," not "speculative." Thus, *Sure-Tan* does not control the backpay award for the Felbro discriminatees.

III. *Backpay Awards to Undocumented Workers and the NLRA*

The Supreme Court in *Sure-Tan* gave no indication that it was overruling a significant line of precedent that disregards a discriminatee's *legal status,* as opposed to *availability to work,* in determining his or her eligibility for backpay.

For example, in *NLRB v. Apollo Tire Co.,* 604 F.2d 1180 (9th Cir.1979), the Board found that six allegedly undocumented workers had been laid off in retaliation for complaining about the non-payment of overtime. The Board ordered the employees to be reinstated with backpay. 236 N.L.R.B. 1627, 1628 (1978). We enforced the Board's order in its entirety. 604 F.2d at 1182–84. We wrote:

> *Furthermore, we hesitate to require the Board to delve into immigration matters, out of its field of expertise.* Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service. An employer who suspects that an employee is in the United States without proper authority should report this information to the INS. Our holding merely insures that an employer is not permitted to commit unfair labor practices in the knowledge that the Board is powerless to remedy them.

Id. at 1183. (emphasis added) *See also Amay's Bakery & Noodle Co.,* 227 N.L.R.B. 214, 214–15 (1976) (reinstatement and backpay awarded to undocumented discriminatees); *Justrite Manufacturing Co.,* 238 N.L.R.B. 57, 65–68 (1978) (underage discriminatee entitled to backpay); *New Foodland, Inc.,* 205 N.L.R.B. 418, 420–21 (1973) (same); *The Embers,* 157 N.L.R.B. 627, 631 (1966) (same), *enf'd,* 64 L.R.R.M. (BNA) 2681 (5th Cir.1967); *Local 57, International Union of Operating Engineers,* 108 N.L.R.B. 1225, 1227–28 (1954) (engineer discriminatee without valid state license awarded backpay); *Robinson Freight Lines, Inc.,* 129 N.L.R.B. 1040, 1042 (1960) (truck driver discriminatee awarded backpay despite no valid driver's license).[12]

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[12] Undocumented workers are entitled to backpay for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq. See Brennan v. El San Trading Corp.,* 73 Lab.Cas. (CCH) ¶ 33032 at 46362 (W.D.Tex.1973); *Alvarez v. Sanchez,* 105 A.D.2d 1114, 482 N.Y.S.2d 184, 195 (1984). Undocumented workers have recovered unpaid wages in state actions for breach of an employment contract. *See Gates v. Rivers Construction Co.,* 515 P.2d 1020, 1021–22 (Alaska 1973); *Nizamuddowlah v. Bengal Cabaret, Inc.,* 69 A.D.2d 875, 415 N.Y.S.2d 685, 686 (1979). Wage loss by undocumented workers due to on-the-job injuries is compensable. *See Hagl v. Jacob Stern & Sons, Inc.,* 396 F.Supp. 779, 784–85 (E.D.Pa. 1975). Undocumented workers are entitled to lost wages as part of a tort recovery, *see Peterson v. Neme,* 222 Va. 477, 281 S.E.2d 869, 871–72 (1981), and to damages generally for personal injuries, *see Arteaga v. Literski,* 83 Wis.2d 128, 265 N.W.2d 148, 150 (1978); for wrongful death, *see Torres v. Sierra,* 89 N.M. 441, 553 P.2d 721, 724 (Ct.App.1976); and for breach of a sale contract,

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The NLRB routinely awards backpay to restore discriminatees to the economic position they would have enjoyed absent the unfair labor practice. *See Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 188–89, 94 S.Ct. 414, 427, 38 L.Ed.2d 388 (1973); *Rutter-Rex,* 396 U.S. at 263, 90 S.Ct. at 420; *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 853, 85 L.Ed. 1271 (1941). Backpay awards also achieve a public purpose by deterring future similar unlawful practices, and by depriving employers of any competitive advantage they may have secured by acting unlawfully. *See Nathanson v. NLRB,* 344 U.S. 25, 27, 73 S.Ct. 80, 82, 97 L.Ed. 23 (1952); *NLRB v. United Marine Division,* 417 F.2d 865, 868 (2d Cir.1969), *cert. denied,* 397 U.S. 1008, 90 S.Ct. 1237, 25 L.Ed.2d 421 (1970). In *Apollo Tire,* we noted that denying an NLRA remedy to undocumented workers subverts the broad remedial goals of the NLRA. 604 F.2d at 1183.

The remedy proposed here by the Board leaves undocumented discriminatees without compensation. Admittedly, employers who violated Board cease and desist orders would risk contempt penalties, *see Sure-Tan,* 467 U.S. at 904 n. 13, 104 S.Ct. at 2815 n. 13, but this risk would be slight. Contempt proceedings would require a further complaint from an undocumented employee who knew that filing a charge would immediately place his or her immigration status in jeopardy. Few undocumented workers would take such a chance. Moreover, the knowledge that deportation proceedings are a likely consequence of filing a successful unfair labor practice charge would chill severely the inclination of any unlawfully treated undocumented worker to vindicate his or her rights before the NLRB.

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Additionally, the Board's proposed remedy encourages employers to continue to violate the NLRA. If employers know that they will incur no backpay liability, they will have less incentive to obey the NLRA. The victims of the Board's conditional remedy would be not only undocumented workers, but also American and documented alien workers. Unscrupulous employers would be encouraged to hire undocumented workers for the competitive advantage that an environment relatively free of labor safeguards may offer. "If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Sure-Tan* 467 U.S. at 893, 104 S.Ct. at 2809. Congress intended to protect collective bargaining rights by ensuring that there is no "subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." *Id.* at 892, 104 S.Ct. at 2809. Thus, the Board's conditional backpay remedy proposed here is inconsistent with the goals of the NLRA.

IV. *Backpay Awards to Undocumented Workers and the INA*

A.

The *Sure-Tan* discriminatees were not entitled to backpay because they were all in Mexico without papers authorizing them to reenter the United States legally, and thus they were unavailable for work during the backpay period. In *Sure-Tan,* the Court recognized that to treat the Sure-Tan discriminatees as available for work, as the six-month minimum backpay award implied, would undermine the Immigration and Nationality Act ("INA") by compensating aliens outside the United States for work they were unable to perform. 467 U.S. at 902–05, 104 S.Ct. at 2814–16. In contrast, the Felbro discriminatees are all in the United States presently working at Felbro. Thus, for the NLRB to award backpay to the Felbro discriminatees would not implicate the concerns expressed by the Supreme Court in *Sure-Tan.*

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see Moreau v. Oppenheim, 663 F.2d 1300, 1307 (5th Cir.1981), *cert. denied* 458 U.S. 1107, 102 S.Ct. 3486, 73 L.Ed.2d 1368 (1982). *See also Hurtado v. United States,* 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973) (illegal aliens held as witnesses for trial entitled to full per diem expenses); *Plyler v. Doe,* 457 U.S. 202, 210–215, 102 S.Ct. 2382, 2391–2394, 72 L.Ed.2d 786 (1982) (illegal aliens entitled to broad range of constitutional protections); *United States v. Otherson,* 637 F.2d 1276, 1279–85 (9th Cir.1980) (civil rights' laws protect illegal aliens), *cert. denied,* 454 U.S. 840, 102 S.Ct. 149, 70 L.Ed.2d 123 (1981); *Cabral v. State Board of Control,* 112 Cal.App.3d 1012, 1015–17, 169 Cal.Rptr. 604, 606–07 (1980) (illegal alien entitled to compensation under state crime victims' statute); *Dermegerdich v. Rank,* 151 Cal.App.3d 848, 851–52, 199 Cal.Rptr. 30, 32–33 (1984) (illegal alien entitled to state health benefits); *Ayala v. California Unemployment Insurance Appeals Board,* 54 Cal. App.3d 676, 680, 126 Cal.Rptr. 210, 213 (1976) (undocumented worker entitled to state disability benefits).

The employment of undocumented workers is "peripheral" to the INA. *Sure-Tan,* 467 U.S. at 892–93, 104 S.Ct. at 2809–10 (quoting *DeCanas v. Bica,* 424 U.S. 351, 360, 96 S.Ct. 933, 938, 47 L.Ed.2d 43 (1976); 8 U.S.C. § 1324(a)(3)); *National Center for Immigrants' Rights v. INS,* 743 F.2d 1365, 1370 (9th Cir.1984). There is no provision "in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Sure-Tan,* 467 U.S. at 892–93, 104 S.Ct. at 2809–10; *see* 8 U.S.C. § 1324(a)(3). "Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally." *Sure-Tan,* 467 U.S. at 893, 104 S.Ct. at 2809.

The Court in *Sure-Tan* was not dealing with the employment of undocumented workers but was primarily concerned with the INA's prohibition against illegal entry into the United States. *Id.* at 902–04, 104 S.Ct. at 2814–15. "The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas,* 424 U.S. at 359, 96 S.Ct. at 938; *see also Bevles,* 791 F.2d 1393, 1394 (upholding arbitrator's award of reinstatement and backpay to undocumented workers). *See* 8 U.S.C. §§ 1325, 1326 (prohibiting illegal entry and reentry). Since the Felbro discriminatees remained in

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the United States throughout the backpay period, an award of backpay to them would not impinge on this "central concern" of the INA.

Equally, we think it improbable that making backpay available to undocumented discriminatees who have continued to work during the backpay period will encourage illegal entry or reentry to the United States. Indeed, equalizing the backpay liability for unlawful acts against undocumented and American workers could deter employers from hiring undocumented workers and thus marginally reduce illegal entry to the United States.

B.

Sure-Tan also identified as two major goals of the INA the prevention of the loss of American workers' jobs and the protection of American workers' wage rates and working conditions. 467 U.S. at 893, 104 S.Ct. at 2809. *Cf. Pesikoff v. Secretary of Labor,* 501 F.2d 757, 761 (D.C. Cir.), *cert. denied,* 419 U.S. 1038, 95 S.Ct. 525, 42 L.Ed.2d 315 (1974); *see also* 8 U.S.C. §§ 1182(a)(14)(B) (aliens admitted to work only if admission "will not adversely affect the wages and working conditions of the workers in the United States similarly employed."). *Sure-Tan* noted that applying the NLRA's protections to undocumented workers increased the job opportunities of American workers because employers gained no economic advantage by hiring undocumented workers. 467 U.S. at 893, 104 S.Ct. at 2809. Since the Board's proposed remedy makes hiring undocumented workers more attractive to employers, it undermines two of the major goals of the INA.

C.

In *Apollo Tire,* we recognized that determining alien status is a matter peculiarly within the expertise of the INS. 604 F.2d at 1183. The Board's remedy here, however, places upon the NLRB compliance officer the responsibility for determining whether the discriminatee was "lawfully entitled to be present and employed in the United States" during the backpay period. Determining illegal alien status requires application of an intricate complex of statutory and regulatory provisions which an NLRB compliance officer is probably untrained to administer.

At oral argument, counsel for the NLRB candidly admitted that the Board "does not quite know" how a compliance officer would handle the immigration law questions sure to arise at the compliance stage of a conditional remedial order similar to that issued here. Counsel could give us no indication of the procedure the compliance officer would follow to implement such an order.[13]

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[13] The NLRB's Associate General Counsel has issued two memoranda of guidance to NLRB Regional Directors on administering conditional remedial awards to undocumented workers. Memoranda OM 85–57 (July 2. 1985), OM 85–89 (Oct. 4, 1985), *reprinted at* 120 L.R.R.M. 342 (Dec. 23, 1985). Board regional staff are advised to consider "evidence supplied by the employer, the discriminatee, and other sources, together with information received from the local office of INS. . . . If, however, the Region's inquiry does not lead to a clear resolution of the matter, then of course, it will be necessary to refer the issue to INS." OM 85–89 at 1.

Felbro draws our attention to the requirement that social security numbers be issued only to citizens and legal aliens, *see* 20 C.F.R. §§ 422.104, 422.107, and observes that the NLRB should be capable of enforcing a similar requirement excluding undocumented workers from the remedial benefits of the NLRA. The analogy is not apposite.

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Possession of the "green card" issued to aliens with permission to work in the United States is not necessarily conclusive evidence of legal presence. *See* 8 U.S.C. §§ 1251(a)(3), (4) (legal alien may be deported if institutionalized at public expense or convicted of crime of moral turpitude). Conversely, lack of documentation is not *prima facie* evidence of illegal entry. *See Gonzales v. City of Peoria,* 722 F.2d 468, 476–77 (9th Cir.1983); 8 C.F.R. § 212.1(f) (no documents required for admission in "unforseen emergency").

The federal immigration laws are exceedingly complex. *See Lok v. INS,* 548 F.2d 37, 38 (2d Cir.1977) (federal immigration laws bear "striking resemblance . . . to . . . King Minos' labyrinth in ancient Crete."). The INA enumerates thirty-three general categories of people who may not enter the United States. *See* 8 U.S.C. § 1182. Deportable persons can come from these or nineteen other categories. *See* 8 U.S.C. § 1251. Beyond this, the INA provides for many circumstances which prevent a "deportable alien" from actual deportation. *See* 8 U.S.C. § 1254 (petition to suspend deportation); 8 U.S.C. § 1158 (political asylum); 8 U.S.C. § 1255 (adjustment to lawful permanent resident status); INS O.I. § 242(a)(22) (deferred action status). Deportation cases may be reopened on petition to consider evidence previously unavailable, or an Immigration Judge or the Board of Immigration Appeals may reopen the case sua sponte. *See* 8 C.F.R. §§ 3.22, 242.22. A final administrative order of deportation can be stayed by the district director, 8 C.F.R. § 243.4, by a private bill in Congress, INS O.I. § 107.1, or if departure is "prejudicial to the interests of the United States," 8 C.F.R. § 215.3. All these determinations are appealable to the BIA, the Circuit Courts of Appeals and, potentially, to the Supreme Court. *See* 8 U.S.C. § 1105a(a) (review of deportation decisions may be had in federal appellate court); 8 C.F.R. § 3.1(b) (appellate jurisdiction of 314).

Because of this skein of provisions,

> [T]here is no assurance that a [person] subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, [a governmental authority] cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the [governmental authority] to justify a denial of [a benefit] to a [person] enjoying an inchoate federal permission to remain.

Plyler v. Doe, 457 U.S. 202, 226, 102 S.Ct. 2382, 2399, 72 L.Ed.2d 786 (1982) (citations omitted). It is hard to believe that Congress wished to place upon an NLRB compliance officer, probably untrained in the intricacies of immigration law, the responsibility of determining the alien status of an undocumented worker and denying that person the benefit of the NLRA's remedies.

Additionally, we note that Congress has vested the Attorney General and the INS with exclusive responsibility to exercise discretion under the INA. *See generally,* 8 U.S.C. § 1103; 8 C.F.R. § 103.1; *see also* 8 U.S.C. § 1251(f)(1)(A) (waiver of deportation for fraudulent entry); 8 U.S.C. § 1254(a) (suspension in cases of extreme hardship); 8 C.F.R. § 208.8(a) (asylum); 8 C.F.R. § 236.1 (excludability). Because Congress has vested this discretion with the Attorney General, the Board probably lacks the authority to make immigration law determinations even to further its own statutory authority. *Cf. Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB,* 357 U.S. 93, 110–11, 78 S.Ct. 1011, 1021–22, 2 L.Ed.2d 1186 (1958) (NLRB may not look to Interstate Commerce Act to determine whether carrier

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violated hot cargo provisions of the NLRA); *See also Bevles,* at 1393 n. 3 ("NLRB determinations of

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First, the Social Security Act requires the Secretary of Health and Human Services to "take affirmative measures" which would ensure that undocumented aliens do not receive social security numbers. *See* 42 U.S.C. § 405(c)(2)(B)(i)(I). The NLRA contains no comparable provision authorizing the NLRB to take affirmative action which would exclude undocumented workers from the benefits available under the NLRA.

Second, to obtain a social security number an alien need only show that he or she is "permanently residing in the United States under color of law." *See* 20 C.F.R. § 416.1600(c). This may be established simply by proof of address, *see* 20 C.F.R. § 416.1603(a). *See also* 20 C.F.R. § 416.1618. No proof of legal status—as required here by the NLRB—is necessarily required to obtain a social security number.

Third, the social security authorities may not pass any information that they obtain about any individual to the INS. *See* 42 U.S.C. § 1306(a); *Alcaraz v. Block,* 746 F.2d 593, 603 (9th Cir.1984). Thus while the Social Security Act protects against potential chilling effects resulting from discovery of illegal status, the scheme proposed by the NLRB affords no such protection.

issues involving the INA would be entitled to no deference."); *Apollo Tire,* 604 F.2d at 1183 ("Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service."); *Sure-Tan, Inc. and Surak Leather Co.,* 246 N.L.R.B. 788, 788 (1979), *modified* 672 F.2d 592 (7th Cir.1982), *aff'd-in part, rev'd in part,* 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984) ("We do not regard it as within our authority to alter the obligations imposed by the [NLRA] in a manner which might assist in reaching whatever may be the current goals of immigration policies, and we would be uncertain how to do so even if we considered it proper.").

D.

There are significant procedural differences between deportation hearings and Board compliance proceedings. In compliance proceedings, the General Counsel may admit the employee's unavailability, *see* 3 *NLRB Casehandling Manual* § 10622, 10737.2; in a deportation proceeding the government must prove deportability by "clear, unequivocal, and convincing evidence." *Woodby v. INS,* 385 U.S. 276, 286, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966); *Sanchez-Martinez v. INS,* 714 F.2d 72, 74 (9th Cir.1983), *cert. denied,* 466 U.S. 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984). Deportation proceedings also offer several procedural protections not available to discriminatees in NLRB compliance proceedings. *See* 8 C.F.R. §§ 242.1–242.16. The Board's determination of deportability may arguably be entitled to collateral estoppel effect in a subsequent INS deportation proceeding. *See United States v. Utah Construction and Mining Co.,* 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966) (factual determination of federal agency acting in judicial capacity entitled to preclusive effect). If this were so, the alien should be able to raise serious due process objections to the compliance proceeding. For this additional reason, it would be improvident to permit Board compliance officers to determine the immigration status of undocumented discriminatees.

V. *Conclusion*

In *Sure-Tan,* the Supreme Court did not address the issue whether undocumented workers remaining at work in the United States throughout the backpay period are entitled to backpay awards. *Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers. Judicial and Board decisions, notably this court's *Apollo Tire* decision, recognize the right to backpay of undocumented discriminatees who are available for work in the United States. This recognition promotes the underlying aims of the NLRA and does not detract from the purposes of the INA. Moreover, the Board exceeds both its authority and its expertise in requiring its compliance officers to determine the immigration status of an individual discriminatee.

The NLRB's petition for enforcement is GRANTED IN PART and DENIED IN PART. Local 512's petition for review of the remedial section of the NLRB's order is GRANTED and that section of the order is REMANDED to the NLRB for modification consistent with this opinion.

BEEZER, Circuit Judge, dissenting in part: I concur in that part of the majority opinion which holds that substantial evidence in the record supports the findings of the National Labor Relations Board ("NLRB" or "Board") that Felbro, Inc. engaged in unfair labor practices by laying off certain workers without engaging in bargaining with the union and by refusing to execute a collective bargaining agreement that had been negotiated. I also agree that we have proper jurisdiction to review the Board's backpay remedy.

However, I conclude that the Board's decision to condition the payment of backpay to layed-off workers upon proof of their legal immigration status is mandated by the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). Consequently, I dissent from the denial of enforcement of that remedy portion of the NLRB order.

A. *Background*

All of the workers who had been layed-off by Felbro in violation of the labor laws have been reinstated with the company and are currently present in the United States. None of Felbro's alien employees is presently the subject of any Immigration and Naturalization Service ("INS") deportation proceeding. However, several of these aliens were admittedly undocumented. They testified under assumed names at the NLRB hearings and refused to answer questions concerning their immigration status.

Accordingly, the Board amended the remedial order to read:

> Subsequent to the issuance of the [administrative law judge's] decision, the Supreme Court issued its decision in *Sure-Tan, Inc. v. NLRB,* [467 U.S. 883], 104 S.Ct. 2803 [81 L.Ed.2d 732] (1984), in which it held, inter alia, that while undocumented alien workers are employees entitled to the Act's protection, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefor[e] tolled) during any period when they were not lawfully entitled to be present and employed in the United States." Because it appears that a number of the employees affected by the backpay order herein were undocumented aliens, we shall leave to the compliance stage the issue of the employees' entitlement to backpay consistent with the requirements of the Court's opinion in *Sure-Tan.*

274 N.L.R.B. No. 186, slip op. at 5.

In sum, the NLRB concluded that the Supreme Court's decision in *Sure-Tan* restricted backpay awards to those alien employees who could demonstrate lawful presence and entitlement to work in the United States. This court now reverses the Board, by interpreting the *Sure-Tan* holding as narrowly applying to situations where the alien employee was not only unlawfully present in the United States but had actually been deported during the backpay period. I cannot agree with this strained interpretation.

B. *The* Sure-Tan *Decision*

In *Sure-Tan, Inc. v. NLRB,* an employer had retaliated against undocumented alien employees who had engaged in union activities by reporting them to the INS. Agents of the INS arrested five of the employer's workers. Rather than face deportation proceedings, those alien employees accepted immediate voluntary departure to Mexico.

The Supreme Court upheld the NLRB's interpretation of the National Labor Relations Act ("NLRA") as applying to unfair labor practices committed against undocumented aliens. 467 U.S. at 891–94, 104 S.Ct. at 2808–10. The Court accepted the Board's longstanding view that undocumented alien workers are "employees" within the meaning of section 2(3) of the NLRA, 29 U.S.C. § 152(3). *Id.* at 891 & n. 5, 104 S.Ct. at 2808 & n. 5. Turning to the facts of the case, the Court held that the reporting of the undocumented workers to the INS had been a retaliatory constructive discharge for the exercise by the employees of federally protected rights to engage in concerted activities. Accordingly, the Court ruled that the employer's conduct constituted an unfair labor practice in violation of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). *Id.* at 894–98, 104 S.Ct. at 2810–12.

However, the Court limited the availability of individual remedies for the violation by saying that the departed alien employees could be reinstated only upon legal re-entry to the United States, and that "the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903, 104 S.Ct. at 2815.

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In the instant case, the NLRB interpreted this language quoted from *Sure-Tan* to mean that an alien worker discharged in violation of the NLRA is entitled to backpay *only* for the period during which he was lawfully present and entitled to work in the United States. Consequently, the Board's order indicated that each alien employee's immigration status must be ascertained during compliance proceedings before being granted backpay for the unlawful lay-off by Felbro.

The union instead contends, and the majority of this court today agrees, that the *Sure-Tan* decision should be narrowly limited to its specific factual context—where the aliens involved were unavailable for work because they had immediately departed the country and thus were physically outside the United States during the entire backpay period. The union argues that the Supreme Court's only concern in *Sure-Tan* was to overturn the decision of the Seventh Circuit, which had suggested an award of a minimum amount of backpay to the departed aliens by speculating that those aliens would have worked an average of six more months had the employer not reported them to the INS. *See* 672 F.2d 592, 606 (7th Cir.1982). In reversing the Seventh Circuit, the Supreme Court held that the NLRB and any reviewing court must consider whether the aliens were actually available for work and thus entitled to backpay for the period in question. 467 U.S. at 900–905, 104 S.Ct. at 2813–2816. The union concludes that the Court was holding only that the workers must be physically available for work in order to be entitled to backpay, and thus backpay awards to undocumented aliens are tolled only if they are outside the United States during the backpay period.

The holding of the Supreme Court in *Sure-Tan* cannot be read so narrowly. The language used by the Court clearly indicates that individual remedies for labor law violations are to be limited to those aliens who can establish legal immigration status. The Court held that the backpay period is tolled unless the alien is *"lawfully entitled to be present and employed in the United States."* *Id.* at 903, 104 S.Ct. at 2815 (emphasis added). The Court did not limit its holding to situations where the alien has been physically removed from the United States through deportation or voluntary departure.

The Court held that the Seventh Circuit had erred in providing for a minimum amount of backpay because that court failed to take into account the alien employees' *"legal* availability for work" as well as any actual economic losses sustained. *Id.* at 904–05, 104 S.Ct. at 2815–16 (emphasis added). The Court acknowledged that it was uncertain whether any of the discharged employees could "establish at the compliance proceedings that they were *lawfully* available for employment during the backpay period." *Id.* at 904, 104 S.Ct. at 2815 (emphasis added).

This reference to *"legal* availability for work" and the query as to whether the aliens were *"lawfully* available for employment" further confirms the Court's intent that legal immigration status be a crucial relevant factor in determining whether backpay is tolled. The essence of the Court's ruling is that an alien worker is entitled to backpay for a lay-off or discharge in violation of the labor laws only when that alien has been legally present in the United States and authorized by the government to obtain employment during the backpay period.

It is instructive that Justice Brennan, dissenting from this holding, broadly interpreted the Court's decision as "restrict[ing] drastically the remedies available to undocumented alien employees." *Id.* at 912, 104 S.Ct. at 2819 (Brennan, J., concurring and dissenting in part). Justice Brennan went on to warn:

> Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented aliens without fear of having to recompense those workers for lost backpay, their "incentive to hire such illegal aliens" will not decline, it will increase.

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Id.

Justice Brennan plainly read the majority's holding as limiting the availability of backpay to all aliens without legal documentation, regardless of whether they had thus far escaped deportation. Commentators evaluating the *Sure-Tan* decision have likewise taken at face value the Court's express limitation of backpay to aliens lawfully entitled to be present and work in this country. *See, e.g.,* Comment, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce,* 7 Cardozo L.Rev. 223, 244 (1985) ("*Sure-Tan* mandates that illegal aliens do not receive the remedies granted their legal coworkers."); Bethel, *Recent Labor Law Decisions of the Supreme Court,* 45 Maryland L.Rev. 179, 196 (1986) ("[T]he effect of *Sure-Tan* is to deprive undocumented employees of any effective remedy for unlawful discrimination").

In sum, the Supreme Court in *Sure-Tan* held that, while the provisions of the NLRA apply to illegal alien "employees" in general terms to promote the public policies of the Act, the individual remedies normally provided for violations may not be available. The Court effectively directed the NLRB to take into account the individual circumstances of each employee, including his immigration status, in determining entitlement to individual awards of backpay or reinstatement. An undocumented alien is not entitled to such individual relief. [1]

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[1] The union has cited *Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir.1986) as additional authority for the proposition that *Sure-Tan* does not preclude an award of backpay to undocumented aliens still present in the United States.

Continued

The unstated premise behind this holding appears to be that an undocumented alien has not been legally harmed by a lay-off or termination. An alien who had no right to be present in this country at all, and consequently no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement. It may promote the purpose of the NLRA to guarantee the collective bargaining rights of the NLRA to every employee, regardless of immigration status. But the award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have truly suffered harm. Undocumented aliens, who often enter into the United States without inspection in violation of federal criminal law, [2] are not harmed by removal from employment they could obtain only after such an unlawful entry and can retain only through continued unlawful presence.

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The union argues that denial of awards of backpay to aliens unlawfully present in the United States would eliminate any incentive by an employer to obey the requirements of the NLRA, and thereby encourage unscrupulous employers to hire undocumented aliens. The union also contends that undocumented alien employees are unlikely to petition for redress of labor law grievances due to the lack of an effective remedy. The Supreme Court expressly rejected such an argument in *Sure-Tan* by noting that its decision—

> leaves intact the cease and desist order imposed by the Board, . . . one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act.

467 U.S. at 904 n. 13, 104 S.Ct. at 2815 n. 13. The Court further noted that if there remains "[a]ny perceived deficiencies in the NLRA's existing remedial arsenal," the proper solution lies with Congress and not the courts. *Id.* at 904 & n. 13, 104 S.Ct. at 2815 & n. 13.

C. *Consistency With Immigration Laws*

The approach adopted by the Board in this case of limiting backpay awards to aliens "lawfully entitled to be present and employed in the United States" is entirely consistent with the immigration laws. Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), provides for the exclusion from the country of aliens who seek skilled or unskilled employment without certification by the Secretary of Labor. This section thus creates "a presumption that aliens seeking employment are illegally present in the United States unless certified by the Secretary of Labor." Note, *The Alienation of American Labor: The National Labor Relations Act and the Regulation of Illegal Aliens,* 13 N.Y.U.J. Int'l L. & Pol. 961, 978 (1981).

For that reason, an alien who has entered the country and obtained employment contrary to section 212(a)(14) cannot complain when that employment is terminated. Moreover, it could be argued that permitting backpay awards to such aliens has the effect of sanctioning the continuing violation of the law engendered by the alien's very presence in this country. *See INS v. Lopez-Mendoza,* 468 U.S. 1032, ——, 104 S.Ct. 3479, 3490, 82 L.Ed.2d 778 (1984).

Although the union correctly points out that an undocumented alien may later have his status ad-

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In *Bevles,* this court upheld an arbitration award of reinstatement and backpay to undocumented aliens who had been discharged without just cause. The *Bevles Co.* opinion held that the *Sure-Tan* decision did not prohibit the arbitrator's remedy, notwithstanding the immigration status of the employees.

The *Bevles Co.* decision is distinguishable as it involved an arbitrator's interpretation of a collective bargaining agreement, rather than an NLRB application of federal labor law. "[T]his court's review of an arbitrator's interpretation of a collective bargaining agreement is much more limited than its review of a decision of the NLRB in a labor dispute." 791 F.2d at 1393 (footnote omitted). An arbitrator's award will not be vacated because of erroneous findings of fact or conclusions of law. *Id.* at 1392 n. 2; *American Postal Workers v. United States Postal Service,* 682 F.2d 1280, 1285 (9th Cir.1982), *cert. denied,* 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 43 (1983). Only an error by the arbitrator that constitutes a "manifest disregard of the law" will justify reversal of an award. *Bevles Co.* 791 F.2d at 1392 n. 2; *George Day Constr. Co. v. United Bhd. of Carpenters,* 722 F.2d 1471, 1477 (9th Cir.1984). Moreover, an employer may affirmatively agree through a bargaining agreement to make backpay payments that he would not be obligated by the labor laws to make.

To the extent that the *Bevles Co.* decision is precedent for our situation, or adds support to the majority's conclusions, I do not believe it can be reconciled with *Sure-Tan. See Bevles Co.,* 791 F.2d at 1394 (Sneed, J., dissenting).

[2] Under 8 U.S.C. § 1325, any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection at the border, or (3) obtains entry by a willfully false or misleading representation or the willful concealment of a material fact, is guilty of a misdemeanor. *See United States v. Reyes-Oropesa,* 596 F.2d 399 (9th Cir.1979).

A subsequent unlawful entry by aliens into the United States or unlawful entry after deportation constitutes a felony. 8 U.S.C. §§ 1325, 1326.

justed or be granted relief from deportation, that does not alter the fact that his presence is unlawful until such official relief is obtained. If an alien is without documentation, such as a grant of lawful permanent residence which constitutes federal permission to remain in this country, his status is unlawful.

By adopting this approach, the NLRB need not become enmeshed in immigration law nor will it be required to make difficult judgments of immigration status which are reserved to the expertise and discretion of the INS. If the alien is without documentation, his status is unlawful. In *Sure-Tan,* the Court used the terms "undocumented aliens" and "illegal aliens" interchangeably. Other agencies of the federal government withhold benefits from aliens without proper documentation [3] and this

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has not appreciably burdened those agencies nor deprived the INS of exclusive control over immigration law. Furthermore, the NLRB in its discretion may deem it appropriate to stay labor law compliance proceedings with regard to certain individual aliens until their status is conclusively determinated in INS proceedings.

D. *Conclusion*

Unquestionably, the Board's approach does add some complication to remedy compliance proceedings before the NLRB by introducing the element of legal immigration status to its considerations. In addition, denial of backpay and reinstatement awards to illegal aliens does withdraw some of the remedial bite of the labor laws against an unscrupulous employer. Indeed, it may well be that the majority opinion's approach is preferable as a matter of policy. But that approach simply cannot be reconciled with the Supreme Court's teaching in *Sure-Tan.* Such an alternative solution to the problematic interaction between federal labor and immigration laws will have to be requested from that Court or obtained through new legislation from Congress.

I respectfully dissent.

NLRB v. Esco Elevators, Inc.

794 F.2d 1078 (5th Cir.), July 23, 1986—276 NLRB 1245

On petition to review Board Order

Before Rubin, Reavley and Hill, Circuit Judges

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Reavley, Circuit Judge: When this case first came before us in 1984, we remanded it to the National Labor Relations Board (Board) for the limited purpose of determining "whether [Charles McKinney's] safety-related complaints constituted a union endeavor within the meaning of [*NLRB v. Laney & Duke Storage Warehouse Co., Inc.,* 369 F.2d 859 (5th Cir.1966); *NLRB v. Bowman Transportation, Inc.,* 314 F.2d 497 (5th Cir.1963); *Metal Blast, Inc. v. NLRB,* 324 F.2d 602 (6th Cir.1963)] as opposed to a personal undertaking." *NLRB v. Esco Elevators, Inc.,* 736 F.2d 295, 300 (5th Cir.1984). Having reexamined the record on remand, the Board concluded that the complaints were a union endeavor and reaffirmed its prior remedial order. We grant enforcement of that order.

The scope of our review is limited: "we may deny enforcement of an order of the Board only 'if, after full review of the record, we are unable conscientiously to conclude that the evidence supporting the Board's decision is substantial.' " *NLRB v. Gulf States United Telephone Co.,* 694 F.2d 92, 95

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[3] For example, under the Social Security Act, 42 U.S.C. § 405(c)(2)(B)(i)(I), the Secretary of Health and Human Services is required to take affirmative measures to assure that social security numbers will be assigned only to aliens lawfully admitted and to aliens who may lawfully engage in employment.

Under the regulations, before an applicant is granted a social security number, there must be satisfactory proof of age, citizenship or alien status, and true identity. 20 C.F.R. § 422.107(a) (1985). The regulations also provide that a noncitizen shall not be assigned a number until it can be established that the person is not prohibited from engaging in employment in the United States or is procuring a number for nonwork purposes. *Id.* at § 422.104 to .107. An alien seeking to obtain a number may demonstrate residence in the United States "under color of law" by presenting various specified forms of documentation from the INS. 20 C.F.R. § 416.1618(a). If the alien cannot provide such documentation, the Social Security Administration will contact the INS to ascertain the alien's immigration status. 20 C.F.R. § 416.1618(b)(2). A social security number will not be granted to an applicant who presents "invalid or expired Immigration and Naturalization Service documents." *Id.* at § 422.107(e)(4).

It cannot seriously be contended that the NLRB is less able to examine and review INS documentation than is the Social Security Administration.

As a further example, under regulations enacted pursuant to 42 U.S.C. § 1302 of the Social Security Act, payment of certain federal welfare benefits is restricted to citizens and lawfully admitted aliens. 42 C.F.R. § 405.205 (1985).

(5th Cir.1982) (citations omitted). "When the board's findings are reasonable and supported by substantial evidence, a court will affirm them, though the court might well have made contrary findings if sitting *de novo.*" *Id.* (citation omitted).

Here, the Board was presented with the factual question of whether McKinney's safety complaints were a union activity. Two factors were critical to its decision. First, during his successful campaign for president of Local 21 some months earlier, McKinney had emphasized safety-related issues in his platform. From the testimony of Roy Boring, the Board concluded that Esco supervisors knew of McKinney's campaign platform and related it to his complaints about the hazard at Lakeland Manor. Second, in addition to his complaints to his supervisors, McKinney also notified other union officials of the problem. These officials then investigated the problem and **1080** twice discussed with Esco management the need for correction of the problem.

These factors, coupled with the union's decision to pursue McKinney's complaint even after his discharge removed him from the dangerous area, substantially support the Board's conclusion that the complaints were not merely a personal undertaking, but rather part of McKinney's union campaign against unsafe conditions at the workplace. Furthermore, nothing in the record detracts from the Board's finding. We therefore agree that McKinney's discharge for his complaints violated § 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) (1982). Contrary to Esco's suggestion, we see no need to remand for additional testimony.

ENFORCEMENT GRANTED.

NLRB v. Ironworkers Local Union No. 505, affiliated with International Association of Bridge, Structural, and Ornamental Reinforced Ironworkers, AFL-CIO

794 F.2d 1474 (9th Cir.), July 24, 1986—275 NLRB 1113

On petition to enforce Board Order

Before WRIGHT, SNEED and SCHROEDER, Circuit Judges

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SNEED, Circuit Judge: The National Labor Relations Board seeks enforcement of its order finding that the Ironworkers Local Union No. 505 committed an unfair labor practice, in violation of 29 U.S.C. § 158(b)(1)(A), in connection with its operation of a hiring hall. We grant the Board's application for enforcement.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to a collective bargaining agreement, the Ironworkers Local Union No. 505 (the Union) operated a hiring hall for Snelson-Anvil (the employer), a construction and fabrication company. The agreement stated that the Union was the first source of qualified ironworkers, and it gave the Union the exclusive right to refer ironworkers to the employer for 48 hours after a request for applicants. It did not specify the Union's referral procedures.

The Union posted in its hiring hall a short document entitled "Referral Procedures, Iron Workers [sic] Local 505." *See* 3 Transcript of Record (T.R.) exhibit 2. According to the document, the employer could "employ directly a minimum number of key employees" and could "call back two men within a six (6) month period following a job." *Id.* exhibit 2, at 1. The employer was required to hire other workers by calling the Union. The document further provided that workers using the hiring hall would be divided into three groups, denominated A, B, and C. The Union maintained lists for each of these groups, and job applicants were supposed to re-register their names and phone numbers on the list on the first of each month. According to the rules, referrals were to be made from those lists—with group A having priority over group B, group B having priority over group C, and applicants first on each list having priority over those whose names came later. Applicants referred to the em- **1476** ployer but rejected before the expiration of 5 days were returned to their previous position on the list. The general practice was for the Union dispatcher, using the lists, to call applicants at their homes to inform them of specific referrals.

At the time the instant dispute arose and for the preceding three years, the Union had an unwritten exception to these posted rules in the case of recalls by employers following layoffs. In the event of such a "call-back" (as distinguished from an "initial hire"), the lists were initially disregarded and priority was given to those who were physically present in the hiring hall at the time an employer sought workers. Pursuant to this unposted policy, two applicants—Tom Sturdevant and Amadeo Nappi—were twice passed over for call-back referrals in favor of applicants who were lower on the lists but were present in the hiring hall when the jobs opened up. Sturdevant and Nappi were not members of the local and previously had not been informed about the call-back exception. Eventually, however, the Union's dispatcher explained the exception. Soon thereafter, Nappi and Sturdevant were dispatched to the employer.

Sturdevant filed an unfair labor practice charge with the NLRB shortly after learning that he had been passed over pursuant to the unposted call-back policy. The Board issued a complaint against the Union and the case was brought before an administrative law judge (ALJ). The parties stipulated to the facts as recited above and agreed, in addition, that the NLRB had "no evidence to support an allegation of animus of any sort against either Mr. Sturdevant or Mr. Nappi." No testimony was given at the hearing.

The ALJ found in favor of the Union. *See* Respondent's Excerpt of Record (E.R.) at 1–11. He construed the NLRB's complaint as raising only the "duty of fair representation" prong of 29 U.S.C. § 158(b)(1)(A) and not the "discrimination against employees for their exercise of guaranteed rights" prong. *Id.* at 5–6. He determined that call-backs of more than two employees were not specifically covered by the posted referral rules and that the unwritten call-back exception was a longstanding supplementary policy. Moreover, he found, the exception was not a secret and was administered in an evenhanded manner. *Id.* at 9–10. He further held that the criterion of physical presence in the hiring hall was objective in that it indicated an applicant's current interest in obtaining employment. *Id.* at 10.

The General Counsel filed exceptions both to the ALJ's characterization of the complaint as alleging only a breach of the duty of fair representation and to his conclusions regarding the reasonableness of the Union's behavior. On review, the NLRB agreed with the General Counsel. *See* E.R. at 12–22. First, the Board observed that the complaint alleged a violation of 29 U.S.C. § 158(b)(1)(A) independent of the allegation of a breach of the duty of fair representation. Second, it found that the posted rules *did,* on their face, cover call-backs. A departure from these explicit rules, it concluded, constituted an unfair labor practice. *See id.* at 15. Third, the Board held that even if the posted rules did not cover call-backs, physical presence was not the sort of "objective, nondiscriminatory standard which the Board has held must be the basis for hiring hall referrals." *Id.* at 16 (citing *United Association of Plumbers and Pipefitters, Local 619 (Bechtel Power Corp.),* 268 N.L.R.B. 766 (1984)). Accordingly, the Board ordered the Union (1) to cease and desist from administering its call-back exception, (2) to abide by objective standards in operating its hiring hall, and (3) to make Sturdevant and Nappi whole for any damages suffered. The Board denied the Union's motion for reconsideration and now seeks enforcement of its order.

II.

DISCUSSION

A. *The Due Process Challenge*

The Union claims that the NLRB's complaint alleged only a breach of the duty

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of fair representation and not an independent violation of 29 U.S.C. § 158(b)(1)(A) based on interference with guaranteed section 7 rights. It argues that it lacked notice of the latter charge, and that principles of due process therefore barred the Board from finding such a violation. We review the adequacy of the Board's procedures de nova. *See Lord Jim's v. NLRB,* 772 F.2d 1446, 1448 (9th Cir.1985). After due consideration, however, we conclude that the due process challenge must fail.

Contrary to the Union's view, the complaint *can* fairly be construed as alleging an independent violation of 29 U.S.C. § 158(b)(1)(A). Although paragraph 8 of the complaint specifically charges the Union with "fail[ing] to fairly represent Thomas Sturdevant and Amadeo Nappi for reasons which are unfair, arbitrary, invidious and a breach of the fiduciary duty owed to the employees," 1 T.R. item 2, at 3, paragraph 9 more generally alleges the commission of "unfair labor practices affecting commerce within the meaning of . . . the Act." *Id.* These charges in tandem were sufficient to put the Union on notice that the NLRB might proceed under both legal theories. *Cf. NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 433,* 600 F.2d 770, 775 (9th Cir.1979) (holding that "[t]he Board may properly find an unfair labor practice when the issue has been fully litigated even though not specifically pleaded in the complaint"), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980).

B. *The Jurisdictional Challenge*

The Union also argues that the NLRB lacked jurisdiction to regulate its hiring hall practices absent proof of discrimination or animus on the Union's part. Challenges to the NLRB's assertion of jurisdiction are reviewed de novo. *See Columbia Manufacturing Corp. v. NLRB,* 715 F.2d 1409, 1410 (9th Cir.1983) (per curiam) (citing *Foster v. Tourtellotte,* 704 F.2d 1109, 1111 (9th Cir.1983)). This particular challenge, however, is ill-conceived. Under 29 U.S.C. § 160, the NLRB has jurisdiction *to determine* whether any person named in a complaint has committed an unfair labor practice. Because the complaint in the instant case alleged an unfair labor practice, the Board was empowered to decide the issue. In suggesting that the Board's jurisdiction depends on specific factual findings relevant to the merits, the Union confuses the issue of jurisdiction with that of the merits.

C. *The Merits*

Finally, we turn to the merits of the case. The Union challenges the Board's finding that it violated 29 U.S.C. § 158(b)(1)(A) both by deviating from its posted referral rules and by using physical presence in the hiring hall as a criterion in call-back situations. This argument is more substantial than the preceding ones.

1. *Standard of review*

The Board is entitled to enforcement of its order "if it correctly applied the law and its findings are supported by substantial evidence in the record viewed as a whole." *Eichelberger v. NLRB,* 765 F.2d 851, 853 (9th Cir.1985). We accord considerable deference to the Board's interpretation and application of the National Labor Relations Act, *Carpenters Union Local No. 25 v. NLRB,* 769 F.2d 574, 579 (9th Cir.1985) (citing *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979)), and will affirm its reasonable conclusions from the evidence even though they may differ from our own, *see Eichelberger,* 765 F.2d at 853. The Board's disagreement with the ALJ in this case in no way heightens our level of scrutiny: the ALJ's findings "are simply part of the record to be weighed against other evidence supporting the Board." *Id.*

2. *Analysis*

The NLRA, 29 U.S.C. § 158(b)(1)(A) (1982), provides that "[i]t shall be an unfair labor practice for a labor organization or

its agents . . . to restrain or coerce . . . employees in the exercise of [their right to organize]." Based on the facts agreed to by the parties, the Board determined that the Union's unposted call-back policy tended to have such a coercive effect.

The Union argues that this conclusion was improper in light of the stipulation that there was no evidence of Union animus against the charging parties. We disagree. "[N]o specific intent to discriminate on the basis of union membership need be shown" in order to prevail on a claim under 29 U.S.C. § 158(b)(1)(A). *See NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 433,* 600 F.2d 770, 777 (9th Cir.1979), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). A union violates that provision if it wields its power invidiously or arbitrarily, for such conduct "gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies." *Id.; accord NLRB v. International Brotherhood of Electrical Workers, Local 11,* 772 F.2d 571, 576 (9th Cir.1985);

Carpenters Union Local No. 25 v. NLRB, 769 F.2d 574, 580 (9th Cir.1985).

This court has indicated that when the hiring hall deviates from written rules without adequate justification, even pursuant to longstanding exceptions routinely applied, the Board may rationally conclude that the union is wielding its power arbitrarily. *See NLRB v. International Brotherhood of Electrical Workers, Local 11,* 772 F.2d at 576.[1] The Union responds that the call-back policy is not a deviation from the written rules, but rather is a supplement to them. The distinction is subtle and not patently frivolous. Although the ALJ accepted the distinction, the Board rejected it. We defer to the Board's interpretation of the Union's written rules, because we cannot say it is unreasonable and inconsistent with the NLRA's policies. *See id.* at 575.

Like the Board, we are also unpersuaded by the Union's stated justification for the call-back policy—namely that physical presence in the hiring hall is a reasonable method of separating interested from disinterested job applicants. Continuing interest is adequately demonstrated by the applicants' re-registering on the first of each month. Moreover, as the Board noted, physical presence would not be a helpful criterion whenever there were more applicants present in the hiring hall at a given time than there were available jobs. *See* E.R. at 5. In view of these considerations, the Board was warranted in following its stated position in *United Association of Plumbers and Pipefitters, Local 619 (Bechtel Power Corp.),* 268 N.L.R.B. 766, 767 (1984), that physical presence in the hiring hall is an arbitrary basis for job referrals.

ENFORCEMENT GRANTED.

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[1] The Sixth Circuit took a somewhat different approach in *NLRB v. Construction and General Laborers' Union Local No. 534,* 778 F.2d 284 (6th Cir.1985). Noting the importance of the common law of the shop in interpreting labor agreements, the court approved a 30-year-old unwritten exception to hiring hall rules in the case of union stewards. Two factors distinguish that case from this one: (1) the exception involved union stewards, who arguably occupy a special position in our scheme of collective bargaining; (2) the 30-year-old exception predated the collective bargaining agreement containing the hiring hall rules. *Id.* at 290. Neither of those conditions are present here.

United Retail Workers Union Local 881, chartered by United Food and Commercial Workers International Union, AFL–CIO v. NLRB

797 F.2d 421 (7th Cir.), July 25, 1986—268 NLRB 366

On petition to review Board Order

Before BAUER and ESCHBACH, Circuit Judges, and PELL, Senior Circuit Judge

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BAUER, Circuit Judge: This case comes to us on remand from the Supreme Court of the United States. We had held in *United Retail Workers Union, Local 881 v. NLRB,* 774 F.2d 752 (7th Cir.1985), that the National Labor Relations Board did not exceed its statutory authority when it required a union to allow nonunion members of the bargaining unit represented by that union to vote when the union was considering merger or affiliation with another union. The Supreme Court vacated our decision, *United Retail Workers Union, Local 881 v. NLRB,* —— U.S. ——, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986), and remanded the case here for further consideration in light of the recent Supreme Court case of *NLRB v. Financial Institution Employees of America, Local 1182,* 475 U.S. ——, 106 S.Ct. 1007, 89 L.Ed.2d 151 (1986).

Upon consideration of this case in light of the *Financial Institution* case, we find the NLRB did exceed its statutory authority in requiring nonunion employees in a bargaining unit to vote when a union considers merger or affiliation with another union. We, therefore, grant the United Retail Workers' petition for review and overturn the NLRB's decision.

I.

Petitioner, the United Retail Workers Union, Local 881, is an entity created by merger of the United Retail Workers Union and the United Food and Commercial Workers Union. After the unions merged, May Department Stores, an employer whose employees had been represented by the premerger United Retail Workers Union, refused to recognize or deal with the post-merger United Retail Workers Union. The union then filed unfair labor practice charges with the National Labor Relations Board against May Department Stores, alleging violations of sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act. 29 U.S.C. §§ 158(a)(5) and (1).

To determine whether May Department Stores had engaged in an unfair labor practice by refusing to deal with the post-merger union, the NLRB applied its traditional two-prong analysis as modified by what is known as its "*Amoco* rule." In this analysis, the NLRB determines whether the union conducted the vote approving the merger with sufficient due process and then determines whether there is sufficient continuity of interest between the pre- and post-merger unions. As modified by the *Amoco* rule (first expounded in *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982)), the NLRB also determines as a threshold matter whether the union allowed all employees in the bargaining unit to vote on the merger decision. If any of these conditions are not met, the NLRB will not require an employer to bargain with the post-merger union.

Applying this analysis to the instant case, the NLRB found it unnecessary to go any further than the threshold issue. The NLRB held that because United Retail Workers had not allowed nonunion members of the bargaining unit to vote on the merger decision, it was not an unfair labor practice for May Department Stores to refuse to bargain with the post-merger union. *May Department Stores Co.*, 268 N.L.R.B. 979 (1984).

The union appealed to this court, and in *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7th Cir.1985), we upheld the NLRB's decision and denied the union's petition for review. Subsequently, the Supreme Court decided *NLRB v. Financial Institution Employees of America, Local 1182*, —— U.S. ——, 106 S.Ct. 1007, 89 L.Ed.2d 151 (1986), in which the court overturned the NLRB's *Amoco* rule as irrational and beyond the NLRB's statutory authority. The Supreme Court then granted the United Retail Workers' petition for writ of certiorari, vacated this court's decision, and remanded the case for reconsideration in light of the *Financial Institution* decision.

II.

Financial Institution held that the NLRB "exceeded its authority under the [National Labor Relations Act] in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union," *Financial Institution*, 106 S.Ct. at 1017, and that holding controls this case. Although this case involves merger of two unions rather than affiliation, the relevant considerations are the same. Indeed, this is a stronger case than *Financial Institution* foroverturning the NLRB's requirement that nonunion members vote because both parties agree that in this case, due to the small number of nonunion employees, participation by nonunion employees in the vote could not have affected the outcome. Accordingly, we follow *Financial Institution* and hold that the NLRB cannot require the United Retail Workers to allow nonunion employees to vote on the merger before ordering May Department Stores to bargain with the post-merger union.

We express no opinion regarding any remaining issues not presented in this appeal. Whether the merger vote was conducted with sufficient process or whether there is sufficient continuity between the unions as well as any other remaining issues are for the NLRB's determination in the first instance.

III.

United Retail Workers' petition for review is granted and the decision of the NLRB finding that May Department Stores had not engaged in an unfair labor practice on the ground that nonunion employees did not vote on the union merger is reversed. The case is remanded for further proceedings consistent with this opinion.

PELL, Senior Circuit Judge, dissenting: While I agree that the Supreme Court held that the Board in applying its *Amoco* rule in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. ——, 106 S.Ct. 1007, 89 L.Ed.2d 151 (1986) exceeded its statutory authority, and that the Supreme Court vacated our prior judgment in *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7th Cir.1985), and remanded the case to us for reconsideration in the light of *Financial Institution*, I cannot agree with the correctness of the majority's disposition upon that reconsideration. I therefore respectfully dissent.

While it is true that the majority opinion does remand the case for further proceedings by the Board, it does so in a manner sharply limiting the Board's reconsideration and its well recognized jurisdictional primary discretion. It therefore exceeds our jurisdictional authority in a case involving an administrative body. We are a court of review of such proceedings and are not ourselves an administrative body. Any reconsideration must be made in the first instance by the Board.

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See *Bachrodt Chevrolet Co. v. NLRB,* 411 U.S. 912, 93 S.Ct. 1547, 36 L.Ed.2d 304 (1973); *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 245–250, 92 S.Ct. 898, 906–08, 31 L.Ed.2d 170 (1972); *SEC v. Chenery Corp.,* 318 U.S. 80, 87–88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). *Chenery* is apparently the seminal case for the proposition that the making of labor policy is for the administrative body and not the courts. *Chenery* was cited with approval for this proposition in *Sperry & Hutchinson.*

> A court cannot label a practice "unfair" under 15 U.S.C. § 45(a)(1). It can only affirm or vacate an agency's judgment to that effect. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. *Chenery, supra,* at 94 [63 S.Ct. at 462]."

405 U.S. at 249, 92 S.Ct. at 907.

In *Bachrodt, supra,* a petition for certiorari was filed in the Supreme Court challenging a decision of the Seventh Circuit, *NLRB v. Bachrodt Chevrolet Co.,* 468 F.2d 963 (7th Cir.1972). The majority opinion of this court with one exception enforced the Board's order. Judge Stevens dissented disagreeing with the analysis by the majority of the case of *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972). The Supreme Court in a short order, cited above, granted certiorari, vacated the judgment, and remanded the case "with instructions to remand the case to the National Labor Relations Board for such proceedings as may be appropriate in light of" the *Burns* case.

While it is true that the remand in the present case was to this court for further consideration in the light of *Financial Institution,* it appears to me that if the Board's *Amoco* rule is to be vacated or amended the ultimate primary line of disposition should be at the Board or administrative level. The Board had adopted the rule as a policy matter and the Board should have the primary consideration as to its future.

While this court has held that *Chenery* does not require pointless remand, *NLRB v. Village IX, Inc.,* 723 F.2d 1360, 1370 (7th Cir.1983), there is to be a remand here in any event and the Board should have the first opportunity, without limitation, of considering the application of *Financial Institution* to this case and to its *Amoco* rule in general.

While I might agree that in most any factual context, the *Amoco* rule now has little vitality, the Board should have the first opportunity of reconsideration of all issues pertaining to the proposed merger here involved.

My position in contrast to that of the majority might seem at first blush to be merely a matter of an unnecessary exercise in semantics. Words, however, are the principal method of communicating meaning, and the meaning of the majority opinion is loud and clear. While it purports to express no opinion on the "remaining issues," it also expressly holds "that the NLRB cannot require the United Retail Workers to allow nonunion employees to vote on the merger before ordering May Department Stores to bargain with the post-merger union."

Pursuant to a circuit rule, following the remand, the parties were requested to file statements of position. Both the Union and the Board agreed in their statements that the case should be remanded to the Board for further proceedings in the light of *Financial Institution.* The Union also requested that the original decision should be vacated. While arguably, the Board could reconsider all aspects of a case even though its prior opinion was vacated by this court, the majority expressly reverses, precluding thereby any reconsideration of its reasoning in its prior decision.

Whether the Board can find any succor in the *Amoco* rule, as doubtful as that might now seem, it is up to the Board to make that initial determination. This line of demarcation between the executive and judicial branches is an important one and, in my opinion, should not be breached as it has been by the majority's opinion. It appears to me that our obligation on remand was simply, without more, to have remanded the case to the Board for further consideration *Financial Institution.*

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I do also note what seems to be a gratuitous observation in the majority opinion, that the present case is stronger than *Financial Institution* because participation by the minimal number of nonunion employees could not have affected the outcome. I also note, however, the union did not apportion the votes among its four local units. Two of these were solely stores of the May Company. The record simply does not show whether the some 2344 votes against the merger with the addition of the votes of the nonunion personnel of May, which had fewer employees than the number of nay votes, would have shown a different result as to May. In fact we do not know what number of nay votes came from May people. The uncertainty can scarcely make any contribution to this being a stronger case. In the event that at some future time, resolution of this issue should become material to disposition, it is for the Board, upon the basis of the record before it, to pass upon the matter.

NLRB v. DMR Corp. and Harrill Electric Contractors, Inc.

795 F.2d 472 (5th Cir.), July 28, 1986—274 NLRB 38

On petition to enforce Board Order

Before GOLDBERG, HILL and JONES, Circuit Judges

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GOLDBERG, Circuit Judge: This case involves an electrical contractor's attempt to avoid its legal obligations to its union employees by setting up a non-union shop fifteen minutes down the road. It comes to us a second time on the application of the National Labor Relations Board for enforcement of its order entered against Harrill Electrical Contractors, Inc. (Harrill) and DMR Corporation (DMR). The Board found that Harrill and DMR, as a single employer, violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1) and (5), by refusing to apply the terms of Harrill's collective bargaining agreements with Locals 59 and 116 of the International Brotherhood of Electrical Workers (the unions) to electricians who were employed by DMR, and by refusing to recognize Locals 59 and 116 as the bargaining representatives of those employees.

Upon the Board's first trip before this court, we upheld the Board's finding that Harrill and DMR constituted a single employer. *NLRB v. DMR Corp.*, 699 F.2d 788, 791 (5th Cir.), *reh'g and reh'g en banc den.*, 706 F.2d 315, *cert. den.*, 464 U.S. 852, 104 S.Ct. 164, 78 L.Ed.2d 150 (1983). We concluded, however, that the record provided insufficient facts to allow us properly to review the Board's finding that the employees of DMR and Harrill constitute an appropriate bargaining unit. We therefore remanded the case to the Board "for the limited purpose of a new hearing, and new findings and conclusions on the sole issue of the appropriateness *vel non*, of the single bargaining unit of Harrill's and DMR's electricians." *Id.* at 793. With the additional facts adduced at this second hearing before us, [1] we now enforce the Board's order.

FACTUAL BACKGROUND

The facts found during the first hearing before the Board are set out in the prior opinion, 699 F.2d at 789–90, and in the Board's order, 258 NLRB 1063 (1981). The Administrative Law Judge (ALJ) found, the Board concurred, and this court agreed, that Respondents' status as a single employer

> is revealed, among other things, by husband and wife, together, owning 80 percent of the shares of both, the remaining shares of both being held in identical proportions by Rawlinson and Walters; by husband being the nominal head of one and wife of the other, with Anita [the wife] plainly being no more than a figurehead; by husband and wife comprising one-half of the board of directors of one, and two-thirds of the other; by the informality of the loan arrangements between the two entities because they were so "closely-held"; by the identical nature of their business activities; by the dovetailing of Harrill Electric's business decline with DMR's genesis and business build-up, with DMR seemingly inheriting Harrill Electric's role *vis-a-vis* at least two major customers, McCarty Corporation and Honeywell; by the

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[1] Harrill and DMR ("Respondents") initially assert that the prior panel's remand to the Board did not contemplate a new evidentiary hearing and that the Board therefore lacked authority to reopen the record. In the face of the prior opinion's plain language, it is difficult to conceive of a more frivolous argument, and we therefore reject it. Respondents also contend that the prior panel lacked authority to remand the case for its stated purpose. Whatever the merits of respondents' argument, we make no attempt to consider it, as the prior panel's conclusion is the law of the case.

> switch of three-fourths of Harrill Electric's management team—Eavenson, Walters, and Rawlinson—to DMR, where each assumed the approximate role occupied with Harrill Electric; by Randy's [the husband's] being a moving force in the creation of DMR; by Randy's obvious part in the switch of Harrill Electric employees to DMR, his reassigning Ralston from DMR's Denton job to one in Fort Worth, and his concern about the security of DMR's copper wire; by the substantial transfer of Harrill Electric equipment to DMR, albeit under color of sale; by Walters being compensated, during his first 2 or 3 weeks with DMR, by vacation pay accrued with Harrill Electric; by the manifest union-avoidance purpose behind the decline of Harrill Electric and the emergence of DMR, which is suggestive of a ruse; and by the appallingly vague, evasive, self-contradicting, and mutually conflicting testimony of Respondents' witnesses, which not only suggests, but also reveals with virtual conclusivity a form-but-not substance contrivance.

DMR Corp., 258 NLRB at 1068.

Six witnesses testified during the hearing on remand.[2] Two witnesses, Joe Gilmore and Alan Head, had been electricians for Harrill before the emergence of DMR. Three witnesses, Mark Penney, Amos Pollard, and James Ralston, were electricians carried over from Harrill to DMR. The sixth witness, Kenneth Tuggle, was among the first electricians hired by DMR and had never worked for Harrill previously.

The testimony addressed almost exclusively the prior panel's concern that the record contained "little, if any, evidence concerning the work, skills, qualifications, duties and working conditions of the Harrill and DMR electricians." 699 F.2d at 792. As to skills and qualifications, all witnesses were licensed by the City of Dallas as journeyman wiremen. Those witnesses who had worked for both Harrill and DMR testified that their supervisors at DMR did not require of them any greater skills than were required of them at Harrill. All witnesses testified that assignments with both Harrill and DMR involved a mix of residential and commercial work. There was also a considerable carryover of on-the-job supervision in foremen Don Watkins and Mike Eavenson. Finally, Ralston testified that, "basically [he] used the same tools for Harrill as [he] did at DMR," and that the manner in which the work was assigned, supervised, and performed was "[b]asically the same." Rec.Vol. 3 at 656–57.

On the basis of this new evidence and the evidence previously developed—"most notably, Randy Harrill's continued active role, the substantial continuity otherwise of top management, and the union avoidance purpose behind the shift from Harrill Electric to DMR",[3] the ALJ reaffirmed his conclusion, paraphrasing *Appalachian Construction, Inc.*, 235 NLRB 685, 686 (1978), that "The only real difference, other than name, between [DMR] working on the project[s] and [Harrill Electric] was the absence of union labor." Rec.Vol. 5 at 697. The Board therefore concluded that "the only appropriate bargaining unit is 'the single bargaining unit of Harrill's and DMR's electricians.'" *Id.* at 737.

DISCUSSION

A. *Appropriateness of the Bargaining Unit*

The principle question before us is whether the Board's unit determination is correct. "Our power of review is quite

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limited. We are not to overturn the Board's decision unless it is 'arbitrary and capricious.'" *NLRB v. DMR Corp.*, 699 F.2d at 791.

> In determining the appropriateness of a bargaining unit, we are concerned with the community of interests of the employees involved. *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76, 77 (1977). Whether employees have a community of interests is determined by looking at such factors as: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed; similarity in the qualifications, skills and training of employees; frequency of contact or interchange among employees; geographic proximity; continuity or integration of production processes; common supervision and determina-

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[2] After an attempt to prevent the ALJ from reopening the record failed, counsel for Respondents refused to participate further and left the hearing room. The hearing proceeded without them.

[3] Opinion of ALJ on Remand, Rec.Vol. 5 at 697.

tion of labor-relations policy; relationship to the administrative organization of the employer; history of collective bargaining; desires of the affected employees; and extent of union organization. R. Gorman, Labor Law: Unionization and Collective Bargaining 69 (1976). *NLRB v. Purnell's Pride, Inc.,* [609 F.2d 1153 (5th Cir.1980)].

The most reliable indicium of common interests among employees is similarity of their work, skills, qualifications, duties and working conditions. See *Allied Chemical Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co. v. NLRB,* 404 U.S. 157, 172, 92 S.Ct. 383, 393, 30 L.Ed.2d 341 (1971). Two other reliable indicia of common interests are centralized local control on a day-to-day basis of those labor policies which most immediately affect the interest of the employees involved and common supervision. It is these indicia which ultimately determine whether an employer-wide unit of Harrill and DMR electricians is the appropriate bargaining unit or whether DMR's electricians constitute an appropriate bargaining unit separate from Harrill's employees. *Peter Kiewit Sons' Co., supra. Id.* at 791–92.

In assessing the employees' community of interests, "[t]he Board must consider the entire factual situation, and its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors." *International Association of Machinists and Aerospace Workers v. NLRB,* 759 F.2d 1477, 1480 (9th Cir.1985). We have noted therefore that "Harmonizing the cases into a uniform pattern is not wholly feasible, because of the factual nature of the determination, the broad discretion in the agency in making one of several acceptable choices, and the limited scope of correctly applied judicial scrutiny." *NLRB v. J.M. Wood Manufacturing Co.,* 466 F.2d 201, 202 (5th Cir.1972), *cert. den.,* 410 U.S. 931, 93 S.Ct. 1372, 35 L.Ed.2d 593 (1973).

The parties have treated this case as one of accretion by a single employer. "An accretion occurs when new employees are added to an already existing [bargaining] unit." *Universal Security Instrument, Inc. v. NLRB,* 649 F.2d 247, 253 (4th Cir.), *cert. den.,* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981). "A finding of accretion by the Board is similar to the Board's certifying of a particular group of employees as an appropriate bargaining unit because in both the Board is using its expertise to determine the most appropriate mix of employees for a particular unit." *Id.* In this case, the Board seeks to add ("accrete") DMR's employees to the bargaining unit comprised of Harrill's employees and represented by the unions. The community of interests analysis necessary to support an accretion, however, differs somewhat from the Board's more ordinary decision to certify initially a particular group of employees as an appropriate bargaining unit. *NLRB v. Security Columbian Banknote Co.,* 541 F.2d 135, 140 (3rd Cir.1976). In a certification case, "The unit need not be the most appropriate, but only one which is appropriate under the circumstances." *Ochsner Clinic v. NLRB,* 474 F.2d 206, 209 (5th Cir.1973).

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By contrast, in an accretion case, "A group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit *that they have no true identity distinct from it.*" *NLRB v. St. Regis Paper Co.,* 674 F.2d 104, 107–08 (1st Cir.1982) (emphasis added); *accord Security Columbian Banknote Co., supra,* 541 F.2d at 140 (accretion proper "when such a community of interest exists among the entire group that the additional employees have no separate unit identity"); *DMR Corp., supra,* 699 F.2d at 792 n. 2 ("The issue is whether the difference [between the work, skills, qualifications, duties and working conditions of Harrill and DMR electricians] is so great as to indicate that DMR's employees constitute an appropriate unit separate from Harrill's employees").[4] Nonetheless, "[t]he

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[4] Respondents argue that in order to prevail in an accretion case the General Counsel "must show that the two groups of employees constitute *the only* appropriate unit [citing *Acoustics, Inc.,* 270 NLRB 1046, 1047 (1984)]. In other words, in order for the General Counsel to prevail, it must be shown that the employees of the nonunion company *standing alone could not constitute an appropriate bargaining unit.*" Respondents' Brief at 9 (emphasis in original). Insofar as this formulation of the accretion test focuses solely on the community of interests of the employees to be accreted to the exclusion of the community of interests of the two groups as a whole, it must be rejected. Were we to accept Respondents' test, any finding of accretion would necessarily contain the seeds of its own destruction, as is apparent from the example below.

Assume two groups of employees: A, the group of non-union employees to be accreted, and P, the pre-existing unit. If accretion is appropriate, the members of the combined group AP by definition share a community of interests. From this finding, however, it also follows that the members of any subset of AP also share a community of interests. Thus, the members of A share a community of interests and could therefore stand alone as an appropriate unit. Under Respondents' formulation, how-

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Board's finding of accretion is similar to its function of determining the appropriateness of particular units for bargaining purposes. . . . The determination is one involving the Board's discretion and should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." *NLRB v. R.L. Sweet Lumber Co.,* 515 F.2d 785, 794 (10th Cir.), *cert. den.,* 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302 (1975); *accord NLRB v. Baton Rouge Waterworks Co.,* 417 F.2d 1065, 1067 (5th Cir.1969).

This heightened concern for the interests of the employees to be accreted arises from accretion's interference with the employees' freedom to choose their own bargaining agents. *International Association of Machinists v. NLRB, supra,* 759 F.2d at 1480. Accretion interferes with the employees' freedom to choose because a "determination [of accretion] forecloses a vote and restricts the employees in the exercise of their basic right to select their bargaining representative." *Boire v. International Brotherhood of Teamsters,* 479 F.2d 778, 796–97 (5th Cir.1973) (quoting *Pix Manufacturing Co.,* 181 NLRB 88, 90 (1970)). The Board's special attention to the existence of a distinct and separate community of interests among the employees to be accreted addresses this concern, as a group of employees whose interests are distinct from another group's interests would not necessarily choose the same bargaining representative.

The Board satisfied its evidentiary burden on remand when the evidence showed that "Respondent's electricians performed a mix of the same kinds of commercial and residential work, using much the same skills, during both the Harrill Electric and DMR phases." Rec. at 697. With this finding, the Board could properly conclude

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that DMR's employees did not possess a community of interests sufficiently separate and distinct so as to preclude their accretion to the bargaining unit of Harrill's employees. Accordingly, we conclude that the Board's determination that the employees of Harrill and DMR constitute the appropriate bargaining unit is neither arbitrary nor capricious.

The Board's decision is further supported by its finding "that DMR was created in order to avoid dealing with the bargaining representatives of Harrill's employees." *DMR Corp.,* 258 NLRB at 1063 n. 3. This finding weighs heavily in this case, as the Board must, in addition to safeguarding the employees' freedom of choice, act to ensure the stability of labor relations. *International Association of Machinists v. NLRB, supra,* 759 F.2d at 1480.

This finding of union animus distinguishes this case from the "double-breasted" [5] cases relied upon by Respondents in their attack on the Board's order. Where a true "double-breasted" operation exists, the Board has generally refused to find the requisite community of interests. *See, e.g., Peter Kiewit Sons' Co.,* 231 NLRB 76 (1977), *enforcement granted,* 595 F.2d 844 (D.C.Cir.1979). Here, the Board expressly distinguished *Peter Kiewit* by finding that Respondents did not constitute a double-breasted operation: "two companies *operating in different economic climates,* one union and one non-union." *DMR Corp.,* 258 NLRB at 1069 (emphasis in original) (quoting *Appalachian Construction, Inc.,* 235 NLRB 685, 686 (1978)). Given DMR's succession to Harrill contracts, and the coincidence of Harrill's decline with DMR's rise, we cannot conclude that the Board's finding is arbitrary and capricious.

B. *Relief*

To remedy Respondents' violations of the NLRA, the Board ordered Harrill and DMR to cease and desist from the unfair labor practices found; to recognize and bargain upon request with the unions as the bargaining representatives of DMR electricians; to make their employees whole

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ever, this fact would destroy the finding of accretion, because the General Counsel would be unable to show "that the employees of the nonunion company *standing alone could not constitute an appropriate bargaining unit.*" The proper test is therefore not whether group A has a community of interests among its members only, but rather whether the difference between the communities of interests of A and P "is so great as to indicate that [A's] employees constitute an appropriate unit separate from [P's] employees." *DMR Corp., supra,* 699 F.2d at 792 n. 2.

[5] We noted in *Florida Marble Polishers Health and Welfare Trust Fund v. Edwin M. Green, Inc.* that

> In general, double breasted units are formed in order to allow a contractor to compete for union and nonunion work. For example, a subcontractor may wish to operate one corporation that employs union workers and which, therefore, can bid for work from general contractors who let contracts only to unionized subcontractors. Simultaneously, the subcontractor may operate a nonunionized corporation which will bid on jobs let by general contractors who do not require unionized subcontractors.

653 F.2d 972, 976 n. 7 (5th Cir.1981), *cert. den.,* 456 U.S. 973, 102 S.Ct. 2235, 72 L.Ed.2d 846 (1982). However, the contractor may not, under cover of an alleged double-breasted operation, avoid its union shop obligations.

for any losses suffered by reason of their failure to honor the collective bargaining agreements with the unions; and to post an appropriate notice.

Respondents claim that the Board erred in ordering make-whole relief. This claim is wholly without merit. Section 10(c) of the NLRA, 29 U.S.C. § 160(c), accords the Board broad discretion in fashioning remedies for unfair labor practices. The remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964). The Board's order must not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1942).

Respondents have failed to make this showing. The Board may properly prevent the Respondents from gaining an advantage by their unlawful conduct. An order requiring that the employees be made whole for the unlawful repudiation of a collective bargaining agreement serves this end. *NLRB v. R.H. Rutter-Rex Manufacturing Co.,* 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969); *NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575, 612, 89 S.Ct. 1918, 1939, 23 L.Ed.2d 547 (1969). As

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we stated in *NLRB v. George E. Light Boat Storage, Inc.,* 373 F.2d 762, 768 (5th Cir.1967).

> [a] simple order to bargain in good faith would not be sufficient. To allow an employer unlawfully to repudiate a collective bargaining agreement at the small cost of being required, sometime in the future, to sit down and bargain with the union would encourage such violations of the Act. For the period from the breach until a new agreement, if any, is reached pursuant to the Board's bargaining order, the employer would be at liberty to disregard the terms of the contract. The temptation to violate the Act in a situation where the employer would have everything to gain and nothing to lose could be overwhelming.

Similarly, mere prospective application of the contracts would permit the Company to reap an unjust advantage from its unlawful conduct and would not adequately redress the employees' losses.[6] The Board's order, "which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy." *Virginia Electric & Power Co., supra,* 319 U.S. at 541, 63 S.Ct. at 1219. We therefore enforce it.

CONCLUSION

A prior panel of this court held that Respondents are a single employer. We now uphold the Board's finding that Respondents' employees constitute an appropriate bargaining unit. Together, these two findings trigger Respondents' liability under the NLRA for their actions in this case. Our laws protect the labor-management relation from the insidious acts here proved just as surely as they protect that relation from overt violence. At long last, the Board can now begin the process of providing Respondents' employees with the material relief to which they are entitled by virtue of Respondents' patently unlawful activities. To borrow from the Biblical injunction: what the Board hath joined together let not the employer rend asunder. The Order of the Board is

ENFORCED.

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[6] Respondents' suggestion that no DMR employees suffered harm from Respondents' refusal to apply the contracts is an issue properly reserved for the compliance stage of this proceeding.

NLRB v. Local Union 497, International Brotherhood of Electrical Workers, AFL–CIO

795 F.2d 836 (9th Cir.), July 28, 1986—275 NLRB 1290

On petition to enforce Board Order

Before GOODWIN, HALL and THOMPSON, Circuit Judges

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GOODWIN, Circuit Judge: Local 497 of the International Brotherhood of Electrical Workers appeals a National Labor Relations Board (NLRB) decision that the local's refusal to disclose to employers the names and addresses of all persons subject to a union hiring hall referral procedure is an unfair labor practice. We affirm.

Local 497, International Brotherhood of Electrical Workers, maintained a hiring hall that by collective bargaining agreement was the exclusive source of electrical workers in the contract area. During negotiations over a new contract, the multiple employer association expressed dissatisfaction with the hiring hall provision, claiming that those referred to the employers were often incompetent. As part of these negotiations, the employers demanded the names and addresses of all union members using the hiring hall, claiming that this would aid in determining the competence of workers. The union agreed to permit the employers to examine the records, but refused to allow the employers to copy them. It claimed that the employers' motive for seeking the records was not to determine competence, but to collect names and addresses for antiunion purposes, including the hiring of union members without going through the hiring hall.

The employers modified their request to include the names of all those using the hiring hall, not just union members, [1] and brought an unfair labor practice proceeding, claiming that the information sought was relevant to the bargaining process so that the refusal to disclose it was a refusal to bargain in good faith. The union conceded that the information was relevant, but defended its refusal to disclose on the grounds of freedom of association. The NLRB found that the refusal to supply the information was an unfair labor practice and that there were no constitutional objections to the compelled disclosure of the information. This petition for enforcement followed.

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The National Labor Relations Act (NLRA) creates a duty to bargain in good faith. *See* 29 U.S.C. § 158(b)(3) (1982). As part of this duty, the parties to bargaining must disclose information that aids in the bargaining process. *See NLRB v. Associated General Contractors,* 633 F.2d 766, 770 (9th Cir.1980), *cert. denied,* 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981). A broad discovery standard is used for relevance. *NLRB v. Leland Stanford Junior University,* 715 F.2d 473, 474 (9th Cir.1983). However, the bare assertion that information is needed to process a grievance does not oblige the party from whom it is requested to turn it over. *See Detroit Edison Co. v. NLRB,* 440 U.S. 301, 318, 99 S.Ct. 1123, 1132, 59 L.Ed.2d 333 (1979). Moreover, the Supreme Court has rejected the Board's position that "interests in arguably relevant information must always predominate over all other interests, however legitimate." *Id.*

The Board's responsibility is to balance the arguable relevance of the material against any harm the union may legitimately claim will stem from disclosure. To the extent that these contentions require the resolution of issues of law outside the NLRB's area of expertise, we review for legal error. To the extent that the issues involve considerations intrinsic to labor law, we defer to the NLRB's reasonable judgments.

The NLRB argues that any privacy interests are irrelevant because the NLRA supersedes all but constitutionally protected associational rights. However, *Detroit Edison* held that the sensitive nature of an employee's test scores made the NLRB's forced disclosure of the information an abuse of its remedial discretion. 440 U.S. at 318–20, 99 S.Ct. at 1132–34. That holding reached no constitutional conclusion.

The employers in our case sought the names and addresses of the users of the hiring hall. The employer could require employees to disclose their names and addresses as a condition of employment. Moreover, the union was willing to allow outsiders to inspect the list. We are therefore unable to see that the additional disclosure, which merely reduced the burden on employers in collating information, so deals with such sensitive information as to require the employer to meet a higher standard of relevance. *NLRB v. Wyman-Gordon,* 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

The union also claims that its associational right to privacy under the first amendment was infringed by the NLRB's order. *See, e.g., NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 458–60, 78 S.Ct. 1163, 1169–71, 2 L.Ed.2d 1488 (1958) (striking down state law which required organization to disclose the names of its members as violating right to free association because of the potential for harrassment of members and harm to organization). The union is an association which may assert the organizational rights of its members and its own interest against actions which reduce its membership under *NAACP v. Alabama ex rel. Patterson. See International Organization of Masters, Mates, and Pilots v. NLRB,* 575 F.2d

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[1] Because the propriety of a failure to respond to a request for information cannot be based solely on the wording of the initial request, *see Oil, Chemical & Atomic Workers Local Union 6-418 v. NLRB,* 711 F.2d 348, 363 n. 40 (D.C.Cir.1983); *Ohio Power Co.,* 216 N.L.R.B. 987, 990–91 n. 9 (1975), *enforced,* 531 F.2d 1381 (6th Cir.1976), we are concerned with the modified request for names of union members using the hiring hall.

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896, 905 (D.C.Cir.1978). We find, however, that disclosure of the names and addresses of all members using the hiring hall does not threaten the union or the associational rights of union members. While the union claims to fear harrassment or misuse of the names, such actions would violate the contract or the NLRA. The union has failed to point to any facts, either before the NLRB or in this court, suggesting that harrassment is likely. The NLRB's conclusion that retaliation is unlikely is well within its sphere of expertise. On this record, we cannot say the NLRB erred or that any first amendment interests are implicated.

The union also argues that even if the associational rights of the union and its members were not violated, the NLRB erred in requiring the union to provide a written list of names and addresses of hiring hall users because of the sensitive nature of the information. The sensitive nature of information requested is one factor to be considered by the NLRB in determining whether a party has violated its duty to bargain in good faith by refusing to provide requested information. *See Detroit Edison,* 440 U.S. at 318–20, 99 S.Ct. at 1132–34 (holding that NLRB erred in requiring employer to disclose performance test scores of employees as information for collective bargaining, regardless of employee consent, because of the sensitive nature of the test scores). The names and addresses of persons using the hiring hall do not have the same degree of sensitivity as the performance test scores requested in *Detroit Edison.* The employer could require employees to disclose their names and addresses as a condition of employment, and the union was willing to allow outsiders to inspect the list of names and addresses. The requirement that the union provide employers a written list aided the employers in collating the information without increasing the amount of information disclosed by the union. The union has conceded the relevance of this information. *See Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB,* 233 NLRB 144 (1977), *enf'd,* 598 F.2d 267 (D.C.Cir.1979); *International Association of Asbestos Workers Local No. 80,* 248 NLRB 143 (1980). Under these circumstances, we conclude that the NLRB did not err in finding that the interest in disclosure for bargaining purposes outweighed any interest in the sensitivity or confidentiality of the names and addresses of hiring hall users.

Petition enforced.

NLRB v. Carson Cable TV; Inglewood Cable TV; TCI of Pomona Cable TV; and Cable Management Company

795 F.2d 879 (9th Cir.), July 30, 1986—275 NLRB No. 201

On petition to enforce Board Order

Before Kennedy, Beezer, and Hall, Circuit Judges

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Beezer, Circuit Judge: The National Labor Relations Board ("Board") has applied to this court for enforcement of its order requiring the respondents, Carson Cable TV ("Carson"), Inglewood Cable TV ("Inglewood"), TCI of Pomona Cable TV ("Pomona"), and Cable Management Company ("CMC"), to bargain collectively with the Communications Workers of America, Local 11513. The Board found that the respondents had committed an unfair labor practice by refusing to bargain collectively in violation of the National Labor Relations Act ("NLRA") section 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1).

The respondents contend that that the Board improperly certified the union as bargaining representative of all their field employees because (1) the finding that respondents constitute a single employer is not supported by substantial evidence, and (2) the designation of a single multi-location bargaining unit of field employees was inappropriate.

We affirm the decision of the Board and grant the application to enforce the order.

I

Background

Carson, Inglewood, and Pomona operate cable television systems in their respective communities in the greater Los Angeles area. CMC, a cable management company, conducts management and administrative activities for Carson, Inglewood, and Pomona.

On July 26, 1983, the Communication Workers of America filed a petition under section 9(c) of the NLRA, 29 U.S.C. § 159(c), seeking certification as the exclusive collective bargaining representative for all of the respondents' employees. The Regional Director of the National Labor Relations Board found that all of the respondents together constituted a single employer and that a single multi-location bargaining unit of field employees was appropriate. On September 11, 1984, the Board

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affirmed the Regional Director's decision and direction for an election.

By secret ballot, a majority of the respondents' technical employees voted to be represented by the union. [1] On September 27, 1984, the Regional Director certified the union as the collective bargaining representative of the respondents' technical employees in that multi-location bargaining unit.

Following its certification, the union made a formal demand on the respondents for bargaining and requested information concerning the employees' terms and conditions of employment. The respondents refused to bargain and declined to furnish the requested information. [2]

On April 1, 1985, the Regional Director issued a complaint alleging that the respondents had violated section 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by refusing to negotiate with the certified bargaining representative. The respondents denied any violation of the Act and contended that the bargaining unit certified by the Board was inappropriate. On August 20, 1985, the Board granted the General Counsel's motion for summary judgment and ordered respondents to bargain with the union. The Board now seeks enforcement of its order pursuant to section 10(e) of the NLRA, 29 U.S.C. § 160(e).

II

Single Employer Finding

The Board found that all of the respondents constitute a single integrated business enterprise and thus are a single employer for labor relations purposes. Under section 10(e) of the NLRA, we review the Board's conclusion to determine whether it is supported by substantial evidence on the record. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). In conducting our review, "in light of the special expertise of the Board, we will defer to the reasonable derivative inferences drawn by the Board from credited evidence." *See NLRB v. Big Bear Supermarkets No. 3,* 640 F.2d 924, 928 (9th Cir.), *cert. denied,* 449 U.S. 919, 101 S.Ct. 318, 66 L.Ed.2d 147 (1980).

It has long been settled that the Board may treat two or more distinct business entities as a "single employer" within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2). [3] *NLRB v. Don Burgess Construction Corp.,* 596 F.2d 378, 384 (9th Cir.), *cert. denied,* 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979). To determine single employer status, the Board considers four basic criteria: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *South Prairie Construction Co. v. Operating Engineers Local 627,* 425 U.S. 800, 802 n. 3, 96 S.Ct. 1842, 1843 n. 3, 48 L.Ed.2d 382 (1976) (per curiam) (quoting *Radio Union v. Broadcast Service, Inc.,* 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965)); *Carpenters' Local Union No. 1478 v. Stevens,* 743 F.2d 1271, 1276 (9th Cir.1984), *cert. denied,* —— U.S. ——, 105 S.Ct. 2018, 85 L.Ed.2d 300 (1985).

The Board has stressed the first three of these factors, in particular the presence of control of labor relations, because these factors tend to show "operational integration." *Sakrete, Inc. v. NLRB,* 332 F.2d 902, 905 n. 4 (9th Cir.1964), *cert. denied,*

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[1] The vote was 9 to 5 in favor of the union, with 2 challenged ballots, an insufficient number to affect the results of the election.

[2] An election certification does not constitute a final order which can be appealed to the courts of appeals. The respondents refused to bargain in order to obtain review of these issues through an appeal from an order to bargain following an unfair labor practice proceeding. The respondents properly preserved their objection to the designation of the multi-location bargaining unit, and we have jurisdiction to review those issues. *See NLRB v. Island Film Co., Inc.,* 784 F.2d 1446, 1450 n. 5 (9th Cir.1986).

[3] Section 2 of the NLRA provides:

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, [or] corporations. . . .

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly. . . .

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379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965). However, no one of these factors is controlling, and the presence of all four factors is not necessary to a finding of single employer status. *NLRB v. Don Burgess Construction Corp.,* 596 F.2d at 384; *NLRB v. Big Bear Supermarkets No. 3,* 640 F.2d at 930. The ultimate determination of single employer status depends upon all of the circumstances of the case. *NLRB v. Don Burgess Construction Corp.,* 596 F.2d at 384. We will consider each of the relevant factors in turn.

A. *Common Ownership*

Carson, Inglewood, and Pomona are California corporations that have been awarded cable television franchises in their respective communities.

Inglewood and Pomona were originally owned and managed by Six Star Cable Vision. TCI Growth, Inc., a subsidiary of Telecommunications, Inc. ("TCI"), purchased 20 percent of Inglewood stock and 80 percent of Pomona's stock in 1982. The remaining stock is held by individuals—298 in the case of Inglewood and 25 in the case of Pomona. Carson is principally owned by Marvin Roseman.

Shortly after the TCI subsidiary purchased stock in Inglewood and Pomona, TCI and Roseman created a new corporation—CMC—to manage Inglewood, Pomona, and Carson. TCI owns 80 percent of CMC, and Roseman owns the other 20 percent.

Roseman serves as president of CMC and Teresa Speir is its area manager. Speir was formerly employed by TCI, and now reports to both Roseman and to a TCI vice-president. CMC shares office space with the Carson facility.

Although it is true that no one entity has a controlling interest in all four entities and that there is no complete identity of ownership interests, it is apparent that a pattern of common ownership exists among the four businesses through the combined ownership interests of TCI and Roseman.

B. *Common Management*

CMC hires the system manager for each of the three cable television facilities, and those system managers report to CMC area manager, Speir. The system managers in turn are responsible for hiring and firing his or her own staff. CMC is informed of each personnel action and prepares the necessary paperwork, which is in turn forwarded to TCI. Neither CMC nor TCI has ever vetoed a hiring decision made by a system manager, although respondents appear to acknowledge that CMC or TCI possess the actual authority to exercise such a veto. In addition, TCI prepares the payroll for each system and issues the paychecks.

CMC establishes operating procedures for the systems under which each system manager is to run the day-to-day operations of each respective system. A TCI accounting manual prescribes accounting procedures for each system. A CMC-prepared document sets forth operating rules for the public access channel.

Although each system has its own office, equipment, customers, and budget, CMC reviews the budgets drafted by each system manager and forwards them to TCI, which has the ultimate authority over budget questions. CMC or TCI also advance the funding to cover most major expenses, including cable network charges, programming fees, and construction costs. These advances are later charged back to the individual system. Local expenses, such as utilities, gasoline, office supplies, and rent, are paid directly by each system out of its individual bank accounts.

The Board reasonably concluded that, through CMC, TCI and Roseman maintain a degree of control at the policy level for all three systems. Each system operates within certain general guidelines prescribed by CMC. The Board's conclusion that ultimate authority is vested in CMC, which is controlled by TCI and Roseman, is the product of reasonable inferences drawn from the evidence.

C. *Interrelation of Operations*

The three systems are the only systems managed by CMC, and they are located in

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close geographical proximity to each other in the greater Los Angeles area. Each system does maintain its own antennae for receiving satellite signals and its own equipment and physical plant for delivery of television signals to subscribers. However, there is a significant degree of interrelation as the systems share common management and some centralized administration, as well as certain facilities and services.

An accounts payable clerk employed by CMC provides clerical and bookkeeping support for the three systems. A regional engineer provided by CMC spends about 40 percent of his time visiting the three systems to assist with technical problems. A CMC converter technician repairs converters for all three systems at the Pomona system's warehouse. A public access coordinator working for CMC assists all three systems in fulfilling their public access responsibilities. The main studio for public access programming—used by the public in all three communities—is at the Carson facility.

The field employees at each of the three systems install, connect, disconnect, and maintain the cable hardware in subscribers' homes. At one point, the field employees at Carson and Inglewood were supervised by the same chief technician. Now the chief technician at Carson visits Inglewood twice a month to assist its field staff. For a time, a customer service representative at Carson did the scheduling of assignments for field employees at both Carson and Inglewood. At least one field employee works in more than one system as part of his regular duties.

In addition, employees are occasionally transferred from one to another of the three systems to meet temporary staffing problems. In such cases, the system receiving the help is billed by the home system. There appears to be a general freedom for each system to call on employees at one of the other systems for assistance when needed. There has been at least one permanent transfer among the three systems, and several transfers from TCI to CMC or the systems. These employees were considered "transfers," not new hires.

Accordingly, the Board reasonably found that, although nominally autonomous, the three systems are in fact linked together on numerous levels. On balance, the record shows a sufficient degree of interrelationship to add support to a finding of single employer status.

D. *Centralized Control of Labor Relations*

As noted above, although each system manager hires and fires that system's employees, he or she is ultimately accountable to CMC. Moreover, TCI has established a uniform fringe benefit package covering holidays, vacations, sick leave, and insurance for all employees. The wages set by the system managers vary between the systems only by about 50–75 cents per hour. Each system has adopted its own bonus program. Payroll is centralized and paychecks are issued by TCI.

At least on occasion, CMC and the three systems have combined their workforces for training and for social purposes. Although most training is conducted at the system level, CMC prepares the training material and the regional engineer has held a joint training session for all field engineers. All employees were invited to a common picnic and to the Christmas party.

Finally, at the hearing held in response to the union's representation petition, only a CMC representative appeared before the Regional Director on behalf of all three systems because, as CMC's area manager Speir testified, CMC handles labor relations questions for all three systems.

On the basis of this evidence, the Board reasonably concluded that effective control over labor relations is centralized in the hands of CMC. The fact that day-to-day control of labor relations at the "worker level" is left in the hands of system managers is not dispositive. *See NLRB v. Don Burgess Construction Corp.*, 596 F.2d at 385. Where the major labor policy decisions are made by a central authority, the Board may reasonably find that the

criterion of centralized control of labor relations has been met. *See id.* at 385; *Sakrete, Inc. v. NLRB*, 332 F.2d at 907.

E. *Conclusion*

The Board concluded that Carson, Inglewood, Pomona, and CMC are a single integrated enterprise and a single employer because they share a degree of common ownership, significant aspects of their labor relations and operations are centrally controlled, and their management is directed by CMC.

Under the deferential substantial evidence standard, we may not reverse the Board simply because we disagree with its evaluation of the facts, but only if we find that its evaluation is not supported by substantial evidence. Considering the evidence in the record as a whole, it was a reasonable conclusion that there is "an absence of an arm's length relationship between the business entities in question." *NLRB v. Big Bear Supermarkets No. 3,* 640 F.2d at 930. The determination that the respondents constitute a "single employer" is affirmed.

III

Appropriate Bargaining Unit

The Regional Director determined, and the Board affirmed, that a multi-location unit sought by the union is an appropriate bargaining unit for all field employees employed at the three systems and working out of the CMC office. [4]

The determination of an appropriate bargaining unit under section 9(b) of the NLRA, 29 U.S.C. 159(b), [5] is a matter committed to the Board's broad discretion. *Spring City Knitting Co v. NLRB,* 647 F.2d 1011, 1013 (9th Cir.1981); *NLRB v. Don Burgess Construction Corp.,* 596 F.2d at 386. We will not overturn the Board's unit designation unless the decision is "arbitrary and capricious." *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947); *Alaska Statebank v. NLRB,* 653 F.2d 1285, 1287 (9th Cir.1981). Accordingly, the Board's decision "will rarely be disturbed on appeal." *Alaska Statebank,* 653 F.2d at 1287.

In *NLRB v. Don Burgess Construction Corp.,* 596 F.2d at 386, we described the analysis to be applied in a case such as this:

> In determining the appropriateness of a bargaining unit the focus differs from that employed in deciding whether there is a single employer. "In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved." *Peter Kiewit Sons' Co.,* 231 N.L.R.B. 76, 77 (1977).

See also South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382 (1976) (per curiam).

The Board, in evaluating the community of interests among employees working at more than one location, considers several factors, including (1) similarity in employee skills, duties, and working conditions, (2) functional integration of the business, including employee interchange, (3) centralized control of management and supervision, (4) geographical separation of facilities, (5) collective bargaining history and extent of union organization, and (6) employee choice. *See Spring City Knitting Co.,* 647 F.2d at 1014; *Pacific Southwest Airlines v. NLRB,* 587 F.2d 1032, 1038 (9th Cir.1978); *NLRB v. Sunset House,* 415 F.2d 545, 548 (9th Cir.1969).

"Because unit determinations are dependent on slight variations of facts, the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions." *NLRB v. J.C. Penney Co., Inc.,* 620 F.2d 718, 719 (9th Cir.1980); *see also Pacific Southwest Airlines,* 587 F.2d at 1038. Each decision ultimately rests on the particular circumstances of that unique case.

A. *Similarity in Employee Skills, Duties, and Working Conditions*

"The most reliable indicium of common interests among employees is similarity in their skills, duties, and working conditions." *Pacific Southwest Airlines,* 587 F.2d at 1042.

The approximately 14 field employees have identical skills, duties, and interests. The field employees in each system fill the same job classification and perform the same tasks, using the same types of tools under the same working conditions.

In addition, all are subject to certain uniform labor policies dictated by CMC and TCI—TCI sets company policy on holidays, vacation, sick leave, and insurance benefits. There also appears to be an established wage range within which the system managers set individual employee wages. This evidence strongly supports the Board's finding that their grouping in a common unit is appropriate.

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[4] The multi-location unit for field employees was described as follows: All field employees, including installers, technicians, warehousemen, and construction employees employed by Carson Cable TV, Inglewood Cable TV, TCI of Pomona Cable TV, and Cable Management Company . . .; excluding all other employees, sales employees, office clerical employees, guards and supervisors as defined in the Act.

[5] Section 9(b) provides that the Board "shall decide in each case, whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."

B. *Functional Integration of the Business*

As discussed above regarding the single employer status finding, there is a meaningful, although not overwhelming, degree of interrelation as the three systems share common management and some centralized administration, as well such services as public access programming coordination. [6]

The frequency of employee interchange has been regarded as a "critical factor" in ascertaining a community of interest among employees. *Spring City Knitting Co.,* 647 F.2d at 1015. In the past, field employees at Carson and Inglewood were supervised by the same individual, and scheduling for field employees at both systems was performed through the Carson office. One field employee, a CMC converter technician, works in each system as part of his regular duties.

Moreover, while field employees are assigned to an individual system, each system may "borrow" another system's employees to fill temporary staffing needs. Although there appears to be a relatively low level of employee transfers, and always for a short period of time, there is at least some degree of such interchange. In a quite small bargaining unit of 14 employees, almost any level of interchange would have some significance. The degree of employee interchange is not so great as to weigh strongly in favor of a multi-location bargaining unit, but neither is it so minimal as to preclude the designation of such a unit.

C. *Centralization of Management and Supervision*

It is significant that the multi-location unit designated by the Board mirrors the respondents' own administrative grouping. The three systems are the only systems managed by CMC, and all three are in the greater Los Angeles area.

CMC's managerial authority, maintained on behalf of the primary owners, TCI and Roseman, is primarily exercised on the policy level. Day-to-day labor relations are conducted at the system level upon the supervision of the system managers. This fact would tend to militate against a single multi-location bargaining unit. This is, however, offset to some extent by the fact that the system managers are hired by and must answer to CMC, as well as by the fact that certain management, budgetary, and labor relations matters are established by TCI and CMC such that the discretion available to system managers on a daily basis is somewhat circumscribed.

D. *Geographical Separation*

The Carson facility, which also houses CMC, is located about 10–15 miles southeast of Inglewood and 30 miles southwest of Pomona; Pomona and Inglewood are about 40–45 miles apart.

The geographical distance between facilities is important as to whether it is feasible for all employees in a multi-location unit to participate without great difficulty in union activities. *See NLRB v. Sunset House,* 415 F.2d 545 (9th Cir.1969). It is not apparent from the record that the distance between the three systems is such as to unduly inhibit interchange between them. Indeed, the fact that employee transfers between the systems have occurred, at least on an infrequent basis, indicates that the distance is not so great as to present any severe obstacle to employee participation in union activities. *See id.* at 549.

E. *Extent of Union Organization*

The multi-location unit designated by the Board is that which was sought by the union. The Supreme Court has held that the Board may "consider[ ] the extent of [union] organization as one factor, although not the controlling factor, in its unit determination." *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 442, 85 S.Ct. 1061, 1063, 13 L.Ed.2d 951 (1965); *see also* 29 U.S.C. § 159(c)(5).

Particularly where, as here, there is no history of collective bargaining at any of the locations, and no other union is seeking to represent these employees in this or any other unit, the Board may reasonably give some weight to the petitioning union's desires for representation on a multi-location basis. [7]

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[6] The respondents contend that the Regional Director improperly relied on the prior decision that respondents constituted an integrated enterprise and thus were a single employer. Yet the respondents inconsistently contend as well that the Director failed to cite any evidence demonstrating functional integration among the respondents making a single multi-location unit appropriate.

Although the appropriateness of a bargaining unit is indeed a distinct issue from that of the scope of an employer's operation, the factors involved in evaluating each question substantially overlap. Certainly, for example, a finding that the respondents are a single integrated employer is relevant to the assessment of functional integration in determining the appropriateness of a multi-location bargaining unit.

F. *Conclusion*

The respondents primary argument against the appropriateness of the multi-location bargaining unit is that it purportedly conflicts with an established presumption in favor of single location bargaining units.

We have frequently recognized the existence of a presumption that a single location bargaining unit, when designated by the Board, is appropriate. *See, e.g., Alaska Statebank,* 653 F.2d at 1287; *Spring City Knitting Co.,* 647 F.2d at 1013–16; *Victoria Station, Inc. v. NLRB,* 586 F.2d 672 (9th Cir.1978); *NLRB v. Lerner Stores Corp.,* 506 F.2d 706 (9th Cir.1974); *see also Sohio Petroleum Co. v. NLRB,* 625 F.2d 223 (9th Cir.1980); *NLRB v. J.C. Penney Co., Inc.,* 620 F.2d 718 (9th Cir.1980). However, a crucial aspect of each of those cases was that the *Board* had found a single location unit to be appropriate, and the *employer* contended that only a multilocation unit could be appropriate—the exact reverse from what we confront in the instant case. The question raised in those

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cases was not whether a multi-location unit was inappropriate, but rather whether the Board had abused its discretion by designating a smaller unit instead.

As the Sixth Circuit explained in *NLRB v. First Union Management, Inc.,* 777 F.2d 330, 334 (6th Cir.1985):

> The presumption, however, only tends to establish that a single-site unit, when requested, constitutes *an* appropriate unit. The presumption does not affect this case because we only face the question whether the bargaining unit that the Union sought and the NLRB certified constituted an appropriate unit.

Where, as here, the union requests and the Board designates a multi-location unit as appropriate, the presumption simply has no application. The presumption does not preclude designation of a larger unit, but only works to assure that a Board determination that a smaller unit is appropriate will almost never be subject to challenge. Consequently in this case, the Board is not required to "rebut" any "presumptive appropriateness of single location units," as suggested by the respondents.

After considering the "balanc[e] of salient factors" relevant to the designation of a multi-location bargaining unit, *see Spring City Knitting Co.,* 647 F.2d at 1016, particularly the striking similarity of employee skills, duties, and working conditions, we conclude that the Board acted within its broad discretion in designating a single bargaining unit for all three systems and CMC.

It may be true that the handling of day-to-day management and personnel relations by the system managers, as well the less than overwhelming extent of interrelation and employee interchange, tends to make separate bargaining units *more* appropriate. But the Board need only designate *an* appropriate unit; it need not be the *most* appropriate one. *Alaska Statebank,* 653 F.2d at 1287. The respondents have not met their burden of showing, not merely that some other unit would have been more appropriate, but that the Board's designated unit is "clearly inappropriate." *Sohio Petroleum Co.,* 625 F.2d at 226.

ENFORCED.

Jose A. Blanco v. NLRB

641 F.Supp. 415 (D.C. Cir.), July 30, 1986

On action to investigate decertification petition held in abeyance

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JUNE L. GREEN, District Judge: Plaintiff brings this action for injunctive relief and mandamus pursuant to 28 U.S.C. §§ 1331, 1337, 1361. Plaintiff seeks an order by the Court directing the National Labor Relations Board ("NLRB" or "Board") to investigate his decertification petition which the Board held in abeyance pending the resolution of unfair labor practice charges. Defendants have moved to dismiss the complaint, and plaintiff has opposed defendants' motion by filing for summary judgment. For the reasons set forth below, the Court grants defendants' motion to dismiss.

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[7] The Board's counsel also argues that this multi-location unit is appropriate as reflective of employee wishes. Although employees' wishes cannot supplant all other considerations, "[e]mployee choice can tip the balance in determining which of two equally appropriate units should be preferred." *Pacific Southwest Airlines,* 587 F.2d at 1044.

However, there is no evidence whatsoever in the record that the employees were given any opportunity to indicate whether they wished to be represented in a single multi-location unit or separate system units. The election only allowed the respondents' employees to choose whether or not to be represented by the union; they were not polled on which unit they favored. *See id.*

At any rate, this factor was not relied upon by the Regional Director in his decision. We must affirm the Board upon the actual ground stated in its decision. "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . .'" *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. at 444, 85 S.Ct. at 1064 (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962)).

Statement of Facts [1]

Plaintiff, Jose A. Blanco, is an employee of Marriott In-Flite Services, Inc. ("In-Flite") and is represented for purposes of collective bargaining by the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 1894 ("union"). Plaintiff is not a member of the union.

In-Flite is a division of Marriott Corporation and is engaged in airline catering at John F. Kennedy International Airport where plaintiff is employed. The union has acted as the exclusive bargaining representative of In-Flite employees since its certification by the NLRB in September 1978. Since April 1, 1984, the union and In-Flite have been parties to successive collective bargaining agreements, including agreements effective from April 1, 1984, to March 31, 1985, and from April 1, 1985, to March 31, 1988.

On December 31, 1985, the union filed unfair labor practice charges against In-Flite with the NLRB. Board Case No. 29-CA-11602. The charges alleged, in essence, that In-Flite violated section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), by interrogating employees concerning their relationships with the union; by soliciting and encouraging employees to withdraw their membership in and support of the union; by promising employees job promotions and other benefits in their working conditions to induce the employees to refrain from becoming or remaining members of the union; by directing employees to remove their union insignia; and by threatening employees with discharge and other reprisals if they became or remained members of the union or supported it in any fashion. Exhibit D, attached to Complaint. Following an investigation of these allegations, the Board's Regional Director for Region 29 issued a complaint on the union's charges on February 28, 1985.

In the meantime, on January 23, 1985, plaintiff submitted to Region 29 of the NLRB a petition seeking the decertification of the union. The petition was supported by more than 30 percent of the employees in plaintiff's bargaining unit as required by Board regulation. *See* 29 C.F.R. § 101.18.

On March 6, 1985, NLRB Regional Director Samuel Kaynard informed plaintiff that his decertification petition was being dismissed. Mr. Kaynard indicated that he based his decision upon the belief that plaintiff was a supervisor within the meaning of section 2(11) of the Act. Plaintiff filed a request for review of the dismissal of his petition. On May 14, 1985, the Board remanded the case to the Regional Director for a hearing on plaintiff's supervisory status and ordered the petition reinstated. Pursuant to the Board's order a hearing on the supervisory issue was conducted from June 12 to June 20, 1985.

Subsequently, on September 13, 1985, the Regional Director issued an amended unfair labor practice complaint based upon new evidence. The amended complaint realleged the unfair labor practices set forth above and added allegations that In-Flite management personnel had initiated and supported the circulation and execution of plaintiff's decertification petition. Exhibit F, attached to Complaint.

On September 19, 1985, the Regional Director notified the parties by letter of his decision to invoke the "blocking charge rule"—that is, to hold the decertification petition in abeyance in view of the pending unfair labor practice complaint. [2] In addition, the Regional Director indicated that the Board was considering the possibility of initiating contempt proceedings against In-Flite since the unfair labor practices alleged constituted conduct prohibited by an outstanding court decree. *See NLRB v. Marriott In-Flite Services,* 113 LRRM

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[1] By order dated April 25, 1986, the Court allowed defendant to file its opposition statement of material facts out of time. Plaintiff has filed a motion asking that the Court reconsider that order. As the Court is disposing of this case on defendants' motion to dismiss, the Court need not address the motion for reconsideration. *See Prakash v. American University,* 727 F.2d 1174, 1182 n. 52 (D.C.Cir.1984).

[2] The blocking charge rule is a procedural policy set forth in section 11730 of NLRB's Casehandling Manual, published by the NLRB's General Counsel's Office.

3528 (2d Cir.1983), *cert. denied,* 114 LRRM 2568 (1983).

Plaintiff appealed the Regional Director's decision to the full Board on October 16, 1985, but on October 31, 1985, the Board affirmed. On November 27, 1985, the Board denied plaintiff's motion for reconsideration *en banc.* Plaintiff seeks a Court order instructing the Board to vacate its determination to hold the decertification petition in abeyance, to investigate the petition to determine whether a question of representation exists, and to conduct a decertification election if a question concerning representation is found to exist.

Conclusions of Law

The Court and both parties agree that, as a general rule, federal district courts are without jurisdiction to review Board orders emanating from representation proceedings. *Hartz Mountain Corp. v. Dotson,* 727 F.2d 1308, 1310 (D.C.Cir.1984). This is because representation proceedings under the Act are not adversary in nature and are not considered to result in the issuance of a judicially reviewable final order. *American Federation of Labor v. NLRB,* 308 U.S. 401, 411, 60 S.Ct. 300, 304, 84 L.Ed. 347 (1940). Such rulings are reviewable under sections 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e), (f), if and when they form the basis of a subsequent unfair labor practice proceeding. *Boire v. Greyhound Corp.,* 376 U.S. 473, 476–77, 84 S.Ct. 894, 896–97, 11 L.Ed.2d 849 (1964).

A. *Leedom v. Kyne Doctrine Does Not Apply*

Plaintiff asserts that the doctrine announced by the Supreme Court in *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), establishes district court jurisdiction. In *Leedom v. Kyne,* the Court carved out a very narrow exception to the general rule that the district court is without jurisdiction to review Board orders issued in connection with representation proceedings. In the case where the Board acts in a manner that contravenes an express statutory prohibition and the aggrieved party has no alternative way of securing relief, a district court is vested with the authority to review the Board's determination. *Id.* at 188–90, 79 S.Ct. at 183–84. As numerous judicial opinions have emphasized, the *Leedom v. Kyne* doctrine may be invoked only in extraordinary circumstances.

> [T]o say that there are possible infirmities in an action taken by the Board by reason of an erroneous or arbitrary exercise of its authority in respect of the facts before it is not to conclude that there is jurisdiction in the District Court to intervene by injunction. For such jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court even before the Board's own processes have run their course.

Local 130, International Union of Electrical, Radio & Machine Workers v.

McCulloch, 345 F.2d 90, 95 (D.C.Cir.1965); *accord Boire v. Greyhound Corp.,* 376 U.S. at 481, 84 S.Ct. at 898. *Hartz Mountain Corp. v. Dotson,* 727 F.2d 1311–12.

Plaintiff argues that the Board's decision to hold plaintiff's decertification petition in abeyance violated the "clear and mandatory" language of section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1). That section provides, in pertinent part:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> * * * * * *
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

To emphasize the significance of section 9(c)(1), plaintiff reminds the Court of the right of employees "to bargain collectively through representatives of their own choosing" and the corresponding right "to refrain from any or all such activities." 29 U.S.C. § 157.

Ever conscious of the important employee rights at stake here, the Court declines to read section 9(c)(1) in such a mandatory tone. "Section 9(c) hearings and investigations are particularly within the Board's discretion; the nature and scope of those proceedings were intentionally not specified in the Act but were to be developed in light of the Board's experience and expertise." *Newport News Shipbuilding & Dry Dock v. NLRB,* 633 F.2d 1079, 1081 (4th Cir.1980); *see also Lawrence Typographical Union v. McCulloch,* 349 F.2d 704, 707

(D.C.Cir.1965) (District court review of representation proceedings would violate express intention of Congress.)

Plaintiff relies primarily on two Fifth Circuit cases to support his position that the Board's use of the blocking charge rule was arbitrary and in violation of section 9(c)(1). *Suratt v. NLRB,* 463 F.2d 378 (5th Cir.1972); *Templeton v. Dixie Color Printing Co.,* 444 F.2d 1064 (5th Cir.1971). *Suratt* and *Templeton* both involved the automatic dismissal of decertification petitions because the union had filed "blocking charges." [3] In *Suratt* the charges were found to be without merit, while in *Templeton* the charges had been pending for almost four years at the time the decertification petition was dismissed by the Regional Director. These two cases held that the Board's mechanistic application of the blocking charge rule amounted to arbitrary action. That is, the effect of the Board's actions was to frustrate the petitioners' section 7 rights, 29 U.S.C. § 157, and was counter to the language of section 9(c)(1) that the Board conduct an investigation upon the filing of a decertification petition. *See Suratt v. NLRB,* 463 F.2d at 381 ("[T]he Board should not be allowed to apply its 'blocking charge practice' as a *per se* rule without exercising its discretion. . . .").

This case presents none of the peculiar facts that justified the district court's jurisdiction in *Suratt* and *Templeton. See Bishop v. NLRB,* 502 F.2d 1024, 1031 (5th Cir.1974) (*Suratt* and *Templeton* cases "had carved out a precarious exception to the general rule of review."). The union filed its unfair labor practice charge with the NLRB almost four weeks before plaintiff petitioned for decertification. An investigation proceeded and the Regional Director conducted some eight days of hearings on plaintiff's petition. The Regional Director continued the investigation and only invoked the blocking charge rule upon consideration of new evidence which indicated that plaintiff's petition might be the result of some impropriety on the part of In-Flite management personnel. Plaintiff's decertification appears to raise issues related to and dependent upon resolution of the issues raised by the unfair labor practice charges. Defendants have satisfied the terms of section 9(c)(1), and their exercise of the blocking charge rule appears to have

been well considered. *See generally NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946) (Congress "has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the free and fair choice of bargaining representatives by employees."); *accord Hartz Mountain Corp. v. Dotson,* 727 F.2d at 1314.

Further, the Board's exercise of the blocking charge rule in this instance is supported by important policy considerations that underlie the Act. The Board's general obligation under the Act is to promote two goals: (1) employees' freedom of choice in deciding whether they want to engage in collective bargaining and whom they wish to represent them; and (2) the maintenance of established, stable bargaining relationships. *See J.I. Case Co. v. NLRB,* 321 U.S. 332, 338–39, 64 S.Ct. 576, 580–81, 88 L.Ed. 762 (1944). When these goals conflict, the Board's responsibility is to strike a sensible balance between them. Here, the use of the blocking charge rule is in accord with the Board's policy to preserve the "laboratory conditions" necessary to permit employees to cast their ballots freely and without restraint or coercion. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575, 611–12, 89 S.Ct. 1918, 1938–39, 23 L.Ed.2d 547 (1969); *Edward J. Schlacter Meat Co.,* 100 NLRB 1171, 1172 (1952).

B. *Plaintiff's Constitutional Rights Have Not Been Violated*

Alternatively, plaintiff argues that by invoking the blocking charge rule the Board has deprived him of his first amendment rights. While it is true that the Court would have jurisdiction to enjoin Board action which violates the Constitution, no such situation is presented in this case. *See McCulloch v. Libbey-Owens-Ford Glass Co.,* 403 F.2d 916, 917 (D.C.Cir.), *cert. denied,* 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1963).

In a number of cases, the lower federal courts have recognized as an exception to the general rule prohibiting review of representation proceedings, that the district court is vested with subject matter jurisdiction where the plaintiff makes a nonfrivolous assertion that the NLRB has infringed his constitutional rights. *See, e.g., Fay v. Douds,* 172 F.2d 720 (2d Cir.1949); *but see Greensboro Hosiery Mills,*

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[3] A "blocking charge" is the filing of an unfair labor practice charge by a union while a decertification petition is pending.

Inc. v. Johnston, 377 F.2d 28 (4th Cir.1967) (declining to follow *Fay v. Douds*). "The Courts have also construed this exception . . . very narrowly, requiring a 'strong and clear' showing that the Board has acted in a manner infringing on the union's constitutional rights." *United Food & Commercial Workers v. NLRB,* 694 F.2d 276, 279 (D.C.Cir.1982) (citing *McCulloch v. Libbey-Owens-Ford Glass Co.,* 403 F.2d at 917).

As set forth *supra* at 418–419, plaintiff has made no "strong and clear" showing that the Board has violated any standard, constitutional or statutory. To the contrary, the Board has justified sufficiently its exercise of the blocking charge rule, here, since the legitimacy of the decertification petition is dependent upon the resolution of the unfair labor practice case.

Likewise, the Court finds unpersuasive plaintiff's due process argument, particularly in view of the narrowness of the *Leedom v. Kyne* exception. *See Boire v. Greyhound,* 376 U.S. at 481, 84 S.Ct. at 898. Because of the pending unfair labor practice charges, which have been found sufficiently meritorious to warrant the issuance of a complaint, no issue concerning representation can arise until such charges are resolved. *See Grissom v. NLRB,* 364 F.Supp. 1151 (D.C.La.), *aff'd.,* 497 F.2d 43 (5th Cir.1974). Furthermore, any final Board order entered in the unfair labor practice case is subject to appellate court review under sections 10(e), (f) of the Act, 29 U.S.C. §§ 160(e), (f). The courts have held that raising a constitutional issue concerning the Board's procedure, when judicial review is available in the courts of appeals, is insufficient to confer jurisdiction on the district court. *Squillacote v. International Brotherhood of Teamsters,* 561 F.2d 31, 38 (7th Cir.1977).

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Conclusion

Because plaintiff has not demonstrated that the Board has violated any clear and specific mandate, the Court must grant defendants' motion to dismiss for lack of subject matter jurisdiction. *See Hishon v. King & Spaulding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *see also Kerr v. U.S. District Court,* 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976) (mandamus jurisdiction does not lie, either).

Palmas Del Mar Company v. NLRB

797 F.2d 39 (1st Cir.), July 30, 1986—277 NLRB 71

On petition to review and cross-application for enforcement

Before COFFIN, Circuit Judge, BROWN, * Senior Circuit Judge, and BOWNES, Circuit Judge

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PER CURIAM: This matter arises out of a consent election held on August 23, 1984, for certain employees of petitioner, Palmas del Mar Company, Inc., resulting in the victory of a newly formed independent union, Union Independiente de Empleados de Palmas del Mar. Objections were shortly thereafter filed by Union de la Industria Gastronomica de Puerto Rico, Local 610, Hotel and Restaurant Employees International Union, AFL–CIO. Hearing was held before David L. Evans, Administrative Law Judge, on December 17–20, 1984. On June 18, 1985, Judge Evans filed his twenty-seven-page decision, finding that petitioner had violated Sections 8(a)(1) and (2) of the National Labor Relations Act. He recommended that the August 23, 1984, election be set aside and a new one held; that petitioner be ordered to cease urging employees to support an independent union, that petitioner refrain from otherwise supporting such a union, as well as threatening to stop operations if employees supported Local 610; and that petitioner post appropriate notices. The petitioner filed thirty-one exceptions to the ALJ's decision, but ultimately the Board affirmed the judge's findings and conclusions and adopted, slightly

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modified, his recommended order on October 31, 1985.

It is now some one-and-a-half years later that we dispose of this petition for review and cross-application for enforcement of the Board's order. The petitioner's brief is long on law and short on facts. In order to ascertain whether there were any real issues lurking in this case after the prior proceedings and determinations, we have examined in detail the ALJ's findings, reasoning, and conclusions and also the nature of petitioner's objections. We conclude that this case has outlived any legitimate claim it may once have had to the adjudicatory process.

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* Of the Fifth Circuit, sitting by designation.

The ALJ in his decision took pains to scrutinize each of the eighteen alleged violations of section 8(a)(1), the eight alleged violations of section 8(a)(2), and the sixteen Local 610 objections to the election. In his 8(a)(1) scrutiny, he recommended dismissal of paragraphs 5(a), (b), (c), and (t) of the complaint as being pertinent only for background. He then found that paragraphs 5(d), (e), (f), (g), (h), (i), (k), (*l*), (*o*), part of (q), (r), and (s) did indeed call for findings of violation. These findings rested largely on credibility judgments. Five of the more important findings ((e), (f), (i), (*l*), (*o*)) were supported by the fact that petitioner did not choose to call the company spokesman involved, who might have refuted the General Counsel's witnesses if their testimony were false. The ALJ recommended dismissal as to paragraphs 5(p), (u), and most of (q). There was more than sufficient evidence to support the findings that petitioner coerced employees to oppose Local 610 and support the Union Independiente, both by threats of reprisal and promises of benefits.

Indeed, the ALJ's discriminating treatment of paragraphs 5(q), (r), and (s) illustrates the carefulness of his decision. He recommended dismissal as to seven out of eight letters identified in paragraph 5(q) because they were well within petitioner's free speech privilege. But the letter of August 21, the Kassan speech of August 2 (r), and the "last pay check" notice of August 23 (s) together constituted, he found, "blatant" violations of 8(a)(1). This conclusion is well supported by the record. Petitioner went beyond making reasonable predictions based on available facts. The record indicates repeated, high powered, and undocumented assertions of Palmas de Mar's "critical" financial condition, as well as equally unsupported panic-inducing predictions of Local 610's bargaining demands. Particularly when these statements are viewed as a reasonable employee might view them, *Wyman-Gordon Co. v. NLRB,* 654 F.2d 134, 145 (1st Cir.1981), or through the experienced eyes of the Board, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 620, 89 S.Ct. 1918, 1943, 23 L.Ed.2d 547 (1969), they provide clear support for the findings of 8(a)(1) violations.

The ALJ scrutinized the 8(a)(2) allegations in a similarly discriminating manner, concluding that the evidence under paragraphs 5(d) through (1), already analyzed under 8(a)(1), also constituted, at a minimum, unlawful support for the independent union, but that it did not rise to the level of domination of that union. Finally, the ALJ painstakingly canvassed the evidence relating to the sixteen objections, recommending that ten be dismissed and six be sustained.

Against what we have termed the discriminating (in the praiseworthy, not the pejorative sense) approach of the ALJ, endorsed by the Board, the petitioner's thirty-one objections constitute an undiscriminating scatter-shot approach. Practically all of them are aimed, impliedly or directly, at credibility findings of the ALJ. In addition, the petitioner's brief makes it seem as if the ALJ had resolved every issue in favor of the Board, and thus, it was totally unhelpful to us in reviewing the facts.

The Board's findings as to violations of section 8(a)(1) and 8(a)(2) are abundantly supported by the evidence. Because this petition for review, in light of the evidence and the findings of the Board, was frivolous, we assess petitioner double costs and a reasonable attorney's fee in the amount of $3,000. Fed.R.App.P. 38; *NLRB v.*

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Smith & Wesson, 424 F.2d 1072 (1st Cir.1970).

NLRB v. Technicolor Government Services, Inc.

795 F.2d 916 (11th Cir.), August 4, 1986—276 NLRB 383

On petition to enforce Board Order

Before HILL, Circuit Judge, HENDERSON *, Senior Circuit Judge, and LYNNE **, Senior District Judge

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LYNNE, Senior District Judge: Pursuant to the provisions of 29 U.S.C. § 160(e), the National Labor Relations Board (the Board) has petitioned this Court for enforcement of its order of September 24, 1985, against Technicolor Government Services, Inc. (the Company), reported at 276 NLRB 41. We grant its petition.

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* *See* Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

For about twenty years, the Company has been under contract with the United States Air Force to provide photographic services to users of the Air Force Eastern Test Range Facility and the Kennedy Space Center in Florida. As required by 41 U.S.C. § 353(d), the Air Force regularly requests bids from those interested in competing for the work. Early in 1984, it announced that the work would be put out for bid. In April 1984, it issued a "request for proposals", formally soliciting the submission of bids within 40 days from companies which had expressed an interest in competing for the work. The Company submitted its bid in August 1984, and on September 31, 1984, it was once again awarded the photographic services contract.

Since 1964, the Company has recognized Local 666 and Local 780 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (the Union) as the collective bargaining representatives of its employees. Both locals administer a single collective-bargaining agreement with the Company.

In early February when Andrew Younger, a representative of the Union and the business manager for Local 780, learned that five or six companies were interested in submitting bids for such contract and that at least one of them was advertising in the newspapers for individuals with the necessary skills required, he determined that the Company's employees and members of his union should obtain and submit applications for employment by the respective bidders. Apparently he had a dual motive. He was seeking not only to ensure continued employment for the Company's employees in the event the Company was unsuccessful in the bidding, but also to increase the chances of Union recognition by any successful bidder.

On February 21, 1984, in a telephone conversation, Andrew Younger advised Harry Van Riper, the Company's Vice President and General Manager, that he proposed to distribute employment applications to the Company's employees for completion and delivery to bidders on the new contract. Understandably, Van Riper protested that such proposal was contrary to the best interest of the Company. [1]

Previously, on February 18, Younger had directed his secretary to deliver Raytheon employment applications to the Union stewards for completion by the Company's employees and return to the Union. These instructions were carried out on the morning of February 21 by use of the Company's inter-facility mail. Younger did not tell Van Riper that this was going to be done.

Alfred Eugene Matthieu, employed by the Company for some 20 years, was a member of Local 780 and a steward for the Union in Building 44410. Shortly after 9:30 a.m. on February 21, he received approximately 20 blank Raytheon applications in the inter-facility mail, and, pursuant to instructions received from Younger's secretary, between 9:50 and 10:30 a.m., when bench space was not available to him, distributed such applications to employees in other portions of the building, [2] directing them to complete and return them to him as soon as possible.

At around 2:15 p.m., on February 21, Van Riper was advised by Ed Graf, the Company's motion picture supervisor, that he had observed a number of Raytheon applications in a large, unsealed envelope addressed to Local 780 steward, Zan Burton. Thereupon, Van Riper informed the Union's chief stewards that anyone who distributed competitor employer applications would be fired. [3]

The Company had no rule forbidding the distribution of employment applications on work time. When Van Riper was informed at approximately 3:15 p.m. that Matthieu had been handing out Raytheon applications, he directed that he report to his office. When Matthieu admitted that he had distributed applications to the Company's employees for whom he was steward, protesting that he had heard nothing about a rule prohibiting their distribution until around 3:10 p.m., Van Riper angrily directed that he be fired.[4] Matthieu was subsequently given a letter stating that he was "terminated for cause." Adopting the extensive findings of fact made by the Administrative Law Judge, few of which involved credibility choices, and his conclusions of law, the Board found that Matthieu was engaged in Union and protected concerted activity;[5] that such activity under the peculiar circumstances of this case, did not lose its protection as being so disloyal to the Company as to be indefensible and that his discharge was not otherwise necessary to maintain discipline and prevent disruptions of its orderly operations.

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[1] When Van Riper strongly insisted that he didn't think the completion of employees' applications for employment by competitors was a good idea, Younger responded that they would not be turned in to competitors until they talked further. It is clear that the Union was not interested in severing any relationships with the Company.

[2] The Company had previously tolerated infrequent Union activity and distributions on work time.

[3] The time of distribution was apparently immaterial to Van Riper. He did not limit his threats that if any of his people handed out applications for competitors on work time they would be fired.

In view of the cogent points advanced by counsel for respondent in briefs and oral argument, we have carefully reviewed the record and now hold that the Board's conclusion that Matthieu was engaged in Union and protected concerted activity when he distributed Raytheon employment applications on the Union's behalf,[6] and that the Company violated Section 8(a)(3) and (1) of the Act [29 U.S.C. § 158(a)(3) and (1)], by discharging him because he engaged in that conduct, is supported by substantial evidence and is not contrary to law.[7]

Accordingly, its order is ENFORCED.

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[4] There is some discrepancy in Matthieu's version of the discharge interview and that of Van Riper. Matthieu testified that when he went into the latter's office, Van Riper said, "Gene, what is this I hear that you are passing out applications in mass?" Matthieu replied that he didn't know what he meant by "mass" but admitted that he had distributed applications to the employees for whom he was steward. Van Riper angrily responded that he talked to Younger and Mamet (the Union's counsel) and they were "not going to start this crap." Following Van Riper's direction that he be fired, Matthieu protested that he didn't know anything about a rule against distribution of applications until around 3:10 p.m., and he had passed out the applications that morning. Van Riper responded, "Maybe next time you will think." The ALJ elected to credit his account of what transpired.

[5] In characterizing Matthieu's activity as concerted, the Board relied upon its decision in *Meyers Industries, Inc.*, 268 NLRB No. 73 (1984).

[6] We explicitly disclaim any intention to fashion a per se rule for determining the disloyalty of employee activities conducted on work time.

[7] On its unique facts we find this case plainly distinguishable from *Boeing Airplane Co. v. NLRB*, 238 F.2d 188 (9th Cir.1956), cited by Respondent as the closest analogy, and other cases upon which it relies in briefs.

Local Union 1395, International Brotherhood of Electrical Workers, AFL–CIO v. NLRB

797 F.2d 1027 (D.C. Cir.), August 8, 1986—273 NLRB 1715

On petition to review Board Order

Before STARR and SILBERMAN, Circuit Judges, and WRIGHT, Senior Circuit Judge

Opinion for the Court filed by Circuit Judge SILBERMAN

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SILBERMAN, Circuit Judge: Local Union 1395, International Brotherhood of Electrical Workers, AFL–CIO, petitions for review of an order of the National Labor Relations Board dismissing an unfair labor practice complaint. The complaint charged that the Indianapolis Power & Light Company violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1982), by suspending an employee who had refused to cross a picket line in the course of his duties. The Board held that the employee's right to engage in this "sympathy strike"[1] had been waived in Local 1395's collective bargaining agreement with Indianapolis Power, which contained a no-strike clause. Because the Board failed to address relevant evidence of the parties' intent underlying this no-strike clause, however, we reverse the Board's decision and remand the case to the Board for further consideration.

I.

Since 1972, Local 1395 and Indianapolis Power have entered into a series of collective bargaining agreements. Each of these agreements has contained a clause providing:

> During the term of this agreement, and any extension or renewal thereof, the Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lock-out.

In August 1983, employee Herbert King was assigned to read the meters on the premises of one of Indianapolis Power's customers. Arriving on the scene, however, King encountered a picket line set up by workers on strike against the company. King refused to cross the picket line despite his supervisors' instructions to do so. As a result, King was threatened with termination and suspended from work for two-and-one-half days. In response, Local

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[1] The parties to this case, as well as the courts that have considered the issue, use the term "sympathy strike" to refer to employees' refusal (whether acting in concert or, as in this case, individually) to cross picket lines at the premises of their employer's customers.

1395 filed an unfair labor practice charge, and, subsequently, the NLRB's General Counsel issued a complaint alleging that the discipline imposed upon King violated Sections 8(a)(1) and 8(a)(3) of the Act.

After a hearing, an administrative law judge issued a decision sustaining the complaint. The ALJ noted that the Board, in *Operating Engineers Local 18 (Davis-McKee, Inc.),* 238 N.L.R.B. 652 (1978), had held that "broad no-strike clauses, without more, are insufficient to establish waiver of the right to engage in sympathy strikes." *Id.* at 654. Accordingly, the ALJ concluded that the collective bargaining agreement's no-strike clause would not effectively waive the right to honor picket lines unless extrinsic evidence of the parties' specific intent (such as bargaining history and past practice under the agreement) conclusively established such a waiver. The ALJ regarded the evidence on this point as equivocal at best; he found that the parties had expressed different views at the bargaining table over whether the no-strike clause covered sympathy strikes and had, in effect, agreed to disagree on the issue. Thus, the ALJ held, the right had not been waived, King's refusal to cross the picket line was protected conduct, and Indianapolis Power's sanctions against him ran afoul of the Act.

On January 31, 1985, the Board issued a decision reversing the ALJ. Rejecting the basic approach announced in *Davis-McKee,* the Board maintained that it could "discern no logical or practical basis for the proposition that the prohibition of all 'strikes' does not include sympathy strikes merely because the word 'sympathy' is not used." 273 N.L.R.B. No. 211, 1984–85 NLRB Dec. (CCH) ¶ 17,040 (1985) slip op. at 2–3. A broadly-phrased no-strike clause, according to the Board, should properly be read to encompass sympathy strikes unless the contract as a whole or extrinsic evidence demonstrates that the parties intended otherwise. *See id.* The Board stated generally that it agreed with the ALJ that the extrinsic evidence of the parties' intent was uncertain and inconclusive; but the Board did not discuss the ALJ's specific finding that the parties had expressed different meanings about the scope of the no-strike clause at the time they entered the agreement. Instead, the Board regarded the no-strike clause's plain meaning as dispositive. The Board held that employees had waived their right to honor picket lines, and so concluded that Indianapolis Power was entitled to discipline King for refusing to carry out his work assignments.

Local 1395 filed this petition for review. This court has jurisdiction pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f) (1982).

II.

A.

We begin with settled principles. Under Section 7 of the Act, 29 U.S.C. § 157 (1982), employees enjoy the right to observe lawful picket lines that they encounter in the course of their duties. *See, e.g., United States Steel Corp. v. NLRB,* 711 F.2d 772, 775–76 (7th Cir.1983); *NLRB v. Southern Cal. Edison Co.,* 646 F.2d 1352, 1363–64 (9th Cir.1981). This right, however, may be waived by employees in collective bargaining agreements. *See NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 79–80, 73 S.Ct. 519, 524–525, 97 L.Ed. 832 (1953); *News Union of Baltimore v. NLRB,* 393 F.2d 673, 677 (D.C.Cir.1968). Still, waiver of the right to engage in sympathy strikes, like waiver of other rights under the Act, must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); *IBEW Local 1466 v. NLRB,* 795 F.2d 150, 153 (D.C.Cir.1986).

In this proceeding, the Board altered its basic approach toward analyzing collective bargaining agreements for a waiver of the right to honor picket lines. Under *Davis-McKee,* the Board apparently would find such a waiver only if a contractual no-strike provision specifically referred to sympathy strikes or if extrinsic evidence unambiguously established that the parties intended such a waiver. Now the Board

regards a broadly-phrased, comprehensive no-strike clause as sufficiently "clear and unmistakable" evidence that employees intended to waive the right to engage in sympathy strikes, *unless* the contract as a whole or extrinsic evidence demonstrates the contrary.

In reviewing the Board's orders, courts customarily defer to the Board's exercise of its "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963). This deference is not withheld simply because the Board has departed from a prior policy. *See NLRB v. Local Union 103, Iron Workers,* 434 U.S. 335, 350–51, 98 S.Ct. 651, 660–661, 54 L.Ed.2d 586 (1978). However, while it is settled that the Board may interpret collective bargaining agreements when they are raised as defenses in unfair labor practice proceedings, *see NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967), it is less clear whether such interpretations are entitled to judicial deference. *Compare, e.g., NLRB v. Southern Cal. Edison Co.,* 646 F.2d 1352, 1362 (9th Cir.1981) (deference is appropriate), *with Pacemaker Yacht Co. v. NLRB,* 663 F.2d 455, 458 (3d Cir.1981) (deference is inappropriate). [2] The approach reflected in cases of this Circuit appears to be that deference is extended to the Board's factual findings on matters bearing on the intent of the parties, *see News Union of Baltimore v. NLRB,* 393 F.2d 673, 677–78 (D.C.Cir.1968), but not to the ultimate legal conclusion attached to the parties' words and conduct. *See Retail Clerks Int'l Ass'n Local 455 v. NLRB,* 510 F.2d 802, 805 (D.C.Cir.1975).

The reason for this approach is not simply that contract interpretation *simpliciter* has traditionally been thought to be peculiarly within the expertise of the judiciary. Courts have often found it appropriate to give weight to the interpretation of regulated parties' agreements by an administrative agency charged with the primary enforcement of a statutory mandate. *See, e.g., Kansas Cities v. FERC,* 723 F.2d 82 (D.C.Cir.1983). The added factor here is that the courts' role under the labor laws goes beyond merely seeing that the Board stays within the bounds of its delegated authority. Congress has authorized the courts independently to entertain suits brought to enforce collective bargaining agreements under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982), and has directed them to formulate the principles of federal contract law to be applied in these suits. *See Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456–57, 77 S.Ct. 912, 917–18, 1 L.Ed.2d 972 (1957).

If deference were afforded the Board's interpretation of collective bargaining agreements, the Board would be free to apply different (if sufficiently reasonable) standards of interpretation than those applied by the courts in Section 301 suits. That result would surely undermine the voluntary collective bargaining process that lies at the heart of federal labor policy. As the Supreme Court stated in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962) (in the context of holding state contract law preempted by Section 301):

> The possibility that individual contract terms might have different meanings [in different forums] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to interpretation.

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369 U.S. at 103–04, 82 S.Ct. at 576–77 (footnote omitted). *See also Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 1910–11, 85 L.Ed.2d 206 (1985). We find in these concerns powerful reasons to adhere to the view expressed by former Chief Judge Bazelon in *Retail Clerks* that the Board's interpretation of contractual provisions is entitled to "no particular deference." 510 F.2d at 805.

B.

Before turning to the particular contract before us, we address the question—vigorously disputed by the parties—of how the standard governing the waiver of statutory rights ought to be applied. Local 1395 maintains that the Board's new approach, which treats waiver of sympathy strikes essentially as a matter of straightforward contract interpretation, is inconsistent with the "clear and unmistakable" standard. According to Local 1395, this standard is addressed to an employee's subjective intention to give up a statutory right, rather than to an objectively reasonable construction of a contract that binds the employee. The petitioner contends that the clear and unmistakable test represents a more exacting standard than that employed by courts in suits brought under Section 301 to enforce collective bargaining agreements (or, for that matter, by arbitrators). Under this view, while a court or arbitrator would not be precluded, under "accepted principles of traditional contract law," *Lucas Flour,* 369 U.S. at 105, 82 S.Ct. at 578, from reading a general no-strike clause to cover sympathy strikes, the Board could not find a waiver of the right to honor picket lines without more specific contractual language or compelling extrinsic evidence.

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[2] In *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983), the Supreme Court did not exhibit deference to the Board's view about whether a collective bargaining agreement waived a statutory right. On the other hand, the Court did not squarely address the question.

Local 1395's argument, ably presented by counsel, is not without intuitive appeal. At first blush, one might well think that finding a "clear and unmistakable waiver" of a statutory right requires more elaborate evidentiary support than simply placing an objective construction on a contract. But that is not in fact the approach adopted by the Supreme Court. In *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953), which held that a general no-strike clause waived employees' right to engage in sympathy strikes, the Supreme Court stated that resolution of the case required "no determination of rights or duties respecting picket lines broader than this contract itself prescribes." *Id.* at 79, 73 S.Ct. at 524. Similarly, in *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), upon which the petitioner principally relies, the Court stated that the question of waiver "turns upon the proper interpretation of the particular contract before us." *Id.* at 279, 76 S.Ct. at 356. The relevant cases simply do not support the proposition that waiver hinges upon employees' subjective intent rather than the mutual consent reflected in a contractual commitment.

Local 1395 relies upon cases such as *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), which discuss the requirements governing the waiver of constitutional rights. The distinction between those cases and the present one, we think, is that waiver of constitutional rights is *disfavored.* By contrast, no federal policy is disserved when a union is permitted freely to enter into agreements limiting its recourse to economic weapons in exchange for "gains it considers of more value to its members." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 707, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). In our view, federal labor policy is more threatened by the interposition of artificial rules of construction upon the parties' mutual intent when "waiver" of sympathy strikes is at stake than by the Board's practice of giving effect to the clear import of contractual language. *See generally* Note, *Coterminous Interpretation: Limiting the Express No-Strike Clause,* 67 VA.L.REV. 729, 742–45 (1981). A grudging or stilted inter-

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pretation of collective bargaining agreements tends to encroach upon the fundamental national policy favoring the ordering of the employer-employee relationship by voluntary bargaining rather than governmental fiat, *cf. H.K. Porter Co. v. NLRB,* 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970);[3] it injects into the collective bargaining process an uncertainty that diminishes the prospects for successful bargaining. *See United States Steel Co. v. NLRB,* 711 F.2d 772, 780 (7th Cir.1983); *Pacemaker Yacht Co. v. NLRB,* 663 F.2d 455, 460 (3d Cir.1981).[4]

For the same reason we reject the petitioner's contention that the standards governing the question of waiver in unfair labor practice proceedings before the Board differ markedly from the contract interpretation practiced by courts under Section 301. Precedents from these two forums regarding interpretation of collective bargaining agreements have typically been cited interchangeably. Courts deciding cases arising under Section 301 have relied upon Board decisions about waiver of the right to strike, *e.g., Lucas Flour,* 369 U.S. at 105, 82 S.Ct. at 577, and have applied the "clear and unmistakable" standard, *e.g., Ryder Truck Lines, Inc. v. Teamsters Local 480,* 727 F.2d 594, 600 (6th Cir.) (en banc), *cert. denied,* —— U.S. ——, 105 S.Ct. 103, 83 L.Ed.2d 48 (1984); *Delaware Coca-Cola Bottling Co. v. Teamsters Local 326,* 624 F.2d 1182, 1184 (3d Cir.1980); *cf. Drake Bakeries v. Local 50, American Bakery & Confectionary Workers Int'l,* 370 U.S. 254, 265, 82 S.Ct. 1346, 1352, 8 L.Ed.2d 474 (1962) (citing *Mastro Plastics*); conversely, courts reviewing decisions of the Board regarding waiver have discussed the reasoning of Section 301 cases, *e.g., NLRB v. Magnavox Co.,* 415 U.S. 322, 325, 94 S.Ct. 1099, 1102, 39 L.Ed.2d 358 (1974); *Metropolitan Edison,* 460 U.S. at 708 n. 12, 103 S.Ct. at 1477 n. 12; *cf. Rockaway News,* 345 U.S. at 80, 73 S.Ct. at 524 (deferring to arbitrators' interpretation of collective bargaining agreement's no-strike clause). Indeed, in formulating its prior approach toward no-strike clauses in *Davis-McKee,* the Board explicitly relied upon its reading of the Supreme Court's Section 301 decisions. *See* 238 N.L.R.B. at 654.

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[3] To be sure, the policy favoring contractual autonomy does not govern all situations, and *some* statutory rights cannot be waived by contract. *See, e.g., NLRB v. Magnavox Co.,* 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974) (right to solicit support for or against collective bargaining representative is non-waivable). Thus, while "a union may bargain away its members' economic rights, . . . it may not surrender rights that impair the employees' choice of their bargaining representative." *Metropolitan Edison,* 460 U.S. at 705–06, 103 S.Ct. at 1475–76. It cannot seriously be argued that the right to engage in sympathy strikes falls in the latter category.

[4] In passing the Labor-Management Relations Act, Congress recognized that "[t]he chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation for the term of the agreement" and that absent this expectation, "there is little reason why an employer would desire to sign such a contract." S.Rep. No. 105, 80th Cong., 1st Sess. 16 (1947).

Although this process of cross-fertilization has taken place largely without analysis or conscious approval, we think it follows quite naturally from the policies of the labor laws. A divergence of interpretive standards "would inevitably exert a disruptive influence" on the voluntary collective bargaining process central to federal labor policy. *Lucas Flour,* 369 U.S. at 103, 82 S.Ct. at 576. As the Supreme Court has instructed, a uniform approach to the interpretation of labor agreements is necessary to a healthy system of voluntary collective bargaining. *See supra* pp. 1030–1031. The petitioner concedes that under its view, an employer could obtain an award of damages in a Section 301 suit against a union on the theory that a sympathy strike violated a no-strike clause, but the employer would be guilty of unfair labor practices if it disciplined employees for the same conduct. This is precisely the sort of "conflicting substantive interpretation under competing legal systems" that the Court has regarded as destructive of the collective bargaining process. *Lucas Flour,* 369 U.S. at 104, 82 S.Ct. at 577. We cannot accept the view that Congress sanctioned such an anomalous result.

We conclude, then, that the standards governing the question of whether a contract "waives" statutory rights (and thereby provides a defense to an unfair labor practice charge) do not differ significantly from those applied in breach-of-contract suits under Section 301. In neither context, however, is it appropriate to interpret collective bargaining agreements in a vacuum, solely in accordance with "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." *C & C Plywood,* 385 U.S. at 430, 87 S.Ct. at 565. Rather, collective bargaining agreements must be read in light of the realities of labor relations and considerations of federal labor policy, *see Lucas Flour,* 369 U.S. at 105, 82 S.Ct. at 577, which make up the background against which such agreements are entered. *See Mastro Plastics,* 350 U.S. at 279–83, 76 S.Ct. at 356–58. To be sure, the clear and unmistakable test dictates that the waiver of statutory rights may not be inferred casually. But that test also cannot be applied woodenly; whether rights have been waived with the requisite clarity depends crucially upon context and "the specific circumstances of each case." *Metropolitan Edison,* 460 U.S. at 709, 103 S.Ct. at 1478.

Examination of the leading cases reveals that the explicitness with which a waiver must be stated in a contract varies with the nature of the right at issue. At one end of the spectrum lies *Mastro Plastics.* In that case, the Supreme Court held that a general no-strike clause did not waive employees' right to strike against flagrant unfair labor practices. The employees had struck to protest a campaign of intimidation by their employer designed to oust their incumbent representative, conduct "destructive of the foundation on which collective bargaining must rest." 350 U.S. at 281, 76 S.Ct. at 357. It seems highly unlikely, to say the least, that a union would agree to give up its members' right to strike against such conduct—in effect, to forfeit its means of self-preservation—and the Court held that a general no-strike clause did not by itself establish that concession. By contrast, in *Lucas Flour,* the Court unhesitatingly *implied* an obligation not to strike over arbitrable grievances from a collective bargaining agreement's arbitration clause. *See* 369 U.S. at 104–06, 82 S.Ct. at 577–78. Despite the absence of an express no-strike clause, the Court deemed it reasonable to presume that the union gave up the right to strike over arbitrable disputes in exchange for the employer's promise to submit such disputes to arbitration. *See id.* at 104–05, 82 S.Ct. at 577–78; *see also Gateway Coal Co. v. UMW,* 414 U.S. 368, 381–82, 94 S.Ct. 629, 638–39, 38 L.Ed.2d 583 (1974). Thus, where strikes over purely "economic" matters are at stake and the context strongly suggest that waiver was intended, "there does not have to be an express waiver." *Metropolitan Edison,* 460 U.S. at 708 n. 12, 103 S.Ct. at 1477 n. 12.

Somewhere between these two polar examples, we think, lies the question of waiver of the right to honor picket lines. Essentially, sympathy strikes are a type of economic weapon available to employees; because union members expect that the refusal to cross picket lines will be reciprocal, the practice rests on employees' self-interest as well as "sympathy." *See Southern Cal. Edison,* 646 F.2d at 1363–64, and cases cited therein. Still, we also recognize the right to honor picket lines is one that many union members cherish and, indeed, regard as fundamental to the union movement. For that reason, it might be thought that collective bargaining representatives would not lightly give up such a right. In assessing whether a broadly-phrased no-strike clause covers sympathy strikes, however, the unexpressed reservations of employees cannot be treated as dispositive; since a union's surrender of the right is not disfavored by reason of national labor policy (as, for instance, in *Mastro Plastics*), a court's task is simply to interpret the parties' manifestations of mutual consent.

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And in determining the meaning to be ascribed to a general no-strike clause, our starting point must be *Rockaway News.* In that case, the Supreme Court held a sympathy strike to be within the purview of a general no-strike clause. The Court's conclusion appears to have rested primarily on the language of the clause itself. *See* 345 U.S. at 79–80, 73 S.Ct. at 524–25. [5] *Rockaway News* thus establishes, at a minimum, that nothing in the Act prevents the Board or a court from finding a waiver of the right to honor picket lines in a contractual no-strike clause of sufficient breadth.

To counter the weight of *Rockaway News,* the petitioner relies upon cases in which it is stated that a union's no-strike obligation constitutes the *quid pro quo* for an employer's agreement to arbitrate specified disputes. *See, e.g., Lincoln Mills,* 353 U.S. at 455, 77 S.Ct. at 917. A general no-strike clause, Local 1395 contends, is ordinarily intended to cover only strikes over arbitrable grievances, and because sympathy strikes do not result from any immediate (and arbitrable) dispute between employer and employee, but rather from an employee's respect for a "stranger" picket line, such strikes are not covered by a general no-strike clause. We think, however, that the petitioner's argument proceeds from an overbroad premise. In a case like *Lucas Flour,* in which a no-strike obligation is *implied,* it is certainly reasonable to presume that the no-strike obligation is no broader than the duty to arbitrate from which it is inferred. However, this common-sense notion offers less guidance in interpreting an *express* no-strike clause. *See United States Steel,* 711 F.2d at 776–77; *Delaware Coca-Cola Bottling,* 624 F.2d at 1192 (Rosenn, J., concurring). In some situations, it will be apparent from the language and structure of an agreement that its no-strike and arbitration clauses are functionally linked. *See, e.g., Gary Hobart Water Corp. v. NLRB,* 511 F.2d 284 (7th Cir.), *cert. denied,* 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1975). In other contexts, the inclusion of an express no-strike clause may evidence the parties' intent to reach *beyond* strikes over arbitrable matters (which would be banned by implication from an arbitration clause even absent an express no-strike clause). A no-strike clause may well constitute the *quid pro quo,* not merely for the promise to arbitrate disputes, but for the promise not to engage in lock-outs or for other concessions by the employer. The question "[u]ltimately . . . depends on the intent of the contracting parties." *Gateway Coal,* 414 U.S. at 382, 94 S.Ct. at 639. And in discerning the intent of the parties underlying an express no-strike clause, *Rockaway News* is directly on point and *Lucas Flour* is not. [6]

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[5] The Court went on to state that "if [the clause's language] be considered ambiguous in meaning," the conclusion that it covered sympathy strikes was buttressed by an arbitration decision to that effect. 345 U.S. at 79–80, 73 S.Ct. at 524–525. The Court also noted that the employer had tendered an offer of proof that in the course of negotiations the union had unsuccessfully sought an amendment excluding sympathy strikes from the no-strike clause. But the Court does not appear to have relied upon this extrinsic evidence because it was "not clear" whether the offer of proof had been accepted by the trial examiner. *See id.*

C.

The question remains whether *this* no-strike clause effectively waives the right to honor picket lines. From the language of the clause itself, we would be inclined to conclude that it does. The clause has extraordinary breadth: in the style of the draftsman determined to allow no loopholes, it refers to "any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the **1035** operation of the Company's business." Significantly, too, the clause binds "the Union and *each employee covered by the agreement,*" (emphasis added)—which precludes any argument that only union-authorized strikes are covered. Fairly read, then, the clause would seem to embrace the scenario of an employee's refusal to cross a picket line to discharge work assignments even though it does not specifically use the words "sympathy strike." *See W-I Canteen Serv. v. NLRB,* 606 F.2d 738, 745 (7th Cir.1979). The no-strike clause, moreover, is contained in a section of the agreement separate from the arbitration clause and appears to be fully independent of that clause; one cannot readily infer that the no-strike clause covers only arbitrable disputes. *See United States Steel,* 711 F.2d at 778. Finally, other provisions of the agreement strongly evidence the employees' commitment to facilitate the delivery of the uninterrupted service expected of a public utility. [7] This commitment is hardly consistent with a privilege to refrain from reading meters or performing other services on the premises of Indianapolis Power's customers because of the presence of picket lines on the site.

Local 1395 contends that because a collective bargaining agreement must be read "in the light of the law relating to it when made," *Mastro Plastics,* 350 U.S. at 279, 76 S.Ct. at 356, it is entitled to the benefit of the Board's prior *Davis-McKee* approach toward interpreting no-strike clauses. This contention is misplaced for several reasons. To begin with, when the no-strike clause was drafted in 1972, the Board was quite willing to find a waiver of the right to honor picket lines in a general no-strike clause. *See, e.g., Local 12419, UMW (Nat'l Grinding Wheel Co.),* 176 N.L.R.B. 628 (1969). In effect, then, the petitioner's argument rests on the hypothesis that the parties, in later ratifying preexisting contractual language without change, necessarily intended to incorporate changes in the law *sub silentio.* Even if it were appropriate to indulge such speculation, however, we note that *Davis-McKee* was not "the law" in the Seventh Circuit, where the agreement was entered and ratified. *See W-I Canteen Serv. v. NLRB,* 606 F.2d 738 (7th Cir.1979) (rejecting *Davis-McKee* approach). In any event, it is simply wrong to assume that "the law" to which parties refer in entering collective bargaining agreements is exclusively, or even primarily, Board law. As we have noted, *see supra* pp. 1030–1033, collective bargaining agreements are interpreted by arbitrators and courts as well. [8] Moreover, it is our distinct impression that the Board's *Davis-McKee* decision represents something of a sport among the corpus of the law of collective bargaining agreements viewed as a whole. We therefore reject Local 1395's suggestion that although it agreed to an undoubtedly broad no-strike clause, it could nonetheless rest assured (in reliance upon *Davis-McKee*) that that clause would not be interpreted as covering sympathy strikes.

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[6] We also regard as inapposite *Buffalo Forge Co. v. United Steel Workers,* 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976), which held that courts may not enjoin a sympathy strike pending an arbitrator's decision as to whether the strike violates a contractual no-strike clause. *Buffalo Forge* simply addressed the scope of the Norris-LaGuardia Act's restrictions on injunctive relief; the Court expressly declined to decide whether sympathy strikes violated the no-strike clause in question. *See id.* 428 U.S. at 410, 96 S.Ct. at 3148.

[7] Section 1.04 of the agreement, entitled "Recognition of the Duties of Employees," states:

> (a) In recognition of the fact that the Company is a public utility which is obligated to provide continuous and adequate service to the public, each employee covered by this agreement has a special duty to assist the Company in maintaining that service by rendering competent, efficient and diligent service at all times in the performance of his job.
> (b) In the event of any interruption or threatened interruption of the service supplied or to be supplied by the Company to the public, the Union and each employee covered by this agreement hereby promise to assist the Company in preventing the interruption and in restoring, maintaining and continuing normal service to the public.

[8] In fact, it is usually said that parties to collective bargaining agreements bargain for the arbitrator's interpretation of the agreement. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960). Accordingly, courts must give broad—indeed virtually complete—deference to an arbitrator's interpretation of a collective bargaining agreement. This is so because the arbitrator's interpretation is an integral part of the agreement itself, in a way that a public tribunal's interpretation could never be. This case, however, does not raise the question of whether the Board may defer to an arbitrator's interpretation of a contractual no-strike clause. *See, e.g., Chevron, U.S.A., Inc.,* 275 N.L.R.B. No. 132, 1985–86 NLRB Dec. (CCH) ¶ 17,374 (1985).

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Were we faced only with the language of the agreement itself, we would have little trouble upholding the Board's order. But the words parties use in drafting contracts are only evidence of their intent; the words are not themselves the parties' intent. The Board may not, in the guise of enforcing the "plain meaning" of contractual language, erect an inflexible presumption on an issue turning on the parties' *actual* intent. *Cf. Scenic Artists Local 829 v. NLRB,* 762 F.2d 1027 (D.C.Cir.1985). The intent of the parties to collective bargaining agreements is not to be discerned by reference to "abstract definitions unrelated to the context in which the parties bargained," *C & C Plywood,* 385 U.S. at 430, 87 S.Ct. at 565, especially where bargaining history is crucial to an understanding of that intent.[9] In the proceeding below, Local 1395 introduced evidence that when the contract was negotiated the parties had asserted different interpretations of the no-strike clause and that neither party had acquiesced in the other's view. The ALJ concluded that the parties had agreed to disagree over whether sympathy strikes were covered by the clause. If accepted, this factual finding would be controlling: absent mutual consent on the issue, there could be no binding contractual commitment, *see* RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (1979), and, *a fortiori,* no clear and unmistakable waiver of the right to honor picket lines. *See George Banta Co. v. NLRB,* 686 F.2d 10, 20 (D.C.Cir.1982), *cert. denied,* 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983).

While stating generally that it agreed with the ALJ's conclusions respecting the extrinsic evidence of the parties' intent, the Board did not address this specific finding. Instead, the Board stated only that "there is insufficient extrinsic evidence establishing the parties' intent to exclude sympathy strikes from the no-strike provision's scope." 273 N.L.R.B. No. 211, slip op. at 3. This assertion unfortunately assumes the very point at issue, *i.e.,* whether sympathy strikes fall within the clause's scope. And in this regard, the Board's opinion fails to discuss relevant and perhaps dispositive evidence of the parties' intent. The Board appears to have failed to do what its opinion acknowledges it must do in interpreting a no-strike clause: "give the parties' intent controlling weight," *id.,* whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence. *See IBEW, Local 387 v. NLRB,* 788 F.2d 1412, 1414 (9th Cir.1986).

It may be that the Board simply disagreed with the ALJ's finding that the parties had expressed different interpretations to each other at the time the contract was entered. There was conflicting evidence in the record on this point, as well as other evidence suggesting that union officials believed that sympathy strikes were covered by the clause.[10] The agency remained free to substitute its own view of the evidence for that of the ALJ, *see Reckitt & Colman, Ltd. v. Administrator, DEA,* 788 F.2d 22, 26 (D.C.Cir.1986), and cases cited therein; and this court must respect the Board's findings of fact if supported by substantial evidence. *See* 29 U.S.C. § 160(f) (1982). What we may not do, however, is to *presume* that the Board made findings of fact necessary to a defensible decision. *Cf. SEC v. Chenery Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). The Board's order under review does not explain or even recognize any departure from the ALJ's view of the evidence. Under these circumstances, we must reverse the Board's decision and remand the case to the Board for further proceedings. Accordingly, the petition for review is

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GRANTED.

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[9] Besides being ill-suited for the interpretation of collective bargaining agreements, the so-called "plain meaning" rule has fallen from favor in the realm of general contract law. While it may be presumed that parties use words in their ordinary sense, this "presumption" does not govern where the parties' mutual intent to the contrary is demonstrated. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1979). A court may properly consider extrinsic evidence of the parties' intent even where the contractual language may seem unambiguous. *See generally* 3 CORBIN ON CONTRACTS § 535–36 (1960).

[10] In 1973, and again in 1975, Local 1395 sought to amend the clause specifically to permit employees to refuse to cross picket lines, but Indianapolis Power rejected these proposals. This bargaining history could well be thought to provide probative evidence that sympathy strikes were covered by the no-strike clause *ab initio. See News Union of Baltimore,* 393 F.2d at 677 n. 6; *cf. Rockaway News,* 345 U.S. at 79–80, 73 S.Ct. at 524–525 (dictum).

Florida Gulf Coast Building and Construction Trades Council v. NLRB

796 F.2d 1328 (11th Cir.), August 11, 1986; rehearing and rehearing en banc denied November 12, 1986; cert. filed March 11, 1987—273 NLRB 1431

On petition to review Board Order

Before HILL and ANDERSON,* Circuit Judges, and TUTTLE, Senior Circuit Judge

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PER CURIAM: In this case we must determine whether a union violates § 8(b)(4)(ii)(B) of the National Labor Relations Act when it distributes handbills urging a consumer boycott of all the tenants of a mall in furtherance of its dispute with a company constructing a building for one tenant of the mall.

I.

The facts of the case are undisputed and are detailed in the opinion of the Supreme Court in *DeBartolo Corp. v. NLRB,* 463 U.S. 147, 103 S.Ct. 2926, 77 L.Ed.2d 535 (1983) (*"DeBartolo I"*). Briefly summarized, the facts reflect the following. DeBartolo owns a large shopping mall in Tampa, Florida. Approximately 85 retail establishments are tenants of the mall. One of the mall's tenants, H.J. Wilson Company, Inc. ("Wilson's") contracted with High Construction Company ("High") to build a store for Wilson's at the mall. Florida Gulf Coast Building Trades Council, AFL-CIO (the "Union"), became involved in a primary labor dispute with High over the payment of allegedly substandard wages and benefits. The Union distributed handbills at the entrances to the mall urging that consumers not patronize tenants of the mall.

DeBartolo filed an unfair labor practice charge alleging that the Union was engaging in a secondary boycott in violation of the National Labor Relations Act, as amended ("NLRA" or the "Act"), 29 U.S.C. § 151 *et seq.* In February 1980, the general counsel of the National Labor Relations Board ("NLRB" or the "Board") issued a complaint against the Union alleging a violation of § 8(b)(4)(ii)(B) of the Act.[1] Without deciding whether the distribution of the handbills violated the statute, the Board concluded that the handbilling was not prohibited by the Act because of the "publicity proviso"[2] and dismissed the complaint. *Florida Gulf Coast Buildings Trade Council, AFL-CIO (Edward J. DeBartolo Corp.),* 252 N.L.R.B. 702 (1980). The U.S. Court of Appeals for the Fourth Circuit affirmed. *DeBartolo v. NLRB,* 662 F.2d 264 (4th Cir.1981). In *DeBartolo I,* the Supreme Court reversed the decision of the Fourth Circuit and held that the Union's conduct fell outside the protection of the publicity proviso contained in § 8(b)(4). 463 U.S. at 157, 103 S.Ct. at 2932. The Court did not determine whether the distribution of the handbills violated the underlying restrictions of the NLRA or, if so pro-

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hibited, whether the NLRA is constitutional under the First Amendment.

On remand, the NLRB issued the supplemental decision and order which are the subject of the instant case. The Board found that:

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* Judge Anderson was a member of the panel, but took no part in the consideration or decision of this case. This case is being decided by a quorum. 28 U.S.C. 46(d).

[1] The statute reads in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) * * *

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as a representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of § 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C. § 158(b)(4)(ii)(B).

[2] The proviso reads as follows:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. § 158(b)(4).

> By distributing handbills urging potential customers not to shop at East Lake Square Mall, the [Union] has coerced the mall tenants with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo andor Wilson's to cease doing business with High, thereby violating Section 8(b)(4)(ii)(B) of the Act.

Record on Appeal at 237. The Board did not consider whether its interpretation of the Act would violate the First Amendment, presuming, "as a Congressionally created administrative agency[,] . . . the constitutionality of the Act we administer." *Id.* at 236. The Board issued an order instructing the Union to cease and desist from the distribution of handbills and requiring the Union to post an appropriate notice. The Union petitions this court to set aside the decision and order of the NLRB. The NLRB presents a cross-petition for enforcement of its order. Because we find that the Union's handbilling activities do not violate § 8(b)(4)(ii)(B) of the NLRA, we grant the Union's petition and deny enforcement of the order.

II.

The Supreme Court recognized that "this case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing."[3] *DeBartolo I,* 463 U.S. at 157, 103 S.Ct. at 2933. The Union contends that such distribution of a written message is a form of speech protected by the First Amendment. If § 8(b)(4)(ii)(B) is interpreted to restrict the distribution of handbills, then, the Union argues, the NLRA violates the First Amendment. Neither the courts nor the NLRB has directly considered the constitutionality of restricting nonpicketing union publicity. *Cf. Hospital & Service Employees Union v. NLRB (Delta Air Lines),* 743 F.2d 1417, 1428 (9th Cir.1984). If we were to conclude that the statutory provision in question makes it unlawful for unions to distribute such handbills to the public, we would be required to consider whether this provision is consistent with the First Amendment. However, the statutory question presented is almost as novel as the constitutional question. Neither the Supreme Court nor the court of appeals for any circuit has decided whether the statutory prohibition against threatening, coercing or restraining applies to the distribution of handbills.

The Supreme Court has held "that an Act of Congress not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979); *accord DeBartolo I,* 463 U.S. at 157 n. 10, 103 S.Ct. at 2933 n. 10 ("when Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly"); *International Association of Machinists v. Street,* 367 U.S. 740, 790, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) ("Federal statutes are to be construed as to avoid serious doubt of their constitutionality."). "Moreover, the Court has followed this policy in the interpretation of the [NLRA] and related statutes." *Catholic Bishop,* 440 U.S. at 500, 99 S.Ct. at 1318. In *Catholic Bishop,* the Court stated that it would determine whether the statutory interpretation proposed by the NLRB "would give rise to serious constitutional questions." *Id.* at 501, 99 S.Ct. at 1319. If so, the Court held that " 'the affirmative intention of the Congress clearly expressed,' " *id.* at 501, 99 S.Ct. at 1319 (quoting *Benz v. Compania Naviera Hidalgo, S.A.,* 353 U.S. 138, 147, 77 S.Ct. 699, 704, 1 L.Ed.2d 709 (1957)), must be identified, before the statute could be construed in such a manner.

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Thus, we must consider whether the statutory interpretation suggested by the Board would cause serious doubts about the constitutionality of § 8(b)(4). If we determine that there would be serious constitutional questions, we must examine the statute and its legislative history to identify "the affirmative intention of the Congress clearly expressed" to restrict such handbilling.

III.

In *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), the Supreme Court considered the validity of an injunction against distribution of leaflets which were alleged to be intended to coerce and intimidate an individual. The individual was a real estate broker who was alleged to have engaged in tactics termed "panic peddling" and "block busting." A community organization asked the broker to sign an agreement that he would not solicit real estate business in their community. When the broker refused to sign the agreement, the organization distributed leaflets near his home which were critical of his business and which were designed to cause him to sign the agreement with them. An injunction prohibiting the organization from distributing the leaflets was affirmed by a state appellate court on the ground that the alleged activities were coercive and intimidating, rather than informative, and were therefore not entitled to First Amendment protection. *Id.* at 418, 91 S.Ct. at 1577. The Supreme Court reversed, explaining:

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[3] This appears to be the correct interpretation of the language of the Court:

> Stressing the *fact* that the case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing, the Union argues that its handbilling is a form of speech protected by the First Amendment.

463 U.S. at 157, 103 S.Ct. at 2933 (emphasis added).

> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . [S]o long as the means are peaceful, the communication need not meet standards of acceptability.

Id. at 419, 91 S.Ct. at 1577-78. Thus, the distribution of handbills is generally fully protected by the First Amendment, even when designed to pressure others to act.

In *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court, quoting at length from *Organization for a Better Austin,* held that the First Amendment protects a secondary boycott organized by a civil rights group. The Court stated: "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." 458 U.S. at 910, 102 S.Ct. at 3424. " ' "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.' " *Id.* (quoting *Thomas v. Collins,* 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.Ed. 430 (1945)).

However, in *Claiborne Hardware,* the Court "recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." *Id.* at 912, 102 S.Ct. at 3425. The Court gave the following as an example:

> Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."

Id. (quoting *NLRB v. Retail Store Employees Union, Local 1001 (Safeco),* 447 U.S. 607, 617-18, 100 S.Ct. 2372, 2378, 65 L.Ed.2d 377 (Blackmun, J., concurring in part)).

The discussion of restrictions on secondary picketing in *Claiborne Hardware* reflects the settled principle that labor picketing is entitled to less First Amendment protection than pure speech.

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Such treatment is based on the concept that picketing includes elements in addition to speech. These additional elements justify restrictions on picketing which would not be permitted vis-a-vis pure speech:

> [W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." [*Bakery & Pastry Drivers & Helpers Local v. Wohl,* 315 U.S. 769, 775, 776 [62 S.Ct. 816, 819, 86 L.Ed. 1178] (Douglas, J., concurring)]. . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. . . .
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> * * * *
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> A State may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context. . . . And we have found that because of its element of com-

> munication picketing under some circumstances finds sanction in the Fourteenth Amendment. . . . However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.

Hughes v. Superior Court, 339 U.S. 460, 464–65, 70 S.Ct. 718, 720–21, 94 L.Ed. 985 (1950). *See also Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 311 n. 17, 99 S.Ct. 2301, 2315 n. 17, 60 L.Ed.2d 895 (1979);[4] *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits),* 377 U.S. 58, 77, 84 S.Ct. 1063, 1073, 12 L.Ed.2d 129 (1964) (Black, J., concurring);[5] *International Board of Teamsters, Local 695 v. Vogt,* 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347 (1957). In *Safeco,* Justice Stevens reemphasized that picketing has a non-speech element the regulation of which may justify incidental restrictions of its speech element:

> I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers v. Wohl,* 315 U.S. 769, 776–77, 62 S.Ct. 816, 819–20, 86 L.Ed. 1178, Mr. Justice Douglas stated:
>
> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.
>
> The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal rather than a reasoned response to an idea.

Safeco, 447 U.S. at 618–19, 100 S.Ct. at 2379–80 (Stevens, J., concurring in part).

The handbilling in the instant case was peaceful and orderly. It involved none of the non-speech elements, *e.g.,* patrolling, which justify restrictions on picketing.[6] In attempting to enlist the aid of

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[4] The Supreme Court noted that although secondary picketing against a neutral employer could be constitutionally prohibited, picketing was different from other manners of expression for constitutional purposes:

> Although we have previously concluded that picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution, . . . we have noted that, for First Amendment purposes, picketing is qualitatively "different from other modes of communication."

Babbitt, 442 U.S. at 311 n. 17, 99 S.Ct. at 2315 n. 17 (citations omitted).

[5] Justice Black stated:

> "Picketing," in common parlance and § 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy. . . . While "the dissemination of information concerning the facts of the labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," *Thornhill v. Alabama,* 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093, patrolling is, of course, conduct, not speech, and therefore is not directly protected by the First Amendment. It is because picketing includes patrolling that neither *Thornhill* nor cases that followed it lend "support to the contention that peaceful picketing is beyond legislative control." *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 499–500, 69 S.Ct. 684, 690, 689, 93 L.Ed. 834. . . . However, when conduct not constitutionally protected, like patrolling, is intertwined as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press.

Tree Fruits, 377 U.S. at 77, 84 S.Ct. at 1073–74 (Black, J., concurring).

[6] The NLRB suggests that handbilling like picketing involves conduct in addition to speech, i.e., the "physical pressure" of the person distributing the handbills or pamphlets. In making this argument, the NLRB quoted the case of *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), *overruled on other grounds, Hudgens v. NLRB,* 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). However, the NLRB misquoted *Logan Valley Plaza* in its brief. In *Logan Valley,* the Supreme Court stated that handbilling involves conduct other than speech "namely, the physical *presence* of the person distributing the leaflets." *Id.* at 316, 88 S.Ct. at 1607 (emphasis added). On the facts of *Logan Valley,* the Supreme Court was necessarily concerned with "presence"; nowhere did it address "pressure" applied by those distributing handbills.

The physical presence of people distributing handbills was relevant in *Logan Valley,* a case involving picketing in a shopping center, because in earlier cases the Court had found "that title to municipal property [was], standing alone, an insufficient basis for prohibiting all [physical presence on] such property for the purpose of distributing printed matter." *Logan Valley,* 391 U.S. at 316, 88 S.Ct. at 1607. From this rationale, which had been developed in handbilling cases, the Court reasoned that title to property was also insufficient reason to ban people carrying informational

Continued

consumers in its dispute with the construction company, the Union was relying "entirely on the persuasive force of the idea." *Id.* at 619, 100 S.Ct. at 2380. The handbills left the recipients completely free to act in agreement with the ideas presented or to refuse to do so.

In the labor context, the Supreme Court has also held that communication which is merely a "threat of retaliation based on misrepresentation and coercion," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969), is "without the protection of the First Amendment." *Id. See also NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477, 62 S.Ct. 344, 348, 86 L.Ed. 348 (1941). In those cases, the Supreme Court held that communications which contained a "threat of reprisal or force or promise of

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benefit" are not entitled to First Amendment protection.

In the instant case, the NLRB held that the Union, by urging consumers to avoid patronizing the mall tenants, hoped to coerce the mall tenants to pressure Wilson's and/or DeBartolo to force High, with whom the Union has a primary dispute, to use Union standards. However, a finding of statutory coercion would not control the First Amendment analysis. While the focus of § 8(b)(4)(ii)(B) is coercion of the secondary employer, the secondary employer vis-a-vis the handbill is a non-listener. The handbills in this case lacked any elements which could threaten, coerce or restrain the listeners, i.e., the consumers. As pointed out in *Gissel Packing* and *Virginia Electric & Power*, for purposes of assessing the First Amendment protection to which communication is entitled, a court must focus on the possible coercion of the listeners, in this case, the consumers. Moreover, as the Supreme Court stated in *Organization for a Better Austin v. Keefe* and *NAACP v. Claiborne Hardware Co.*, the claim that speech is intended to exercise an ultimate coercive impact upon someone does not remove that speech from the reach of the First Amendment. *Claiborne Hardware*, 458 U.S. at 911, 102 S.Ct. at 3424; *Organization for a Better Austin*, 402 U.S. at 419, 91 S.Ct. at 1577.

In addition, it should be pointed out that the Union was not seeking to have the consumers, the mall tenants, or DeBartolo and/or Wilson's do anything which would be illegal. The consumers were legally free to agree with the Union's position and decline to patronize the mall tenants. The mall tenants would have been acting equally legally if, in response to the consumer pressure, they requested that DeBartolo and/or Wilson's request that High use union labor. In the same way, Wilson's and/or DeBartolo would have been within the law if they requested High to accede to the Union's demands regarding terms and conditions of employment.

In light of the absence of the non-speech elements which have permitted restrictions on labor picketing and in light of the full First Amendment protection afforded to handbilling and pamphleteering, we conclude that if § 8(b)(4)(ii)(B) is construed to prohibit certain types of handbilling, serious constitutional questions will arise. [7] Therefore, we must examine the

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picket signs. *Id.* Fully protected speech usually involves the physical presence of the speaker and reasonable content-neutral time, place, or manner restrictions may be placed on fully protected speech because of, among other reasons, the physical presence of the speaker or those listening to him. *See, e.g., Schneider v. State of New Jersey*, 308 U.S. 147, 160–61, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939) ("[A] person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic.").

In this case, there is no indication in the record that the people distributing the handbills outside the mall were pressuring or harassing the consumers entering the mall. Thus, we are not faced with the situation where the distribution of handbills took on some of the aspects of picketing.

[7] If the statute is read to prohibit handbilling, that prohibition would clearly be content-based. The prohibition is addressed specifically to handbilling that is threatening, coercive, or restraining. When the government regulates an expression of a particular message, without regard to whether the expression consists of speech or speech plus conduct, it has legislated on the basis of content. In order to regulate speech on the basis of content, it is normally necessary for the government to prove a compelling state interest and for the government to show that the statute was narrowly drawn to achieve that end. *See, e.g., United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 55, 103 S.Ct. 948, 960, 74 L.Ed.2d 794 (1983); *Carey v. Brown*, 447 U.S. 455, 461–62, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980); *First National Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). It has been suggested that § 8(b)(4)(ii)(B) "cannot meet the exacting scrutiny of the compelling interest standard." Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand.L.Rev. 1469, 1505 (1983); *accord* Comment, *"It Takes More Than Money to Fly Delta. It Takes Nerve.": Union's Secondary Boycott Publicity and the First Amendment: Delta Air Lines*, 67 Minn.L.Rev. 1235, 1271 (1983).

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statute and its legislative history in order to identify "the affirmative intention of the Congress clearly expressed" to prohibit such speech.

IV.

The language of the statute contains no clear expression of an affirmative intent of Congress to prohibit the distribution of handbills urging a secondary boycott. It is true, however, that the prohibition against threatening, coercing, or restraining could be read very broadly. Therefore, we must examine the legislative history of this portion of the NLRA to determine whether Congress intended to proscribe such publicity.[8]

Congress originally made secondary boycotts an unfair labor practice in 1947 under the Taft-Hartley Act. Section 8(b)(4), as in effect from 1947 to 1959, prohibited unions from inducing a strike where the object of the strike was compelling an employer to cease doing business with any other person.[9] There were three major loopholes in the Taft-Hartley language:

> Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, and municipalities were not "employers" under the Act and therefore an inducement or encouragement of their employees was not unlawful.

Tree Fruits, 377 U.S. at 64–65, 84 S.Ct. at 1067–68.

During both the Eighty-fifth Congress and the Eighty-sixth Congress, the Senate passed labor reform bills—the Kennedy-Ives bill during the Eighty-fifth Congress and the Kennedy-Ervin bill during the Eighty-sixth Congress—neither of which included any amendments to § 8(b)(4). *Id.* at 65, 84 S.Ct. at 1067. Several amendments proposed to fill the three major gaps in the Taft-Hartley Act were rejected by the Senate.

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During the Eighty-sixth Congress, the Eisenhower Administration did introduce a bill to close the three loopholes. In a message to Congress, "Transmitting a 20-point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations," President Eisenhower proposed to

> amend the secondary boycott provisions of the [NLRA] so as to cover the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the act; and inducements of individual employees to refuse to perform services with the object of forcing their employers to stop doing business with others; and to make clear that secondary activities permitted against an employer performing "farmed-out struck work" and, under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer.

S.Doc. No. 10, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 82 (1959) [hereinafter cited as "Leg.Hist."]. The Administration bill, S. 748, was the first Senate bill to propose making it an unfair labor practice to "threaten, coerce or restrain" a secondary employer. In *Tree Fruits,* the Supreme Court noted that in testifying in support of the Administration's bill, the Secretary of Labor did not refer to consumer picketing as making the amendments necessary. *Tree Fruits,* 377 U.S. at 65, 84 S.Ct. at 1067. It is additionally clear that the Secretary did not refer to publicity directed at consumers as making amendments to § 8(b)(4) necessary. 105 Cong. Rec. 1567–68 (1959), *reprinted in* 2 Leg. Hist. at 993–94. Moreover, the Supreme Court found that Senator Goldwater, "an insistent proponent of stiff boycott curbs," who proposed his own amendments to close the loopholes, did not refer to consumer picketing, much less publicity directed at consumers, as making necessary the amendments which he and the Administration proposed. *Tree Fruits,* 377 U.S. at 65, 84 S.Ct. at 1067; *see* 105 Cong.Rec. 1163 and

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[8] The Union does not challenge the findings that the mall tenants were secondary parties and that the object of the handbilling was a boycott of the mall tenants. Their statutory argument is that when Congress enacted a prohibition on threatening, coercing, or restraining, it did not intend to prohibit handbilling.

[9] The history of the 1959 Amendments to the NLRA has been discussed at length in several cases. *See, e.g., Tree Fruits,* 377 U.S. at 62–71, 84 S.Ct. at 1065–71; *NLRB v. Servette, Inc.,* 377 U.S. 46, 51–55, 84 S.Ct. 1098, 1102–04, 12 L.Ed.2d 121 (1964). While our discussion of the legislative history repeats much of what has been set out in earlier cases, we must reexamine the whole legislative history focusing for the first time on whether Congress intended to proscribe nonpicketing labor publicity.

5764 (1959), *reprinted in* 2 Leg.Hist. at 979 and 1079.[10]

When the Senate Committee on Labor and Public Welfare reported out the Kennedy-Ervin Bill, S. 1555, without any proposal to amend § 8(b)(4), the proponents of such a change again listed the major loopholes which they felt needed to be closed in the prohibition against secondary boycotts. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 70 (1959), *reprinted in* 1 Leg.Hist. at 475, U.S.Code Cong. & Admin. News 1959, p. 2318. Their report mentioned the problem with railroad and government employees, the inducement of individual employees, and hot-cargo clauses.[11] It also focused on "coercion of employers." The report pointed out that there was a problem with a union threatening a secondary employer "with a strike or picket line if he continues to do business with [the primary] employer." *Id.* It stated that the Administration bill, S. 748, solved the "coercion of employers" problem by amending § 8(b)(4) to make the restriction apply to " 'threatern [sic], coerce, or restrain any person engaged in commerce . . .' as well as 'induce or encourage any individual employed by any person.' " *Id.*[12] The Administration bill also dealt with the other three loopholes discussed. Thus, it is evident that the proponents of the amendments to § 8(b)(4) had in mind non-consumer picketing and more direct economic actions, *e.g.*, strikes, when they proposed to amend that section by making its restriction apply to "threaten, coerce, or restrain." There is no indication that they intended to restrict distribution of publicity to consumers.

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When the Kennedy-Ervin Bill was being debated by the full Senate, Senator McClellan, who had offered his own bills which included amendments to § 8(b)(4), proposed an amendment to make it unlawful to "exert, or attempt to exert any economic or other coercion against, or offer any inducement to, any [secondary] person engaged in commerce. . . ." 105 Cong.Rec. 5970 (1959), *reprinted in* 2 Leg.Hist. at 1193. Senator McClellan stated that the amendment would close the three loopholes discussed above and would also apply to secondary consumer picketing:

> The amendment, Mr. President, covers pressure in the form of dissuading customers from dealing with secondary employers. *That refers to establishing a picket line around a merchant's store,* when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union. It is an effort to influence the original employer.
>
> * * * *
>
> I point out that we have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand or product. A merchant may have built his business around the product. . . . The merchant may have a competitor who is handling a competitive product made by another manufacturer, which serves the same function, but which is a different brand and is manufactured by someone else. In one of these plants there may be a strike, and the union may picket the merchant who is handling the product of the struck plant. The union may say to the merchant, "You cannot sell this product. If you do, we will picket your place of business. Thus you will not be able to get your supplies, because the Teamsters will not cross the picketline."
>
> In addition, the merchant's customers would be embarrassed. They would be harassed. They would see the picket sign. What would the picket sign say? It would say "Unfair to labor." How is the merchant unfair to labor? It is simply a case of the merchant not being willing to stop handling a product which he has been handling for 20 years and on which he has built his business. That is a secondary boycott which, it seems to me, ought to be prohibited.

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[10] The Supreme Court noted that Senator Goldwater did refer to consumer picketing when the bill agreed upon by the House-Senate conference committee was before the Senate. *Tree Fruits,* 377 U.S. at 65 n. 10, 84 S.Ct. at 1067 n. 10. His statements in support of the conference bill are discussed *infra.*

[11] "Hot-cargo" clauses are clauses in union contracts whereby the employer agrees not to handle products which the union has "blacklisted."

[12] The report pointed out that Senator McClellan had introduced two bills, S. 1384 and S. 1385, which also dealt with these loopholes. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 70, *reprinted in* 1 Leg.Hist. at 475.

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105 Cong.Rec. 5971 (1959), *reprinted in* 2 Leg.Hist. at 1194 (emphasis added).[13] It is clear from this statement that Senator McClellan intended only to prohibit picketing of the secondary merchant. Prior to his proposals regarding consumer picketing, the proponents of the Administration bill had not discussed any form of restriction on appeals to consumers. *See Tree Fruits,* 377 U.S. at 65–67, 84 S.Ct. at 1067–68.

As was pointed out in *Tree Fruits,* the proposed House legislation "[f]rom the outset . . . included provisions concerning secondary boycotts." *Id.* at 67, 84 S.Ct. at 1068. "The Landrum-Griffin bill, which was ultimately passed by the House, embodied the Eisenhower Administration's proposals as to secondary boycotts. The initial statement of Congressman Griffin in introducing the bill which bears his name, contains no reference to consumer picketing in the list of abuses which he thought required the secondary boycotts amendments." *Id.* at 67, 84 S.Ct. at 1068–69 (footnotes omitted). Thus, while the proponents of the House bill wanted, from the

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beginning of debate, to amend § 8(b)(4) to close the major loopholes, there is no indication that *consumer* picketing or publicity was initially considered a problem.

On August 6, 1959, President Eisenhower delivered an address from his White House office on the need for effective labor reform. In this speech, the President called for restrictions on secondary consumer picketing. In discussing such picketing, President Eisenhower gave the following example:

> Take another company—let us say, a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organizing officials, in this case, use another scheme. They picket the stores which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture.
>
> How can anyone justify this kind of pressure against stores which are not involved in any dispute. They are innocent bystanders. This kind of action is designed to make the furniture stores bring pressure on a furniture plant and its employees—to force those employees into a union they do not want. This is an example of a secondary boycott.
>
> I want that sort of thing stopped. So does America.

105 Cong.Rec. A8488 (1959), *reprinted in* 2 Leg.Hist. at 1842. Thus, President Eisenhower, in calling the attention of Congress and the nation to secondary action directed at consumers, framed the problem solely in terms of consumer picketing.

As the Supreme Court in *Tree Fruits* pointed out, later during House debates, Rep. Griffin "did discuss consumer *picketing,* but only in the context of its abuse when directed against shutting off the patronage of a secondary employer." *Tree Fruits,* 377 U.S. at 67, 84 S.Ct. at 1069 (emphasis added). In the following colloquy, which took place six days after the President's address, Rep. Griffin discussed secondary action aimed at consumers:

> Mr. Brown Of Ohio . . .
>
> * * * *
>
> My question concerns the picketing of consumer entrances to retail stores selling goods manufactured under strike. Would that situation be prohibited under the gentleman's bill?
>
> Mr. Griffin. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.
>
> Mr. Brown Of Ohio. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.
>
> Mr. Griffin. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at the store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.
>
> However, if the picketing happened to be around at the consumer entrance, and if the purpose of the picketing were to coerce the employ-

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[13] Senator McClellan's amendment was rejected. 105 Cong.Rec. 5975 (1959), *reprinted in* 2 Leg.Hist. at 1198.

> er not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.
>
> MR. BROWN Of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?
>
> MR. GRIFFIN. The way it has been interpreted.
>
> MR. BROWN Of Ohio. But the Griffin-Landrum bill would?
>
> MR. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or restrain the employer of
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>
> that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.
>
> MR. BROWN Of Ohio. Not to sell goods of some concern that is on strike. Would that same rule apply to the picketing at the consumer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?
>
> MR. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing—
>
> MR. BROWN Of Ohio. Advertising.
>
> MR. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

105 Cong.Rec. 14,339 (1959), *reprinted in* 2 Leg.Hist. at 1615. It is clear from the above colloquy that Rep. Griffin, who introduced the bill which was eventually passed by the House and whose bill contained the restricting amendments which eventually became law, clearly had in mind only prohibiting consumer picketing by his proposed amendments to § 8(b)(4).[14] Moreover, it is clear that he recognized that his bill was limited by the constitutional right of free speech.

The only suggestion in either house of Congress that the proposed amendments to § 8(b)(4) would apply to nonpicketing labor publicity came from opponents of the amendments. As the Supreme Court pointed out in *Tree Fruits,* "Senator Humphrey first sounded the warning early [in the Senate debates]." *Tree Fruits,* 377 U.S. at 66, 84 S.Ct. at 1068. In *Tree Fruits,* however, the Supreme Court stated that the interpretation which the opponents of a bill gave to that bill was not controlling. The Court explained:

> [W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

Tree Fruits, 377 U.S. at 66, 84 S.Ct. at 1068 (citations omitted). The Court therefore refused to give any weight to the interpretations suggested by Senator Humphrey and Senator Morse, another opponent of the amendments to § 8(b)(4). *Id.*

A House-Senate conference committee, chaired by Senator Kennedy, considered the Landrum-Griffin bill and the Kennedy-Ervin bill and reached a conference agreement. The suggestions of the committee regarding § 8(b)(4) were enacted into law. The conference committee agreed to recommend the amendments to § 8(b)(4) contained in the Landrum-Griffin bill. (The

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Kennedy-Ervin bill contained no amendments to § 8(b)(4).) In response to the fears of the opponents of the amendments to § 8(b)(4), the conference committee drafted the publicity proviso to § 8(b)(4), which protects union appeals made through handbilling, advertising, and other nonpicketing publicity to consumers not to deal with a secondary employer who has a "producer-distributor" relationship with a primary employer. *DeBartolo I,* 463 U.S. at 156, 103 S.Ct. at 2932. The proviso " 'was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded.' *NLRB v. Servette, Inc.,* 377 U.S. 46, 55, 84 S.Ct. 1098, 1104, 12 L.Ed.2d 121 (1964)." *DeBartolo I,* 463 U.S. at 157 n. 10, 103 S.Ct. at 2933 n. 10.

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[14] The Supreme Court has stated, "the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." *Tree Fruits,* 377 U.S. at 68, 84 S.Ct. at 1069. The NLRB argues that by stating that coercive conduct might be "picketing or *otherwise,*" the Supreme Court recognized that § 8(b)(4) might prohibit nonpicketing publicity. The prohibitions of § 8(b)(4) were intended to apply to actions other than picketing, *e.g.,* direct threats to the secondary employer, actions aimed at the secondary employer's employees, or strikes.

The activities other than picketing to which § 8(b)(4) has been held to apply have involved conduct in addition to communicative activity. Among the variety of courses of conduct which have been held to be coercive under § 8(b)(4) are: two unions' demands for monetary settlement payments for contract violations, *Electro-Coal Transfer Corp. v. General Longshore Workers,* 591 F.2d 284 (5th Cir.1979); a union's threat to terminate an agreement under which it served as a bargaining agent on a construction project unless the primary contractor took a subcontractor off the job, *NLRB v. IBEW,* 405 F.2d 159 (9th Cir.1968), *cert. denied,* 395 U.S. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969); union's economic sanction of refusing to refer its members for employment as it was bound to by agreement, *NLRB v. Local 825, Int'l Union of Operating Engineers,* 315 F.2d 695 (3d Cir.1963). Thus, "otherwise" could refer to many types of conduct. There is no indication that either the Court or any proponent of the amendments to § 8(b)(4) intended that they apply to nonpicketing labor publicity.

The publicity proviso was clearly drafted to cover nonpicketing labor publicity in the only example of secondary consumer activity which had been discussed—*secondary union action taken against a retail store selling a struck manufacturer's product.* This paradigm had been placed before the nation and Congress by President Eisenhower in his August 6 radio address. Senator McClellan and Rep. Griffin also focused on this typical case. The legislators who feared that the amendments proposed to § 8(b)(4) would cover nonpicketing labor publicity also discussed such publicity in terms of this paradigm case.[15] However, the fact that the publicity proviso was drafted in terms of the paradigm case, does not change the fact that at no time had a proponent of the amendments to § 8(b)(4) stated that nonpicketing should be or was being prohibited by the amendments.

The Board argues that the publicity proviso is an exception to the prohibitions contained in § 8(b)(4). The Board contends that if Congress had not intended to restrict nonpicketing publicity under § 8(b)(4)(ii)(B), it would not have drafted the publicity proviso. In a case of a true statutory exception what the Board argues would be true—an exception exists only to exempt something which would otherwise be covered. However, the legislative history makes it clear that not only did the supporters of the amendments to § 8(b)(4) intend only to prohibit consumer *picketing,* but also that the publicity proviso was inserted both to clarify their position that nonpicketing publicity was not prohibited and, most importantly, to allay the fears of the opponents of the amendments that such speech would be restricted.

In the House, Rep. Griffin and, in the Senate, Senator Goldwater, introduced a report summarizing the "nature of the settlement reached by the conference on the important points of difference between the House and the Senate bill [sic]." 105 Cong. Rec. 16,539 (1959), *reprinted in* 2 Leg.Hist. at 1712 (quoting Congressman Griffin), and 105 Cong.Rec. 16,435 (1959), *reprinted in* 2 Leg.Hist. at 1453 (Senator Goldwater). The report contained the following summary analysis of Title VII of the bill, which included the amendments to § 8(b)(4):

Summary analysis of conference agreement as to title VII, Taft-Hartley amendments

	House bill (Landrum-Griffin)	Senate bill (Kennedy-Ervin)	Conference agreement
I. No man's land	State labor boards and courts could assume jurisdiction and apply State law as to cases declined by NLRB. (Administration recommendation.).	State boards only (12 States) could take jurisdiction—and apply Federal law—to cases declined by NLRB.	Adopts House provision in full. Adds provision to assure that NLRB will continue to take cases falling under its standards as of Aug. 1, 1959; and allows Board to delegate to its regional directors certain powers in representation cases.
II. Hot cargo agreements.	Band all hot cargo agreements.	Bans only hot cargo agreements with motor carriers subject to pt. II of Interstate Commerce Act.	Adopts House provision with modification as to application in garment and construction industries.
III. Other secondary boycotts.	1. Closes loophole which permitted secondary boycott through coercion applied directly against secondary employer (instead of his employees).	No provision	Adopts House provision.

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[15] *See, e.g.,* 105 Cong.Rec. 5580 (1959), *reprinted in* 2 Leg.Hist. at 1037 (Senator Humphrey); 105 Cong.Rec. 15,222 (1959), *reprinted in* 2 Leg.Hist. at 1708 (Rep. Thompson and Senator Kennedy).

Summary analysis of conference agreement as to title VII, Taft-Hartley amendments—Continued

	House bill (Landrum-Griffin)	Senate bill (Kennedy-Ervin)	Conference agreement
	2. Closes loophole which permitted secondary boycott by inducing employees individually (rather than in concert).	do	Do.
	3. Closes loophole which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not "employees" under definition in the act.	do	Do.
	4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute.	do	Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.
IV. Organizational picketing.	1. After an election, bans picketing for 12 months.	Same, except 9 months.	Adopts House provision.
	2. Bans picketing when another union certified or lawfully recognized.	Same	Same.
	3. Before election, restricts picketing to reasonable time not to exceed 30 days.	No provision	Adopts House provision.
	4. Before election, restricted picketing unless union could show 30 percent interest among employees.	do	Substitutes mandatory election procedure. Informational picketing which does not affect deliveries or service is not banned.
	5. Provides for enforcement through mandatory injunction obtained through NLRB, andor suit for damages.	Discretionary injunction by NLRB. Union could delay issuance of injunction and continue picketing by charging employer with unfair labor practices.	Mandatory injunction; no damage suit; union can charge unfair practices but cannot block injunction except in limited situations under sec. 3(a)(2).
V. Other provisions: 1. Voting by economic strikers.	Employer could not petition during economic strike for election for 1 year.	Economic strikers could vote without limitation.	Can vote during period of 1 year after strike commences.
2. Prehire, building and construction industry.	Sec. 702 Administration provision.	Broader provision. Sec. 702.	Adopts Senate provision.
3. General Counsel, vacancy.	Sec. 704	Same	Same.
4. Priority handling of certain unfair labor charges.	Sec. 706	Same	Same.
5. Common situs, building and construction industry.	No provision	No provision	Dropped.

105 Cong.Rec. 17,181 (1959), *reprinted in* 2 Leg.Hist. at 1454; 105 Cong.Rec. 16,539–40 (1959), *reprinted in* 2 Leg.Hist. at 1712–13.

Regarding secondary boycotts, the summary analysis quoted above indicates that the House bill was designed to ban all hot cargo agreements, close the three loopholes in Taft-Hartley identified above, and prohibit secondary customer *picketing* at retail stores which sell a product produced by a manufacturer with whom the union has a primary dispute. The Senate bill applied only to certain hot cargo agreements. It contained no provisions regarding the three Taft-Hartley loopholes or secondary customer picketing. The conference agreement indicates that the House provision as to hot cargo agreements was adopted with

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certain exceptions and that the three Taft-Hartley loopholes were closed as provided for in the House bill. As to secondary customer picketing, the summary analysis states:

> Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.

105 Cong.Rec. 17,181 (1959), *reprinted in* 2 Leg.Hist. at 1454; 105 Cong.Rec. 16,539 (1959), *reprinted in* 2 Leg.Hist. at 1712.

The summary analysis makes it clear that the prohibition on secondary actions directed at consumers restricts only "secondary customer picketing." The summary analysis further points out that the publicity proviso is not an exception which exempts nonpicketing publicity which would otherwise be prohibited by the restrictions in the amendments to § 8(b)(4). Instead, the summary analysis explains that the publicity proviso is a clarification of the fact that the prohibition was never intended to apply to nonpicketing publicity.[16]

The summary analysis explains that a "clarification that picketing at primary site is not secondary boycott" was also added to § 8(b)(4). Just as the proponents of the amendments to § 8(b)(4) did not intend the language of their amendments to reach picketing at the primary site, they did not intend the language of their prohibitions to reach nonpicketing publicity.[17] In both cases the summary analysis uses the term "clarification" to describe the provisos. Neither proviso was an exception; instead they were added to make clear that the prohibitory language does not reach primary picketing or nonpicketing publicity.[18]

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Moreover, the publicity proviso is not drafted in the terms of an exception. Instead, it is drafted as an interpretive, explanatory section. The publicity proviso begins as follows: "*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing. . . ." The fact that the publicity proviso says "nothing . . . shall be *construed* to prohibit publicity" indicates

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[16] Regarding the publicity proviso, the Supreme Court in its *Tree Fruits* opinion stated:

> [T]he Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even by some conduct which might be "coercive." The result was the addition of the proviso. But it does not follow from the fact that some course of conduct was protected by the proviso, that the exception "other than picketing" indicates that Congress had determined that all consumer picketing was coercive.

Tree Fruits, 377 U.S. at 69, 84 S.Ct. at 1070. It seems that the Supreme Court suggested, in dictum, that the publicity proviso exempted nonpicketing publicity which would have been coercive and therefore violative of the amendments to § 8(b)(4). It is true that several Senators and Congressmen feared that nonpicketing publicity might be covered by the prohibition against "coercive" conduct. However, as pointed out above, the fears and doubts of the opposition are not authoritative as to the scope of the prohibition. As discussed more fully above, nowhere in the legislative history is there any indication that the sponsors of the amendments to § 8(b)(4) intended to restrict nonpicketing labor publicity.

[17] The Supreme Court has stated that in order that the amendments to § 8(b)(4) "not be read as supporting a construction of the statute as prohibiting the incidental effects of traditional primary activity, Congress added the proviso that nothing in the amended section 'shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Many statements and examples proferred in the 1959 debates confirm this congressional acceptance of the distinction between primary and secondary activity." *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 632–33, 87 S.Ct. 1250, 1262, 18 L.Ed.2d 357 (1967) (footnotes omitted). Thus, one of § 8(b)(4)'s provisos was certainly not drafted as an exception, but rather as an explanation of Congress' intent not to reach such conduct by its prohibition.

[18] Because of the publicity proviso, there has been little occasion for courts to consider whether nonpicketing publicity is prohibited by the statute. However, the NLRB argues that two circuit courts of appeal have indicated that handbilling in support of a total boycott is coercive within the meaning of § 8(b)(4)(ii)(B). In *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966), the Ninth Circuit affirmed a Board decision that certain publicity fell within the publicity proviso. However, the Ninth Circuit included the following dictum in its opinion:

> The prohibition set forth in § 8(b)(4)(ii)(B) covers the cited union activity, else KXTV would not have a case to begin with.

Id. at 436. This quote is mere dictum given that the Ninth Circuit had already decided that the challenged activity was permissible in light of the publicity proviso.

In *Honolulu Typographical Union v. NLRB*, 401 F.2d 952 (D.C.Cir.1968), the D.C. Court of Appeals enforced a decision and order of the Board that picketing and handbilling on a secondary site was unlawful. However, the court of appeals did not address the question of whether handbilling was prohibited by the statute. It merely assumed this, focusing instead on whether the handbilling was truthful for the purposes of falling within the scope of the publicity proviso. *Id.* at 957–58.

> that this proviso only explains how the prohibitions of the statute should be interpreted rather than creating an exception to the prohibitions contained in the statute. (Emphasis added).[19]

After the conference was complete, Senator Kennedy, a proponent of the publicity proviso, and Senator Goldwater, a proponent of the amendments to § 8(b)(4) engaged in the following colloquy:

> Mr. Kennedy. [Discussing the conference agreement]
>
> * * * *
>
> Accordingly, the Senate conferees insisted that the report secure the following rights:
>
> * * * *
>
> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.
>
> Under the Landrum Griffin Bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activities short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.
>
> Mr. Goldwater. Mr. President, will the Senator yield at that point for a question?
>
> Mr. Kennedy. I yield.
>
> Mr. Goldwater. I have been asked by the people who are vitally concerned whether there is anything in the conference report which would limit or prohibit the buy-America campaigns which are being carried on by certain unions and business groups, and even by some governmental bodies. I should like to ask the distinguished chairman of the conference committee whether the report was intended to have this effect. It is certainly my conviction that no such effect was intended, either by the Senate or by the conferees.

> Mr. Kennedy. I know that a good deal of effort has been made by some groups of workers, such as those who work on hats, to make sure that their working standards are protected. The answer to the Senator's question is no, it was not intended that the conference report have such an effect. I am glad that we have had the opportunity to establish legislative history in this matter.

105 Cong.Rec. 16,413–14 (1959), *reprinted in* 2 Leg.Hist. at 1431–32. Just as the summary analysis introduced by Senator Goldwater and Rep. Griffin indicated that the publicity proviso was a "clarification that other forms of publicity are not prohibited," Senator Kennedy's initial statement above indicates that he believed that the publicity proviso meant that "the union shall be free to conduct informational activity short of picketing."[20] The

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[19] In *DeBartolo I*, the Supreme Court stated "when Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly." 463 U.S. at 157 n. 10 103 S.Ct. at 2933 n. 10 (citation omitted). The Court continued, "It does not, however, expect the statutory language to be deprived of substantial practical effect." *Id.* The NLRB argues that if § 8(b)(4) is construed to apply to nonpicketing publicity, the publicity proviso will have been deprived of "substantial practical effect." This would be true if the publicity proviso were indeed an exception to a statutory prohibition which had been designed to cover both picketing and nonpicketing labor publicity. However, the language of the proviso and the legislative history make it abundantly clear that the proviso was a "clarification" of the reach of the statutory prohibition and that the proponents of the amendments to § 8(b)(4) never intended to reach nonpicketing publicity.

Moreover, the Supreme Court premised its statement that statutory language should not be "deprived of substantial practical effect" on the assumption that the statutory language in question was designed to "restrict [] communicative activity." The proviso was not designed to restrict communicative activity; only the prohibitions of § 8(b)(4) were intended to do so. Although, under our narrow construction of the prohibitions set out in § 8(b)(4), handbilling is not restricted, the portions of the amendments to § 8(b)(4) which restrict communicative activity continue to have substantial practical effect—they regulate picketing, strikes, threats to employers, etc.

Thus, our decision does not interpret any portion of § 8(b)(4) as meaningless verbiage. The restrictive sections of the statute were intended to proscribe many union activities and continue to do so. The publicity proviso was intended to allay the fears of the opponents of the restrictions and clarify the interpretation of the restrictions.

[20] In analyzing the conference committee's work, Senator Kennedy stated:

> Secondly, the House Bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.

Continued

above colloquy also points out Senator Goldwater's concerns that the prohibitions of the statute not affect free speech.[21]

In speaking in support of the conference bill, Senator Goldwater, a member of the conference committee and an ardent supporter of the amendments to § 8(b)(4), stated:

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> The Senate bill did not deal with the subject of secondary boycotts. The House bill, however, closed up every loophole in the boycott section of the law including the use of a secondary picket line, an example of which the President gave on his nationwide TV program on August 6.

105 Cong.Rec. 16,419 (1959), *reprinted in* 2 Leg.Hist. at 1437. Thus, again a proponent of the amendments to § 8(b)(4) indicated, while the final version of the bill was pending, that prohibition extended only to picketing. Senator Goldwater made no mention of nonpicketing distribution of publicity in explaining why the amendments to § 8(b)(4) were necessary.

Similarly, in speaking in support of the conference bill, Senator Curtis, a proponent of the amendments to § 8(b)(4), stated:

> The objectives of the secondary boycott provisions of the bill before us are substantially the same as those contained in the bills which I have introduced over the past several years. In a word, the overall objective has been to close the loopholes that had developed in the secondary boycott protection afforded by the Taft-Hartley Act.

105 Cong.Rec. 16,423 (1959), *reprinted in* 2 Leg.Hist. at 1441. It is clear that the major purpose of the amendments remained the closing of the loopholes in Taft-Hartley and that nonpicketing publicity was not a target of the prohibitions.

In summary, we can ascertain no affirmative intention of Congress clearly expressed to prohibit nonpicketing labor publicity. As pointed out in *Tree Fruits,* it was only in the later debates of the labor reform bill, after President Eisenhower had focused attention on consumer picketing of a retail distributor of a struck manufacturer, that both houses began to consider that the amendments should apply to consumer picketing. Nowhere, except in the statements of the opposition, is there any suggestion that the amendments to § 8(b)(4) would prohibit nonpicketing labor publicity.

V.

In conclusion, we cannot find any indication that the entirely peaceful and orderly distribution of handbills, as in the instant case, was intended to be proscribed by Congress. We therefore apply the rule of *Catholic Bishop,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), to the effect that before interpreting this statute in a manner that "would give rise to serious constitutional questions," *id.* at 501, 99 S.Ct. at 1319, we must first find "the affirmative intention of the Congress clearly expressed." *Id.* Absent such a finding we must GRANT the Union's petition for review and DENY enforcement of the order of the Board.

> We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.
>
> Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

105 Cong.Rec. 16,254–55 (1959), *reprinted in* 2 Leg.Hist. at 1388–89. The NLRB argues because Senator Kennedy was acting as chairman of the conference committee and recommending the conference committee's version of the amendments to the NLRA, his statements were not those of an opponent of the amendments to § 8(b)(4) but, rather, are entitled to authoritative weight. However, Senator Kennedy was never a proponent of amendments to § 8(b)(4). His Senate bill did not contain such amendments. It was the bill which had originated in the House, the Landrum-Griffin bill, which contained such restrictions. It is clear that Senator Kennedy's description of the scope of the restrictions contained in the amendments to § 8(b)(4) was made in light of his fears that those restrictions might be interpreted to preclude nonpicketing publicity—fears which were allayed by the construction of the restrictions detailed in the publicity proviso. It is still fair to say that Senator Kennedy's "fears and doubts . . . are no authoritative guide to the construction of [the] legislation." *Tree Fruits,* 377 U.S. at 66, 84 S.Ct. at 1068.

[21] First Amendment considerations had been placed before the Senate during preconference debates by, among others, Senator Humphrey:

> The Board has indeed held that to place an employer on a "We Do Not Patronize" list is to restrain and coerce him. The Court of Appeals for the Ninth Circuit set aside the Board's determination and pointed out that the union's conduct was "within the general area of protection of the first amendment guaranteeing free speech." (*NLRB v. IAM, Local 942, CA9,* No. 15, 814, Feb. 4, 1959, sl. op. p. 6).
>
> I fear that this proposal may well invade this area. I ask the Senate to hold with Chief Justice Stone that the "publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the first amendment which cannot be made unlawful by an act of Congress."
>
> The citation is a familiar one to lawyers and even to some of us laymen: *United States v. Hutcheson,* 312 U.S. 219, 243, [61 S.Ct. 463, 471, 85 L.Ed. 788].

105 Cong.Rec. 5580 (1959), *reprinted in* 2 Leg.Hist. at 1037.

NLRB v. National Broadcasting Company, Inc.

798 F.2d 75 (2d Cir.), August 14, 1986—276 NLRB 118

On petition to enforce Board Order

Before VAN GRAAFEILAND, KEARSE and MINER, Circuit Judges

VAN GRAAFEILAND, Circuit Judge: The National Labor Relations Board petitions for enforcement of an unfair labor practice order directing the National Broadcasting Company (NBC) to cease and desist from denying representatives of the Directors Guild of America (the Union) access to remote broadcasting facilities at reasonable times and places in order to police NBC's compliance with the terms of a collective bargaining agreement between the Union and NBC. We grant the petition.

NBC televises most sporting events from remote, as opposed to studio, broadcasting sites. The remote broadcasts usually are supervised from a trailer, approximately eight by forty feet, which contains television monitors and other necessary equipment. The broadcast personnel in the trailer generally consist of a producer, who is in overall charge of the facility, a director and an assistant director, who are Union members, and various technical and subordinate employees. The dispute between the Union and NBC originated in the Union's contention that producers, non-unit employees, were doing union work properly assigned to the directors and assistant directors, by "cueing" technical personnel in the performance of certain broadcast functions. Alleged violations of this nature during a 1981 golf tournament in California formed the basis for a grievance against NBC, which was to be arbitrated shortly after the instant proceedings.

In preparation for the California arbitration, the Union decided to have a representative visit an NBC broadcast from a golf tournament at Bay Hill, Florida, to observe whether contract violations were taking place there. However, upon inquiry of NBC, the representative was told that he would not be admitted to the "cramped quarters" of the truck while play was being broadcast or taped for broadcast. NBC's position was that there were Union members present during the broadcast who could report violations to the Union. The Union's position, on the other hand, was that, since the directors were assigned remote control work on a freelance or non-contract basis, they would be reluctant to antagonize their employer by complaining to the Union. Accordingly, the Union instructed its representative to proceed to Bay Hill.

When the representative arrived at the golf course, the occupants of the NBC trailer were taping tournament play for later broadcast. Seeing no one outside the trailer, the representative entered it. His intrusion apparently went unnoticed until he was paged approximately one hour later. At that point, NBC's Vice President of Technical Operations asked him to leave the trailer. When the representative sought admission on the next broadcast day, he was denied access to the NBC facilities while they were in operation.

The Union filed an unfair labor practice charge, alleging that NBC's denial of access violated section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). The Administrative Law Judge ruled that NBC's conduct constituted an unfair labor practice. He stated that NBC's past practice of permitting Union representatives unrestricted access to their unit members' workplaces had ripened into a contractual right of access which NBC could not change unilaterally. Alternatively, applying the balancing test of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), he held that the Union's need for the information outweighed NBC's right to control access to its private property. The ALJ found that the information sought by the Union was relevant to the Union's function as bargaining agent for its employees, and that firsthand observation of the broadcast crew at work was the only way the Union could gather that information. He rejected as insufficient the alternatives to access offered by NBC. He said that unidentified vocal commands and hand-cueing signals

could not be monitored adequately from outside the trailer. He agreed with the Union that it could not rely on whistle-blowing by its "freelancing" director members. Finally, he concluded that Union access limited to the times when no employees were working was no useful access at all. The ALJ ordered NBC to give Union representatives unlimited access to its remote facilities for the purpose of policing and enforcing its collective bargaining agreement.

Upon appeal by NBC, the Board disagreed with the ALJ's finding that NBC had a longstanding practice of permitting Union representatives unlimited access to its remote facilities which had ripened into a contractual right. However, it affirmed the unfair labor practice determination by applying the balancing test of *Holyoke Water Power Co.*, 273 N.L.R.B. 168, *enf'd on other grounds,* 778 F.2d 49 (1st Cir.1985), which, it said, "seeks to accommodate both the employer's common law right to control its property and the employees' statutory right to proper representation by their union." That test was summarized in *Holyoke* as follows:

> Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternative means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

NBC does not quarrel with the "reasonable times and places" requirement; it contends that it complied with that requirement and that the Union did not need the information it sought. The Union, although urging enforcement of the Board's order, argues that the order did not go far enough; that it should have directed that access be granted unless the employer showed that this would cause disruption of its operations.

Our power of review is limited. Congress has committed to the NLRB the difficult and delicate responsibility of balancing conflicting legitimate interests in labor policy. *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978). "When the Board's construction of the Act 'is an acceptable reading of the statutory language and a reasonable interpretation of the purposes of the relevant statutory sections', its decision will not be overturned". *Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB,* 776 F.2d 23, 26 (2d Cir.1985) (quoting *NLRB v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Ironworkers,* 434 U.S. 335, 341, 350, 98 S.Ct. 651, 655, 660, 54 L.Ed.2d 586 (1978)).

We are satisfied that the NLRB's application of the *Holyoke Water Power Co.* balancing test to the facts presented here is rationally consistent with the provisions of the National Labor Relations Act and that the Board's decision is supported by substantial evidence on the record as a whole. The information sought by the Union was relevant not only to the pending arbitration but also to the continued enforcement of the bargaining agreement. *See NLRB v. Acme Industrial Co.,* 385 U.S. 432, 436–38, 87 S.Ct. 565, 568–69, 17 L.Ed.2d 495 (1967). Evidentiary concessions allegedly made by NBC did not obviate the need for the proof of contractual breach which the Union sought. The Board weighed the alternatives to ordering access to NBC's property and concluded that none was sufficient to serve the Union's legitimate purpose. However, in deference to NBC's interests in controlling its private property and the operation of its worksites, the Board narrowed the ALJ's order so as to limit access to "reasonable times and places". We find no fault with the NLRB's resolution of the parties' competing interests. It accommodates the interests of both the Union and the employer "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox, supra,* 351 U.S. at 112, 76 S.Ct. at 684.

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NBC also challenges the Board's refusal to reopen the record to admit evidence that one of the Union's "freelancing" directors testified on behalf of the Union in an arbitration proceeding involving a claim against NBC similar to the claim in the instant case. This allegedly took place some three weeks after the hearing in the instant case was closed and approximately a month before the Union filed its brief with the ALJ claiming it could get no cooperation from its director-members.

Although we are more offended than persuaded by the Union's ambiguous, and therefore potentially misleading, statement that "[a] witness may answer a subpoena but not come forward with a notice of a violation", (Union Brief at 32) we conclude nonetheless that the denial of NBC's motion does not require a remand. Over two years elapsed between the time the additional evidence became available and the making of the motion, and NBC made no effort to explain the delay, as required by Board rules. *See* 29 C.F.R. § 102.48(d)(1); *NLRB v. Jacob E. Decker and Sons,* 569 F.2d 357, 365 (5th Cir.1978). Moreover, it is doubtful that the admission of the evidence would have led to a different result. *See* 29 C.F.R. § 102.48(d)(1).

The petition for enforcement is granted.

Ballou Brick Co. v. NLRB

798 F.2d 339 (8th Cir.), August 15, 1986; rehearing denied Sept. 16, 1986—277 NLRB 41

On petition to review and cross-application to enforce Board Order

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge

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HENLEY, Senior Circuit Judge: This case involves an attempt by Lodge 1426 of the International Association of Machinists and Aerospace Workers (Union) to organize the workers at a plant owned by Ballou Brick Company. On May 2, 1983 the Union filed a petition for a representative election at Ballou Brick. Later, as a result of actions by the Company, the Union filed a complaint alleging unfair labor practices in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(a)(1) and (3).

The issues were consolidated and set before an Administrative Law Judge (ALJ) for purposes of hearing, ruling and decision. The ALJ found in an extensive opinion that Ballou had violated § 8(a)(1) of the Act by (1) requesting employees to engage in surveillance; (2) creating the impression of surveillance; (3) threatening employees and stating that employees had been discharged for union activities; (4) threatening plant closure; (5) encouraging employees to report union activities; and (6) maintaining a policy prohibiting solicitation and distribution of union literature. The ALJ further found that the Company had violated §§ 8(a)(1) and (3) of the Act by discharging thirteen employees to discourage membership in and support of the Union.

A panel of the National Labor Relations Board (NLRB or Board) affirmed the ALJ's decision. Ballou appeals arguing that the ALJ's findings are not supported by substantial evidence. The Board cross-appeals for enforcement of its order. We affirm the Board's decision as to the layoffs but reverse as to some of the unfair labor practices.

Passing for the moment those facts specifically relating to the incidences of alleged unfair labor practices, we now recount the basic underlying facts.

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Ballou manufactures and sells bricks at its Sergeant Bluff, Iowa facility. As would be expected, its business is somewhat seasonal and related to the amount of construction being done. In April, 1983 it completed a major capital construction project at its plant.

Approximately fourteen employees met on April 23, 1983 at a union hall and all but one signed a card authorizing the Union to represent them. The following Monday, April 25, 1983, another meeting was held at a local tavern near the brickyard to have other employees sign authorization cards. That day the Union sent the Company a letter requesting that it be recognized as the collective bargaining agent of the Company's production and maintenance employees.

The company officials and supervisors met with a labor consultant and made a list of those employees they believed were potential union leaders and who would vote for a union. One of the supervisors admitted walking in on the meeting at the tavern. He was told not to discuss who was there with anyone.

On May 13, 1983 the Company advised fourteen employees that they were being laid off. [1] They were told the layoff was permanent and that it was not for misconduct, but rather for economic reasons. Each was given a letter restating this. The Company then held a meeting of the remaining employees who were told that the layoff was based on poor economic conditions and that they were lucky to be "survivors." The Company had prior layoffs in 1981 and 1982, but those were temporary.

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[1] Gary Brady, one of the laid off employees, was found to be a supervisor by the ALJ and therefore not protected by the Act. This finding has not been challenged.

An election was held on July 15, 1983. Of the forty-three votes cast, twenty were for the Union, ten were against and thirteen were challenged.

On July 27, 1983, after the election, the Company began recalling employees and eventually recalled seven of the employees who had been laid off. It also hired fourteen new employees.

I.

The petitioner first argues that substantial evidence on the record as a whole does not support the ALJ's finding that the thirteen employees were discharged in violation of §§ 8(a)(1) and (3). We note that an order by the NLRB in an unfair labor practice case is entitled to be enforced if the Board's findings of fact are supported by the record as a whole. *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 566 (8th Cir.1984). Also, merely because two inconsistent conclusions may be drawn from the same evidence or that this court would be justified in deciding the case differently if acting *de novo* does not mean that the Board's order lacks the support of substantial evidence. *Id.*

Ballou contends that the Board failed to properly apply the *Wright Line* analysis to the layoff question. *See Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir.1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982). According to this analysis:

> [W]hen employees are discharged for both legitimate and illegitimate reasons, the general counsel must make a *prima facie* showing that the employees' protected activity was a "motivating factor" in the employer's decision. The burden then shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct.

Vincent Brass & Aluminum Co., 731 F.2d at 566.

Ballou argues that a *prima facie* case of unlawful discharge was not proven in that there is not substantial evidence showing that the company officials who made the layoff decision had knowledge of individual employee's union activities or that protected activity was the motivating factor in the decision to lay off the employees.

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In an improper discharge case the employer's intent, since it is subjective, will rarely be proven by direct evidence, and the Board is free to draw reasonable inferences from both direct and circumstantial evidence. *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 559 (8th Cir.1982). Inferences as to an employer's motivating intent "may be drawn from the employer's hostility toward the union, coincidence between the employee's activities and the discharge, or the absence of previous warnings or reprimands to the employee." *Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir.1985) (citations omitted).

The ALJ's findings in this regard are not as complete as one might wish them to be; however, we believe the evidence is substantial enough to support a finding that the employer knew of the union activity and that this was the motivating factor behind the layoff.

The ALJ found that Ballou knew of the union activities of its employees before they were selected for layoff because of the Company's knowledge of the April 23 and 25 union organizing meetings. Also, the Company had received the Union's request to represent the employees. We also believe the Company had reasonable identification of the employees who attended the April 25 meeting. In this connection, we note the statement of supervisor William Heckart to employee Scott Clark that Heckart had driven by the tavern on the night of the meeting and knew who had attended the meeting by seeing whose vehicles were there.

We note also that other courts have found it is not necessary that the general counsel prove the employer's knowledge of a specific employee's opinion as to the union, when there is a mass layoff for the unlawful purpose of discouraging union membership. *See Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179–80 (6th Cir.1985); *M.S.P. Industries, Inc. v. NLRB*, 568 F.2d 166, 176 (10th Cir.1977).

We do not agree with the ALJ that the mere hiring of a labor consultant and conducting a vigorous campaign to present its position (except, of course, for those activities which are a violation of the Act) alone would show an unlawful antiunion animus. However, the Company's open hostility to the Union coupled with its other acts does support the ALJ's finding that this was the motivating factor behind the discharges. We note that at the

Company's meeting with its labor consultant two of the laid off employees, Edward Thompson and David McCarthy, were listed as union leaders and that these two employees were among those not recalled after the election. At the Company's meeting, ten of the fourteen laid off employees were listed as potentially voting for the Union and three were listed as questionable. All of the laid off employees had signed union authorization cards, and attended at least one meeting. Moreover, the timing of this layoff right after the request for representation and the recall shortly after the election are suspect.

Also damaging to the Company's position is the statement attributed to its chief operating officer, John Hill, that the employees had been laid off because of union activity, and his comment to a former employee that he would be considered for employment after the union campaign died down. The ALJ found the testimony regarding these statements to be credible, and as there is nothing to make us think otherwise we accept them as true. *See NLRB v. Quick Find Co.*, 698 F.2d 355, 359 (8th Cir.1983).

While any one of these actions by the employer alone might not be sufficient to show that the protected activity was the motivating factor behind the layoff, we believe that taken as a whole and considered in light of the violation of § 8(a)(1) hereinafter detailed they provide substantial evidence to support the ALJ's finding that such was the case.

The Company further alleges that the layoff would have occurred regardless of any employee's involvement in protected activity because the decision was compelled **343** by economic necessity. It argues that the layoff was necessary because of a sharp decrease in sales, an accumulation of inventory with a lack of storage space, and the completion of the capital construction project.

Ballou contends that the ALJ ignored evidence that (1) it was predicting a downturn in business in its management meetings as early as January 6, 1983; (2) the layoff was conducted the same as in prior years; and (3) the employees hired in 1982 for the capital construction project were no longer needed.

The Company also asserts that there were individual reasons for dismissing each of the laid off employees.

Although we do not believe the Board makes a particularly eloquent case in rebutting the Company's argument, we do believe that there is substantial evidence to support the decision.

As to the inventory problem the ALJ found that (1) rather than the inventory of brick over-accumulating in May it had been steadily declining since March (from March to April there was an approximately 100,000 brick decrease, and from April to May there was a decrease of around 402,000); [2] (2) the yard contained at least one million more bricks at the time of the layoff in 1982; and (3) rather than decreasing the production of bricks after the layoff, the Company maintained or increased production levels.

The ALJ rejected the arguments as to a sharp decrease in sales by pointing out that shipments in May and July, 1983 were greater than in any of the previous four months, and in June and August, 1983 shipments were greater than in any month in 1982.

The ALJ surmised that because orders were generally delivered sixty to one hundred eighty days from the time they were placed the Company knew of these orders when it made the layoff in May, 1983. Although it was possible the Company did not know of all of these orders when it made the layoff, there is substantial evidence to support the ALJ's decision.

The ALJ also rejected the construction project argument by stating that only one of the laid off employees was specifically hired for the project, Edward Thompson, and he testified that when he was hired he was told he would work on the project but would then be a permanent maintenance electrician. As to the other unskilled employees hired between September and November, 1982, the ALJ found that they were mainly hired to work in the packaging department, and while they did at times help on the construction project it was company policy to move employees throughout the plant.

While it makes a certain amount of sense to conclude that after the completion of the construction project the Company would need fewer employees, there is substantial evidence to support the ALJ's findings.

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[2] Shipping records reflect a steady increase in shipments beginning in March (an increase of 593,036 from February to March, 235,427 from March to April, and 278,204 from April to May).

The testimony of manufacturing operations supervisor Norman Mahoney in some respects is supportive of the ALJ's findings. He testified that of the nine people hired in the fall of 1982 and laid off in May, 1983, only Thompson was hired specifically for the project. When he listed the duties of the other employees, he stated that they were used primarily in packaging and to take the place of absent employees. We note, however, that Mahoney's testimony that more people were needed in the winter is in conflict with the testimony of supervisor William Heckart, who said that generally there was no need for extra employees in the winter, but rather they were needed in the spring, summer and fall which was the more active season. He testified that generally people were laid off in the winter as occurred in 1982. In fact, the shipment records support his testimony.

The ALJ also found that the layoff in 1983 did not follow the same procedure as those in 1982 and 1981. The ALJ concluded that the procedure was different because the layoff list was neat whereas in previous years it was messy. Neatness is indeed a slender reed upon which to predicate a serious finding. However, neatness aside, there is substantial evidence showing the procedure was different.

Other, and perhaps minor, differences include the facts that letters explaining the layoff were handed out for the first time in 1983 and that the chief operating officer made the speech explaining the layoff in 1983 in contrast to 1982 when it was made by a plant superintendent. More significantly, in 1983 the employees were told the layoff was permanent and not temporary as before. This is significant because if this was a permanent layoff the employees would not be allowed to vote in the union election whereas they could vote if it was temporary.

In turning to the individual reasons for laying off the employees, we generally take notice that it is somewhat contradictory for the Company to have assured the laid off employees in the speech and letter that they were being laid off for economic reasons and not misconduct and now to argue as to some of the individuals that they were poor workers. As the ALJ found, there was no documentary evidence that any of the individuals were unsatisfactory workers; rather the only evidence of poor work was the testimony of company officials.

As to employee Robert Bean, the Company argues that he had limited experience and lacked proficiency. We find these reasons unpersuasive in light of Bean's recall after the election, which recall he rejected.

The Company argues that Brian Brady was laid off because he had been on workmen's compensation in May. While this may relate to issues applicable to the compliance stage, it does not affect our decision as to the propriety of the layoff.

Ballou states no reason as to why Scott Clark was laid off although it seems to imply in its brief that another employee was a better worker. We find this to be weak in light of Clark's recall on July 29, 1983.

Petitioner states that Robert Ingalls was a lackluster employee and yet it recalled him after the election.

David McCarthy, the Company complains, was not a skilled employee and had recently been demoted. We note, however, that he had been passed over for layoff in previous years. It is also pertinent that he was suspected of being a union leader. McCarthy has not been recalled although fourteen unskilled new employees have since been hired.

Bryan Palmer was laid off in 1982 but we note he was recalled. The Company makes the general allegation that he had refused to perform certain functions. The testimony of its former plant superintendent reveals, however, that Palmer did not refuse to perform the work (saw bricks), but rather had said he did not want to do it. The superintendent also testified that he did not consider this a serious problem at the time. We do not believe this incident was sufficient to justify Palmer's layoff. He has not been recalled.

John Palmer had been recently demoted. We note, however, that the Company thought enough of him to recall him in August, 1983.

Curtis Palmer, Ballou states, was a mediocre, unskilled performer. The fact that he had never been laid off previously coupled with the hiring of new unskilled workers makes his layoff questionable.

The Company does not complain about the work of Daniel Pojar (he had recently received a merit increase) and in fact he was recalled, but rejected the recall.

Kevin Ruring, the Company argues, was not proficient and yet he had been recalled after being laid off in 1981 and 1982. We question why he was recalled each of these times if he was a poor worker.

Kenneth Sopoci, Ballou states, was not proficient and merely an extra employee, but he was one of the first employees recalled in early August, 1983.

The Company gave no reason for the layoff of Ronald Warstler and we assume

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he was a good worker because he was recalled in July, 1983.

The layoff of Edward Thompson presents more of a problem, and yet we believe it was improper. Thompson, along with James Osterholt, was specifically hired for the construction project. They both testified, however, that they were informed they would be kept on after the completion of the project as permanent maintenance electricians. Osterholt quit in December, 1982 to serve a prison sentence. When he asked for his job back in May, 1983, he was told he should wait for the union problems to die down. He was rehired in October, 1983.

Since the ALJ found these two men's testimony credible as to the permanency of their employment, we must accept as true. *See Quick Find Co.,* 698 F.2d at 359.

We question why Thompson was not recalled as he had apparently been a good employee and it would seem reasonable that he would be recalled before a former employee who had quit was rehired.

We conclude that substantial evidence supports the ALJ's findings that the employees' protected activities were the motivating factor behind the layoff, that the Company's economic justifications were unsupported, and that Ballou has not sufficiently proven any valid reasons why the individual workers should have been laid off.

II.

Ballou challenges the Board's findings of various independent § 8(a)(1) violations. In determining whether there has been a violation of this section it must be determined if the employer's conduct can be reasonably seen as interfering with, restraining or coercing employees in the exercise of their rights. *DeQueen General Hospital v. NLRB,* 744 F.2d 612, 614 (8th Cir.1984). Our standard on review is to affirm the Board's findings if they are supported by substantial evidence on the record as a whole. *Vincent Brass & Aluminum Co.,* 731 F.2d at 567.

(1) Threatening Discharge and Requesting Surveillance.

Ballou first contends that the ALJ was incorrect in finding that the plant superintendent's questioning of employee Scott Clark as to another employee's (Dale Watchorn) union activities, requesting any information about Watchorn's activities and commenting that "we'll take care of" Watchorn's activities, was a request for Clark to engage in surveillance and a threat to discipline employees for such activity.

Ballou argues that the charge or complaint never alleged that this discussion involved a threat of discharge and therefore it was unfair for the ALJ to find that the comment constituted such a violation because the Company did not have notice of the charge. The complaint alleges that this conversation involved a request to engage in surveillance and an interrogation of an employee but makes no mention that this constituted a threat to discharge or discipline an employee.

Assuming that there was fair notice of the claim of threat of discharge, the evidence is not substantial enough to support a finding of a violation of § 8(a)(1) from this one conversation for this specific violation. The ALJ's discussion was, to say the least, brief, and we simply do not believe the record supports a finding of threat of discipline or discharge. While questioning employees about union activities has been found in some circumstances to constitute a threat of punishment, *see NLRB v. Louisiana Manufacturing Co.,* 374 F.2d 696, 700 (8th Cir.1967), such is not to be found here from the isolated comment in question.

However, as to the finding of a request for an employee to engage in surveillance, we believe the evidence is substantially supportive. This is especially so when viewed in light of manager Mahoney's questioning of another employee, Lewis LeMaster, as to what he had heard about union activity and his request that

LeMaster "keep his ears open" and listen to find out what was said about the Union.

Relatedly, the Company argues that its rulebook did not encourage employees to report union activity as the ALJ found.

The Company's 1981 rulebook provided that:

> If anyone should come to you and ask you to sign a Union authorization card, we are asking you now to refuse to sign it. You have the right to join and belong to a Union, and you have an equal right to not join and belong to a Union. If any other employees should interfere, try to coerce you into signing a Union authorization card, please report it to your supervisor and we will see that the harassment is stopped immediately.

On April 11, 1983 the rulebook was modified and this provision was changed to the following:

> If anyone should ask you to sign a Union authorization card, we believe that you should refuse to sign. While you have the right to join a Union, you also have a right not to join.

These new rules were posted on bulletin boards in the Mill Room and packaging department.

The ALJ found the 1981 rule to be unlawful because it went beyond merely expressing the Company's opinion and had the effect of encouraging employees to report union activity and discouraging employees from engaging in protected activity. The ALJ further found that merely posting the rule change did not adequately inform the workers of it.

While the 1981 rule might have had a coercive effect when it was in effect, we disagree with the ALJ that the posting of the 1983 rule change was not effective. We have been shown no evidence that the employees did not know of the rule change or in fact were coerced by the former rule. We believe the posting of the changes was sufficient especially in light of the fact that the employees did not have personal copies of the rulebook from which they might be misinformed and the change was made two weeks before the start of the union campaign. We therefore conclude that the ALJ's conclusion concerning coercion by means of rulebook was not justified.

(2) Creating an Impression of Surveillance.

The Company next challenges the ALJ's findings that it created an impression of surveillance.

The ALJ found from the conversation between Heckart and Clark that Heckart created the impression of surveillance of protected activity when the supervisor asked Clark if he had gone to the meeting at the tavern and to Clark's affirmative statement replied, "I thought so, me and Dave Clausen drove by to see who was all there by looking at the cars." Heckart then named some of the people who were present and asked Clark who else was there. Clark refused to name others. Heckart denied that he had made this statement but rather that he merely mentioned that he had noticed a lot of people were at the tavern that night.

The ALJ found Clark's statements to be the more credible and finding no reason to believe otherwise we accept them as such. *See Quick Find Co.*, 698 F.2d at 359. This testimony provided substantial evidence to support the ALJ's finding of the creation of an impression of surveillance.

(3) Threatening Plant Closure.

Ballou challenges the ALJ's finding that it violated the Act when its supervisor Covington told a laid off employee, Thompson, that he had been informed by the chief operating officer that the employees had been laid off because of union activity, and that if the Union came in the plant would be closed and operations transferred to another facility. Covington denied that Hill had ever made these statements to him or that he had made these comments to Thompson.

The ALJ found that Thompson was the more convincing and credible witness and we accept this finding. *Id.* This consti-

tutes substantial evidence to support the ALJ's finding as a threatened plant closure is coercive and a violation of § 8(a)(1). *See Lemon Drop Inn, Inc.*, 752 F.2d at 324.

Ballou also argues that the comment cannot be considered a violation of the Act because Thompson was already laid off and could not be coerced in the exercise of his protected rights. However, as we have found that Thompson was illegally laid off, for present purposes he is considered an employee of Ballou because § 2(3) of the Act, 29 U.S.C. § 152(3), states that an "employee" includes "any individual whose work has ceased as a consequence of, or in connection with . . . any unfair labor practice."

The Company also alleges that Covington was a relatively low ranking official and therefore his comments cannot necessarily be attributed to the employer.

The statements of a supervisor can be attributed as being those of the employer if the listening employee reasonably would be justified in believing that the supervisor was speaking for the employer. *NLRB v. Schroeder,* 726 F.2d 967, 971 (3d Cir.1984); *cf. NLRB v. Intertherm, Inc.* 596 F.2d 267, 272 (8th Cir.1979) (actions of a supervisor can constitute an unfair labor practice). We believe that the ALJ was correct in finding that these statements by Covington as an agent of Ballou could be attributed to the employer. We note that Covington stated that he had just spoken to Hill, a high ranking company official, and there was no evidence submitted to show why Thompson should have disbelieved Covington's statements. From this we conclude Thompson could have reasonably believed these statements represented company policy.

(4) Soliciting Union Literature.

Last Ballou argues that the ALJ was incorrect in finding that it violated the Act by maintaining a policy of prohibiting solicitation and distribution of union literature.

On page four of its rulebook Ballou lists as one of the grounds for dismissal "Soliciting—Distributing Literature or Posting of notices on Company Property." However, on page six of the rulebook following a heading of "SOLICITATION AND LITERATURE DISTRIBUTION" the Company explains that "it must be understood that nothing will interfere with employees' protected concerted activities, regarding solicitation or distribution of literature during employees' non-work time."

The ALJ found that (1) these two sections created an ambiguity; (2) the employer in no way "flagged" the language on page four to warn the employees of the rule's limited effect; (3) the Company as the creator of the ambiguity bore the risk of its misinterpretation; and (4) the rule on page four was clear and straightforward while the rule on page six was "legalese." Therefore, the ALJ concluded that these rules constituted a violation of § 8(a)(1).

While we agree that in certain circumstances these two statements might amount to an unfair labor practice, in context we do not believe such is the case here. The amplification of the rule was merely two pages away from the original statement, not so far away that the two could not be connected. Moreover, characterization of the page six material as "legalese" does not impress us. We are not informed of any allegation or evidence that any employees actually believed they were prohibited from distributing union literature.

In any event, in present context we find that there is not substantial evidence to support the ALJ's finding of a prohibition of distributing union literature.

III.

In conclusion, we enforce the Board's decision that the layoff was in violation of the Act and that Ballou committed an unfair labor practice in requesting employees to engage in surveillance, creating the impression of surveillance, and threatening plant closure. However, we reverse and refuse to enforce the decision to the extent it finds that (1) employees were threatened

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with discipline or dismissal by the isolated comment of Ballou's supervisor Heckart; (2) the Company's rulebook encouraged employees to report union activities; and (3) Ballou's rulebook prohibited the distribution of union literature.

NLRB v. Pennsylvania Telephone Guild

799 F.2d 84 (3d Cir.), August 26, 1986—277 NLRB 501

On petition to enforce Board Order

Before SEITZ, ADAMS, and STAPLETON, Circuit Judges

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ADAMS, Circuit Judge: This appeal requires us to address the question whether a union violated the National Labor Relations Act (NLRA) by insisting that a grievance meeting be tape-recorded even after management refused to take part in a tape-recorded meeting. The National Labor Relations Board (Board) found that the union in insisting on the taping failed to bargain in good faith as required by the Act, and ordered it to cease and desist. Because substantial evidence exists to support the Board's conclusion, we will enforce the order of the Board.

I.

Since 1944, the Bell Telephone Company of Pennsylvania (Company) and the Pennsylvania Telephone Guild (Union) have entered into a series of collective bargaining agreements containing grievance and arbitration procedures for dispute resolution.

The Company suspended five employees in early 1984 for allegedly engaging in an unauthorized work stoppage. On March 26, 1984, the Company conducted a series of investigatory meetings to determine whether four other employees, all local union officials, had instigated the work stoppage. Union District President John Zawackis, one of the employees under investigation, attended and tape recorded all the investigative meetings held that day. The Company objected to Zawackis's tape recording of the meetings. On the same day, the Company announced the suspension of union officers for three to five days for their involvement in the unauthorized work stoppage. Zawackis also recorded the meetings at which the suspensions were announced. Neither the investigatory meetings nor the meetings to announce suspension constituted grievance meetings under the contract.

In response to the suspensions, the Union initiated the grievance procedure. On April 3, 1984, after both parties waived the first two steps of the grievance procedure, a third-level grievance meeting was held to consider the Union's protest of the suspensions of the five employees. Zawackis represented the Union; the Company was represented by Avery Robinson. Zawackis brought a tape recorder to the meeting.

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Robinson immediately objected to the use of the tape recorder "for the processing of the grievance." Zawackis responded that he intended to tape record "the entire grievance . . . because . . . this here is [a] very unique situation, and we want the most accurate record of the grievance that we can possibly get." Robinson then repeated his objection to the tape recording, stating that "it [would inhibit the] open and honest discussion . . . necessary to resolve the grievance, [it would cause] people to talk for the record rather than try to solve the problem and address the grievance." Further, he maintained the taping would formalize the process and "[prevent] the flexibility needed in reaching a practical solution to the grievance." In spite of Robinson's objections, Zawackis insisted on recording the grievance meeting.

After a recess, the Company stated that it would permit the meeting to be recorded under protest if the Union would agree to use the tape recording of the grievance as a test case before the Board and not tape any other meeting until the case was resolved by the Board. The Union refused. The Company repeated that it was ready to meet and discuss the grievances, but not while the recorder was running. In response, the Union accused the Company of violating the collective bargain contract. The meeting ended without discussion of the merits of the grievance.

On April 5, a separate third-level grievance meeting was held to consider the disciplinary suspensions of the four union officials. Zawackis again turned on the tape recorder and stated that the Union intended to record the grievance meeting. Robinson refused to discuss the grievance with the tape recorder on, although he was willing to discuss use of the recorder. Because the parties could not reach agreement on the use of the tape recorder, the April 5 meeting also was terminated without any discussion of the merits of the grievance.

The Company subsequently filed an unfair labor practice charge with the Board, claiming that the Union's insistence on tape-recording the grievance meetings constituted a violation of the duty to bargain in good faith under § 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3) (1982). The Administrative Law Judge (ALJ), however, ruled that the Union had not violated § 8(b)(3). He distinguished *NLRB v. Bartlett-Collins Co.,* 639 F.2d 652 (10th Cir.), *cert. denied,* 454 U.S. 961, 101 S.Ct. 3109, 69 L.Ed.2d 971 (1981), which held that a party's insistence on tape recording collective bargaining negotiations constituted an unfair labor practice, on the ground that grievance meetings differed substantially from collective bargaining negotiations.

On appeal to the NLRB, the Board disagreed with the ALJ, asserting that grievance meetings and collective bargaining negotiations are substantially similar. Adopting the reasoning of *Bartlett-Collins,* the Board found that the use of a recorder could inhibit free and open discussions in grievance meetings as well as in collective bargaining sessions. With the use of a recorder, the Board declared, the goal of adjusting the grievance would become subordinate to the preparation of a record for later arbitration or litigation. Further, only some grievance proceedings are eventually submitted to arbitration. Thus, the adverse effects on the bargaining process outweighed the need for a verbatim transcript. The Board therefore held that the Union had violated the duty to bargain in good faith by insisting to impasse on the use of a recording device to record grievance meetings. It ordered the Union to cease and desist from refusing to bargain in good faith with the Company over the processing and adjustment of grievances. The Board now petitions this Court to enforce its order.

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II.

Under 29 U.S.C. § 160(e), we must affirm Board decisions if there is substantial evidence on the record as a whole to support the Board's findings of a violation, regardless of whether this Court would reach a different conclusion if the matter were before it *de novo.* The legal conclusions of the Board must be "reasonably defensible" to be upheld. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979).

III.

Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA, 29 U.S.C. §§ 158(a)(5), 158(b)(3), and 158(d), "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. . . . As to other matters, however, each party is free to bargain or not to bargain. . . ." *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 210, 85 S.Ct. 398, 402–03, 13 L.Ed.2d 233 (1964) (quoting *NLRB v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 349, 78 S.Ct. 718, 722–23, 2 L.Ed.2d 823 (1958)). Accordingly, lawful subjects of bargaining are divided into two categories: mandatory and nonmandatory. Even in the absence of bad faith, a party violates the NLRA by insisting on a nonmandatory subject as a precondition to bargaining. *Borg-Warner,* 356 U.S. at 348–50, 78 S.Ct. at 722–23. Such insistence is, in effect, a refusal to bargain about mandatory subjects of bargaining. *Id.* at 349, 78 S.Ct. at 722–23.

IV.

A.

The Board argues that the Union's demand for verbatim tape recording of the grievance constitutes an unlawful insistence on a nonmandatory subject of bargaining. For support, it cites this Court's decision in *Latrobe Steel Co. v. NLRB,* 630 F.2d 171 (3d Cir.1980), *cert. denied,* 454 U.S. 821, 102 S.Ct. 104, 70 L.Ed.2d 92 (1981), and the Tenth Circuit decision, *NLRB v. Bartlett-Collins Co.,* 639 F.2d 652 (10th Cir.), *cert. denied,* 452 U.S. 961, 101 S.Ct. 3109, 69 L.Ed.2d 971 (1981). The Board based its decision almost exclusively on *Bartlett-Collins.* App. at 8–13.

In *Latrobe,* the company insisted on verbatim recording by a court reporter of collective bargaining negotiations. This Court upheld the Board's finding that verbatim recording of collective bargaining negotiations is a nonmandatory subject of bargaining. It was nonmandatory, we reasoned, because there is "no significant relation between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees." *Latrobe,* 630 F.2d at 176. Moreover, the Court explained, verbatim recording had the potential to chill negotiations and thereby impede reaching an agreement which it was the policy of the NLRA to encourage. Thus, by insisting on a nonmandatory subject of bargaining as a precondition to negotiation of mandatory subjects of bargaining, the company had violated its duty to bargain in good faith. *See Latrobe,* 630 F.2d at 179.

The employer in *Bartlett-Collins* also insisted on verbatim recording of collective bargaining sessions. The Tenth Circuit enforced the Board's order and upheld the Board's determination that verbatim recording of collective bargaining sessions was a nonmandatory subject of bargaining. Thus, the employer's insistence to impasse on the verbatim recording was a violation of the duty to bargain in good faith. *Bartlett-Collins,* 639 F.2d at 655–58. The court in *Bartlett-Collins* also reasoned that verbatim recording could chill negotiations: the presence of a court reporter "may cause the parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiation." *Id.* at 656.

Because *Latrobe* and *Bartlett-Collins* deal with collective bargaining and not grievance meetings, the Union asserts that they are inapplicable to this case. It maintains, without elaboration, that "[t]here is a substantial difference between collective bargaining negotiations . . . and a grievance meeting." The Board answers that grievance meetings and collective bargaining negotiations are substantially similar in character and method. Both are informal mechanisms used to resolve employee concerns about working terms and conditions through settlement and agreement. In contrast to trials or arbitration, the primary purpose of both is not to elicit facts, but to negotiate the settlement of disputes. Therefore, both require a free and open exchange of views so that resolution may be reached. We find convincing the Board's depiction of the similarities between grievance meetings and collective bargaining sessions, and consequently conclude that *Latrobe* and *Bartlett-Collins* are applicable to the facts of this case.

Alternatively, the Board argues that grievance meetings are not only similar to collective bargaining sessions, but they are "integral parts of the collective-bargaining process." Board at 12; App. at 9. *See NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). It asserts that grievance meetings are fundamental elements of the ongoing collective bargaining agreement, addressing issues arising under the contract and facilitating settlement of disputes. Therefore, if tape-recording is adverse to collective bargaining, it is also adverse to grievance meetings. *See Chicago Cartage Co. v. International Bhd. of Teamsters,* 659 F.2d 825 (7th Cir.1981) (presence of court reporter is likely to inhibit give and take of negotiation). Accordingly, the Board claims it was acting reasonably when it found that *Bartlett-Collins* was controlling. The Board also argues that insistence on a recorder over the other party's objection suggests a lack of confidence in the good faith of the other side. Such manifestations of suspicion and distrust are antithetical to the negotiating process. *See Bartlett-Collins,* 639 F.2d at 656.

Accurate grievance minutes are necessary, the Union claims, because in the past both parties have submitted their minutes of grievance meetings into evidence during arbitration. But the Union offers no argument to explain why preparation for arbitration outweighs the need for an atmosphere in negotiation meetings which is conducive to settlement and resolution. The Union has assumed the pre-litigation stance that the Board argues is inappropriate for the successful settlement of disputes. Since the policy of the NLRA is to "promote the peaceful settlement of industrial disputes," rather than prolong them, the Union's concern with the preparation of a record for arbitration should be subordinate to the need for an atmosphere in negotiation that facilitates agreement. *See Fibreboard,* 379 U.S. at 221, 85 S.Ct. at 408–09. Thus, the Board acted reasonably in finding that the insistence on tape recording grievance meetings violated the duty to bargain in good faith even if some grievance meetings' minutes were later used in arbitration.

The Union also contends that Zawackis's recording of the meeting would not chill negotiations because "Zawackis did not intend to tape record those portions of the grievance meetings that dealt with the negotiations of the grievance." During the proceedings before the ALJ, Zawackis did testify that he did not intend to tape those parts of the meetings dealing with the "actual negotiation of the discipline." However, during the taping of the April 3 meetings, Zawackis stated, "I am going to use it for the entire grievance." And at the April 5 meeting, while the tape was running, he stated, "[W]e think we are in a grievance mode . . . and we are clearly indicating . . . that it is a grievance procedure." Therefore, substantial evidence supports the Board's finding that the Union's taping was intended to cover all aspects of the grievance and, therefore, that the negotiations could be chilled as indicated in *Latrobe* and *Bartlett-Collins.*

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Even assuming that a grievance proceeding is a nonmandatory subject, the Union asserts that the Company rather than the Union caused the impasse by refusing to continue the grievance meeting with the tape recorder running. Therefore, the Union argues, it should not be held guilty of an unfair labor practice. The Union relies on the following language in *Latrobe.* "It would appear that it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present." 630 F.2d at 178. The Board emphasizes that this language is mere dictum, since the issue before the Court was whether insistence on the presence of the recorder was a violation of the NLRA, not whether refusal to acquiesce was a violation.

The Board also claims that the *Latrobe* dictum is contrary to the Supreme Court's statement in *Borg-Warner* that a "party is free . . . not to bargain" about nonmandatory subjects. 356 U.S. at 349, 78 S.Ct. at 722–23. It argues that the right not to bargain entails the right to insist on the absence of the nonmandatory subject from negotiation. Otherwise, the finding of an unfair labor practice would be dependent upon whether a party said he would not bargain about a matter (no violation) or said that he insisted that the matter not be discussed (a violation). Such a result would clearly exalt form over substance.

Because the Board is correct in its assertion that there is no substantive difference between refusing to bargain about a matter and insisting that the matter not be discussed, it was not improper for the Company to refuse to acquiesce in the Union's nonmandatory demand. Thus, contrary to the Union's contention, the cause of the impasse does not lie with the Company. Rather, it lies with the Union for refusing to enter into the mandatory grievance meetings without the nonmandatory tape recorder. Since insistence to impasse on a nonmandatory subject constitutes an unfair labor practice, the Board's decision that the Union committed an unfair labor practice is "reasonably defensible" under the *Ford Motor Co.* standard. 441 U.S. at 497, 99 S.Ct. at 1849.

B.

The Union relies on a different line of decisions than the *Latrobe, Bartlett-Collins* cases, claiming that a unilateral change of a nonmandatory subject of bargaining does not constitute an unfair labor practice. In particular, the Union cites as support this Court's decision in *Champion Parts Rebuilders, Inc. Northeast Div. v. NLRB,* 717 F.2d 845 (3d Cir.1983). In *Champion,* the company made a minor change in the procedure for photocopying doctors' excuses. This Court found no violation of §§ 8(a)(5) or 8(a)(1) in the company's unilateral modification of a nonmandatory subject of bargaining, citing *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) (because retirees' benefits are not a mandatory subject of bargaining, company may make unilateral changes without consulting union).

In response, the Board argues that verbatim tape recording is not a minor alteration in the procedure of grievance meetings. The Board's decision limited its proscription to verbatim recording, thereby allowing the widely accepted practice of longhand notetaking to continue. Unlike note taking, the verbatim recordings unduly formalize the bargaining process and impede the resolution of the dispute, according to the Board.

In addition, the Board contends that the Union's reference to *Champion Parts* and the subject of unilateral changes in nonmandatory subjects is not on point. It maintains that correlative to the duty to bargain in good faith, the Act imposes a duty "to refrain from holding [negotiations on mandatory subjects] hostage to a demand for a nonmandatory subject." *NLRB v. International Union of Operating Engineers,* 532 F.2d 902, 907 (3d Cir.1976), *cert. denied,* 429 U.S. 1072, 97 S.Ct. 808, 50 L.Ed.2d 789 (1977). *See also Borg-Warner,* 356 U.S. at 348–50, 78 S.Ct. at 722–23. Therefore, the unfair labor practice

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found by the Board was not for the Union's unilateral change of a nonmandatory subject. It was free to do that under *Champion.* Rather, the unfair labor practice occurred when the Union insisted that the Company acquiesce in its demand on this nonmandatory subject as a precondition to entering into negotiations on a mandatory bargaining subject. On the basis of *Operating Engineers* and *Borg-Warner,* the Board's legal conclusion that the "Union's insistance . . . on tape recording the [April 3 and 5] grievance meetings constituted unlawful insistence on a nonmandatory subject of bargaining in violation of section 8(b)(3) of the Act" is reasonably defensible.

C.

The Union contends it has a right to record in order "to get accurate information," citing *Communication Workers of America, Local 1051 v. NLRB,* 644 F.2d 923 (1st Cir.1981). However, as the Board indicates, *Communication Workers* is not on point. In *Communication Workers,* the court enforced the Board's order that the employer make photocopies of grievance-related materials, such as employee attendance records, available to the Union. Previously, the employer had only allowed handcopying. Hence, *Communication Workers* establishes only the right to information necessary to negotiate the grievance. It is not the right to a tape-recorded transcript of the negotiations themselves. Since there is no established right to a verbatim record of the grievance, the Board reasonably construed the NLRA's policy in favor of open negotiations free from the constraints of tape recording by holding that the Union violated § 8(b)(3) of the Act by refusing to bargain in good faith.

While the Company and the Union have a long history of allowing longhand notetaking in grievance meetings and during collective bargaining, the Company has agreed only to tape recording at a meeting with a blind grievant in the mid-1970's and under protest at the March 26, 1984 investigatory meeting. The subject of the use of a tape recorder at grievance proceedings does not appear in the parties' collective agreement and was not considered during negotiation.

The Union makes the claim that the Company waived its right to object to tape recording the April 3 and 5 meetings because it had allowed other meetings to be recorded. A waiver of statutory bargaining rights, however, must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); *Ciba-Geigy Pharmaceuticals Div. v. NLRB,* 722 F.2d 1120, 1127 (3d Cir.1983). The Company's limited acceptance of tape recording one grievance proceeding involving a blind grievant in 1975 and under protest in 1984 does not establish a clear and unmistakable waiver of the right to object to tape recording grievance meetings.

Similarly, the Union maintains that the parties established a past practice of allowing tape recording on request. In this regard, it cites the ALJ's statement that the parties "had tape recorded grievance sessions in the past. . . . [P]recedents for so doing had existed since the mid-1970's." App. at 20. But the Union ignores the Board's rejection of the ALJ's conclusion: "Although the judge found that a practice of tape recording grievance meetings existed between the parties, we are not satisfied the record supports his conclusion." App. at 12 n. 4. In light of the fact that the Company had only previously allowed tape recording twice, and neither instance was analogous to the April 3 and 5 grievance meetings, the Board's conclusion is supported by substantial evidence and should be upheld.

Notwithstanding the disagreement over whether a past practice had been established, the Board stated that "whether a past practice existed is irrelevant where insistance concerns a nonmandatory subject of bargaining." *See Bakery Workers Local 455,* 272 NLRB 1362, 1362 n. 2 (1984). This is so because a nonmandatory subject does not become mandatory through past practice. *Allied,* 404 U.S. at 187, 92 S.Ct. at 401–02. Therefore, the Union's assertion of a past practice is irrelevant to this case.

V.

Because substantial evidence exists to support the Board's determination that the Union violated the duty to bargain in good faith, we will enforce the Board's order.

Each party to bear its own costs.

Millwright & Machinery Erectors, Local Union 720, United Brotherhood of Carpenters & Joiners of America v. NLRB

798 F.2d 781 (5th Cir.), August 27, 1986—276 NLRB 59

On petition to review Board Order

Before GEE, POLITZ, and GARWOOD, Circuit Judges

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GARWOOD, Circuit Judge: Millwright and Machinery Erectors, Local Union 720 (the Union) petitions this Court to review and set aside an order of the National Labor Relations Board (NLRB or the Board) finding that the Union violated section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(1)(A), in its treatment of Union member Leland H. Johnson, Jr. The NLRB cross-petitions for enforcement of its order. Because the Union conduct at issue was purely a matter of internal union discipline and did not facially, and was not shown to actually, have any effect on Johnson's employment, we find that the NLRB erred in finding a section 8(b)(1)(A) violation based only on the manner in which the discipline was imposed. Accordingly, we set aside the order and remand to the NLRB.

Facts and Proceedings Below

The Union operates a hiring hall providing an exclusive referral system for the employment of millwrights in the greater Baton Rouge, Louisiana area. The Union referral system, which is open to union and nonunion members alike, provides for the maintenance of two lists. The master list assigns to each hiring hall participant a sequential number, which is retained until that individual is referred to a job lasting five or more days. When a worker takes such a job, he or she obtains a new, higher master list number. The daily list, or out-of-work list, is signed each morning by those interested in job referrals. Those who sign on Monday are on the out-of-work list for the week (unless they accept a job referral) and need not appear at the hall again that week. The jobs are offered to those on the out-of-work list, beginning with the person having the lowest master list number and continuing in the ascending order of the master list numbers. Hiring hall participants are permitted to turn down job referrals; a declined referral is then offered to the next eligible individual on the out-of-work list. Those with low numbers and a history of unemployment often turn down short jobs (provided they are longer than five days) because at the completion of the short (though over five days) job they must re-register on the master list, losing their low number and corresponding opportunity for a longer job.

On September 10, 1984, Leland H. Johnson, Jr., a member of the Union, signed the out-of-work list. The next day, Union Business Representative Joe Wade Bennett, who administers the referral system, offered Johnson a job with a union company—a company that had signed a collective bargaining agreement with the Union. Johnson declined the referral, choosing to retain a job he had been working for two months with a nonunion company. At that point, Bennett threatened to file internal union charges against Johnson for declining a union job while working for a nonunion company.

On September 14, 1984, Bennett filed union disciplinary charges against Johnson [1] and announced to the members at a Union meeting that the charges had been filed. The Union Trial Committee conducted a trial on the charges and found Johnson guilty of violating his Union "Obligation." The Union membership voted to fine Johnson $500 and to suspend his membership book. Johnson paid a $50 bond to appeal the decision to the International Union. The Union has not implemented the fine or the suspension.

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On October 17, 1984, after Bennett filed the charges but before the Union trial, Johnson brought this unfair labor practice claim against the Union. The General Counsel issued a complaint alleging that the Union had violated section 8(b)(1)(A) of the NLRA in its treatment of Johnson. The case was tried before an administrative law judge (ALJ) on January 9 and 11, 1985. The ALJ found that Bennett was not unlawfully motivated in his actions, but that the Union violated the NLRA by processing charges against Johnson without providing proper notice of its new policy to file charges against members who decline job referrals while signed on the out-of-work list and working for a nonunion company. [2] In support of his decision, the ALJ found that the Union, by past practice, had condoned its members' rejection of union job referrals while working for nonunion companies. The ALJ also determined that the charges against Johnson deviated from past practice, and that the membership was not informed of the new policy until after charges had been filed against Johnson. A panel of the NLRB agreed that the Union had violated the NLRA in its referenced treatment of Johnson. The NLRB affirmed the ALJ's rulings, findings, and conclusions with modifications that are not relevant here, but issued its own order.

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[1] Bennett charged that Johnson was guilty of (1) causing dissension among Union members and (2) violating "the Obligation"—the Union member's promise of allegiance to the Union. Johnson was found not guilty of the dissension charge, but guilty of violating the Obligation.

[2] The ALJ found that the Union acted unlawfully by threatening to file charges against Johnson, filing charges, informing members of the charges, processing the charges, trying him on the charges, finding him guilty, and imposing discipline.

Discussion

The NLRB's finding of a section 8(b)(1)(A) violation is conclusive if supported by substantial evidence in the record as a whole. *United Association of Journeymen, Local No. 198 v. NLRB,* 747 F.2d 326, 330 (5th Cir.1984); *International Union of Operating Engineers Local 406 v. NLRB,* 701 F.2d 504, 508 (5th Cir.1983). An adequately supported NLRB determination will not be displaced on review, even if we would prefer a different decision on a *de novo* review. *United Association of Journeymen,* 747 F.2d at 330–31. The credibility determinations by the ALJ, at least where sustained by the Board, are to be given special deference. *Operating Engineers,* 701 F.2d at 508–09; *NLRB v. Gulf States United Telephone Co.,* 694 F.2d 92, 96 (5th Cir.1982).

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to engage or refrain from engaging in concerted activities for the purpose of collective bargaining.[3] Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a labor organization "to restrain or coerce" employees in the exercise of their rights guaranteed by section 7: "*Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The Supreme Court has held that the federal labor laws impose on a union, in acting as an exclusive bargaining representative, a statutory duty to fairly represent all workers in the bargaining unit, which includes the duty to treat all such workers without hostility or discrimination, to exercise its discretion with good faith and honesty, and to avoid arbitrary conduct. *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 909–10, 17 L.Ed.2d 842 (1967). A breach of this duty of fair representation constitutes a violation of section (8)(1)(A).

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NLRB v. General Truckdrivers, 778 F.2d 207, 212–13 (5th Cir.1985). However, the Supreme Court has determined that the proviso to section 8(b)(1) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield v. NLRB,* 394 U.S. 423, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385 (1969).

We have interpreted the duty of fair representation to mean that a union operating an exclusive hiring hall "may not apply arbitrary or invidious criteria in referring employees to jobs." *Operating Engineers,* 701 F.2d at 508 (citation omitted); *accord General Truckdrivers,* 778 F.2d at 213. In *Operating Engineers,* we held that the union violated section 8(b)(1)(A) when it changed its hiring hall procedures to permit members to take six-day jobs without forfeiting list seniority by not informing a member who declined a six-day job in reliance on the prior five-day rule. 701 F.2d at 510. Because the union member was "denied employment opportunities," the union's conduct interfered with the performance of its representative function: the union failed to "represent all employees 'in a fair and impartial manner.' " *Id.* (citations omitted). Similarly, in *General Truckdrivers,* we enforced an NLRB order finding that a union violated section 8(b)(1)(A) in the operation of its exclusive hiring hall when, in an arbitrary and capricious manner, it failed to refer employment to the complainants. 778 F.2d at 213–15.

The Union argues that its conduct is protected by the proviso to section 8(b)(1)(A) as internal union discipline not affecting Johnson's employment. The Union claims that, unlike the unlawful union conduct in *Operating Engineers and General Truckdrivers,* its actions only affected Johnson's status as a member of the Union. The NLRB argues that the Union's treatment of Johnson affected his employment. In addition, the NLRB contends that, even if the rule did not affect his employment status, it was not "properly adopted," nor was it "reasonably enforced." Johnson was not "free to leave the union and escape the rule," because he was disciplined before he had the choice of compliance. Thus, the NLRB reasons, the Union conduct was not protected according to the Supreme Court's interpretation of the proviso. *See Scofield,* 89 S.Ct. at 1158.

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[3] Section 7 of the NLRA, 29 U.S.C. § 157, provides in part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."

The NLRB argues that the Union's sanctions were "employment related," because they "adversely impacted on Johnson's ability to work for nonunion contractors."[4] However, Johnson's status as an employee was not affected by Union discipline imposed for his failure to accept the union job on September 11, because he kept the nonunion job. When he turned down the job offered by Bennett, Johnson retained his master list number, his place on the out-of-work list, and his full hiring hall privileges. The potential effect of the new rule on Johnson's subsequent job choices is not at issue. Neither the NLRB nor the ALJ addressed the substantive validity of the rule, but each instead merely found that the Union's internal discipline of Johnson without notice of the rule change prior to his refusal of the union job violated section 8(b)(1)(A). We therefore must determine whether the internal Union sanctions in this case may constitute a violation of the NLRA based on the absence of proper notice of the rule change.

Although the Supreme Court has stated repeatedly that Congress did not intend section 8(b)(1)(A) to regulate internal union affairs, the Court has indicated instances in which internal union sanctions may violate this provision. The Court's opinions suggest two general areas in which the union's discretion regarding internal matters may be limited by section 8(b)(1)(A): (1) when the union adopts a rule that does not reflect a legitimate union interest or impairs **785** a policy that Congress has embedded in the labor laws; or (2) when a union rule is not "properly adopted" or "reasonably enforced." *Scofield,* 89 S.Ct. at 1158. *Cf.* R. Gorman, *Labor Law* 677–85 (1976). The Board in this case declined to answer the question whether the new Union rule "reflects a legitimate union interest or whether it frustrates an overriding policy which 'Congress has imbedded in the labor laws.' " The ALJ opinion adopted by the Board indicates that its finding of a violation is based on the fact that the rule was not "properly adopted," and not on a finding that the absence of notice here contravenes policies that inform the labor laws. Therefore, we must address the Supreme Court's indications that the manner in which a union enforces its internal regulations may violate the NLRA.

In *NLRB v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967), the Supreme Court considered whether a union fine against members who crossed the union's picket lines to work during a lawful strike constituted a violation of section 8(b)(1)(A). Having carefully examined the legislative history of the provision, the Court concluded that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations *to affect a member's employment status.*" *Id.,* 87 S.Ct. at 2014 (emphasis added).[5] The Court thus held that the union may enforce reasonable fines against its members for crossing authorized picket lines. Yet, the Court cautioned that it expressed no view on whether "§ 8(b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader." *Id.* at 2014.[6]

The Supreme Court in *Scofield* held that the imposition of reasonable union fines on members for violating a union rule relating to production ceilings was not subject to challenge based on section 8(b)(1)(A). Because the rule was aimed at a legitimate union interest and did not contravene any policy of the NLRA, and because it was enforced solely through internal union mechanisms not affecting employment, the Court found that its enforcement "by reasonable fines" did not constitute the restraint or coercion prohibited by section 8(b)(1)(A). 89 S.Ct. at 1161. However, the Court observed that there was "no showing in the record that the fines were unreasonable or the mere fiat of a union leader, or that the membership of petitioners in the union was involuntary. Moreover, the enforcement of the rule was not carried out through means unacceptable in themselves, such as violence or employer discrimination." *Id.* at 1158.

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[4] Neither the Board nor the ALJ found that the Union's discipline of Johnson affected his employment or employment opportunities.

[5] The Court relied on the repeated assurances by the sponsors of the bill that this section was not meant to regulate the internal affairs of unions. 87 S.Ct. at 2009–14. Although Senator Taft suggested that Congress should be concerned about arbitrary union conduct, the Court concluded that any inference that Senator Taft envisioned section 8(b)(1)(A) as regulating internal union affairs was negated by "his categorical statements to the contrary in the contemporaneous debates on § 8(b)(2)." *Id.* at 2012. The Court also reasoned that the adoption of the Landrum-Griffin Act in 1959, "thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs," *id.* at 2013, indicated that Congress did not intend such regulation when it adopted section 8(b)(1)(A) in 1947. *Id.* at 2013–14.

[6] In a dissent joined by three other justices, Justice Black concluded that the judicial enforcement of union fines for refusal to join the strike was "restraint or coercion" of those employees' section 7 right to refrain from joining in concerted activities. 87 S.Ct. at 2016.

In determining whether the language in *Allis-Chalmers* and *Scofield* supports the NLRB's argument that the Union's unreasonable and arbitrary imposition of internal discipline violates the NLRA, we find some guidance in the Supreme Court's opinion in *NLRB v. Boeing Co.*, 412 U.S. 67, 93 S.Ct. 1952, 36 L.Ed.2d 752 (1973). In *Boeing* the union had called a lawful economic strike against the employer upon the expiration of their collective bargaining agreement. After the dispute was resolved and a new agreement signed, the union attempted to enforce fines against members who had crossed the picket lines. The employer filed a charge with the General Counsel, claiming that, although the members were validly fined by the union, the fines were unreasonable in amount. In appealing the Board's ultimate rejection of its claim, the employer argued that the Supreme Court's language in *Allis-Chalmers* and *Scofield* was intended to suggest that unreasonable fines would amount to a section 8(b)(1)(A) violation. *Id.*, 93 S.Ct. at 1955.

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The Supreme Court concluded that, although the employer's interpretation was not illogical, it was based only on dicta because in both *Allis-Chalmers* and *Scofield* the reasonableness of the fines was assumed. *Id.* at 1955. The Court continued:

> "Being squarely presented with the issue [of unreasonable fines] in this case, *we recede from the implications of the dicta in these earlier cases.* . . . The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* was not that reasonable fines were non-coercive under the language of § 8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines *not affecting the employer-employee relationship and not otherwise prohibited by the Act.* The reason for this determination, in turn, was that Congress had not intended by enacting this section to regulate the internal affairs of unions to the extent that would be required in order to base unfair labor practice charges on the levying of such fines." *Id.* at 1956 (emphasis added).

The Court referred to the construction of the legislative history of this provision in *Allis-Chalmers* and *Scofield*, reasoning that the Board's inquiry in the case before it into matters such as the union's motivation for imposing a fine involved the Board in internal union affairs in a manner that the Court had held Congress did not intend. *Id.* at 1956. The Court also relied on the Board's longstanding view that assessment of the reasonableness of union fines should be left to the state courts. *Id.* at 1956–58. The Court adopted the Board's conclusion that "when the union discipline *does not interfere with the employee-employer* relationship or otherwise violate a policy of the National Labor Relations Act, the Congress did not authorize it 'to evaluate the fairness of union discipline meted out to protect a legitimate union interest.'" *Id.* at 1958 (footnotes omitted) (emphasis added).

The NLRB does not challenge the reasonableness of the amount of the fine against Johnson, but instead asserts that the unreasonableness of imposing Union discipline without notice of the rule change violated the NLRA. We believe that the Court's opinion in *Boeing* suggests that we should not rely on the language in *Scofield* and *Allis-Chalmers* urged by the NLRB to support the Board's determination that the Union violated the Act because its rule was not "properly adopted." If Congress did not intend section 8(b)(1)(A) to proscribe internal union discipline (not affecting the disciplined member's employment) even in the form of an unreasonably large fine, it is not likely that Congress intended the provision to regulate the manner in which a union imposes internal sanctions. The Supreme Court's reiteration that Congress did not intend section 8(b)(1)(A) to reach internal union matters which do not affect the member's employment, as well as the Court's statement in the context of a challenge to the reasonableness of a fine that it recedes from any contrary implications raised by its previous decisions, lead us to reject the Board's argument. Furthermore, we are unable to discover any decisions that find internal union discipline not affecting employment to be a violation of the NLRA solely on the fact that the union rule was not "properly adopted" or "reasonably enforced," without consideration of whether the union policy reflects a legitimate union interest or impairs federal labor policies.[7] We thus conclude that the

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Union's discipline of Johnson for violating the new Union rule does not constitute a violation of the NLRA merely because he had not received notice of the rule change.

The Union contends that because the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), 29 U.S.C. § 411(a)(5), provides safeguards against improper disciplinary actions by unions, the NLRA is not the proper avenue for any relief that Johnson may be afforded. Although this argument is supported by the Supreme Court's interpretation of the legislative history of section 8(b)(1)(A) in *Allis-Chalmers, see* note 5, *supra,* it is closely related to the question of whether the Union's conduct contravened any policy that "Congress has imbedded in the labor laws." *Scofield,* 89 S.Ct. at 1158.

The NLRB and several courts have followed the Supreme Court's lead in *NLRB v. Industrial Union of Marine & Shipbuilding Workers,* 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968), in finding a section 8(b)(1)(A) violation when union discipline not affecting employment impairs policies underlying the NLRA. *See, e.g., NLRB v. Stationary Engineers, Local 39,* 746 F.2d 530, 533–35 (9th Cir.1984) (union violated section 8(b)(1)(A) by disciplining members who crossed unlawful picket lines); *NLRB v. Retail Clerks Union, Local 1179,* 526 F.2d 142, 145–47 (9th Cir.1975); *cf. NLRB v. Local No. 18, International Union of Operating Engineers,* 503 F.2d 780, 782–83 (6th Cir.1974); *Amalgamated Meat Cutters, Local 593,* 237 NLRB 1159 (1978). In *Marine Workers,* the Supreme Court found a violation of this provision based on the union's expulsion of a member who filed with the General Counsel an unfair labor practice against the union without first exhausting the available union remedies. The Court determined that, although this section does not interfere with internal union affairs concerning legitimate union interests, it does not permit a union to discipline a member

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for seeking to enforce his rights under the NLRA concerning a matter beyond the internal affairs of the union. 88 S.Ct. at 1722. The Supreme Court in *Boeing* reaffirmed its position that when union discipline violates a policy of the NLRA, it is an unfair labor practice under section 8(b)(1)(A). 93 S.Ct. at 1958.

Although the Union conduct in the present case, unlike that in *Marine Workers,* does not invoke policies necessary to the enforcement of the NLRA, it may perhaps be arguable that other—

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[7] Of course, all union discipline which concerns a union member's employment-related activities may affect the member's employment status or employee-employer relationship *in the sense* that the employee threatened with or coerced by such discipline may be or feel compelled to *choose* between the desired employment-related activity and maintenance of membership or good standing in the union; but so long as maintenance of (or failure to maintain) membership or good standing in the union does not itself actually or potentially affect the worker's employment status or employee-employer relationship, then the referenced necessity for choice should not alone suffice to render the union discipline such as affects the member's employment status or employee-employer relationship within the necessarily implied meaning of that concept as employed in *Boeing, Allis-Chalmers,* and *Scofield. Cf. International Union of Elevator Constructors Local Union No. 8 v. NLRB,* 665 F.2d 376, 379 (D.C.Cir.1981) (stating that the proviso to section 8(b)(1)(A) "has been interpreted to allow enforcement of union rules with a legitimate purpose, which do not conflict with national labor policy, *so long as members are free to escape union discipline by resignation*" (emphasis added; footnote omitted)). We also believe that this comports with the NLRA's recognition of unions as essentially private organizations generally having the right to regulate their own internal affairs other than by use of their power to control employment (a somewhat different approach, however, having been taken in the Landrum-Griffin Act). Our analysis here is, however, contrary to that in *NLRB v. International Longshoremen's and Warehousemen's Union, Local 13,* 581 F.2d 1321, 1323 (9th Cir.1978), *cert. denied,* 440 U.S. 935, 99 S.Ct. 1279, 59 L.Ed.2d 493 (1979). Nevertheless, we note that in that case the discipline itself—ordering the union member not to use the hiring hall, effectively not to work, for ten days—directly affected the member's employment status; where the penalty is a fine, the union member has the option of discharging the penalty without affecting his employment status, while if the penalty is missing work, it cannot be discharged without affecting employment. The decision appears to have been interpreted in that manner, being cited in *Carpenters Union Local No. 25 v. NLRB,* 769 F.2d 574, 581 (9th Cir.1985), for the proposition that "a union may not be able to enforce its internal regulations in a manner which affects a member's employment status." Further, in the case presently at bar, the retroactive application of the rule—the only thing that the Board or the ALJ passed on, as they left open whether the rule could be prospectively applied to Johnson or anyone else—necessarily presents a situation where the member was not in fact faced with a choice between union membership (or discipline) and a particular work opportunity, such a choice (at least when directly imposed *as* union discipline) being what the Court found objectional in *International Longshoremen's and Warehousemen's Union, Local 13.* Consequently, while we are inclined to a different view than that expressed in *International Longshoremen's and Warehousemen's Union, Local 13,* even were we to follow the approach of that case it would not change the result here.

non-NLRA—labor policies should be considered. In *Carpenters Local Union No. 22 (Graziano Construction Co.)*, 195 NLRB 1 (1972), the Board observed that under *Scofield* it must consider the full panoply of congressional labor policies in determining the legality of a union fine. The Board determined that the union conduct in that case frustrated policies embodied in the Landrum-Griffin Act. The Board concluded that, although it is not charged with the administration of the Landrum-Griffin Act, its policies should be considered in assessing the requirements of section 8(b)(1)(A) of the NLRA.

We do not address the issue whether the Union's treatment of Johnson may impair policies imbedded in the labor laws because the Board did not reach the issue in its determination and does not discuss it on appeal. Whether policies other than those embodied in the NLRA may properly be considered by the Board in this type of case, and if so to what extent, and whether any such policies are applicable in this case are difficult questions, which we leave to the Board's determination in the first instance, subject to appropriate judicial review. In addition, the Board did not decide whether the rule itself impairs any labor policies or supports a legitimate Union interest. We therefore remand the case to the NLRB for further consideration.

Conclusion

Because the NLRB based its finding of a violation of section 8(b)(1)(A) only on its determination that the Union rule was not properly adopted, we SET ASIDE THE ORDER and REMAND the case to the NLRB.

Hospital & Service Employees Union, Local 399, Service Employees International Union, AFL-CIO v. NLRB

798 F.2d 1245 (9th Cir.), August 29, 1986—263 NLRB 996

On petition to review Board Order

Before FARRIS and CANBY, Circuit Judges, and SOLOMON, District Judge *

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CANBY, Circuit Judge: Local 399 of the Hospital and Service Employees Union seeks review of an order of the National Labor Relations Board dismissing an unfair labor practice complaint against Naftalie Deutsch, Frank DeMascio and Kenneth Childs, who form a partnership that does business as the Westbrook Bowl, Valley View Bowl and Verdugo Hills Bowl (the Employer) in the greater Los Angeles area. The Board dismissed the complaint for failure to serve a copy of the charges underlying the complaint within the six-month period prescribed by section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(b) (1982). We grant the petition for review and reverse the Board's decision.

Background

On September 10, 1981, the Union filed three charges with the NLRB's Los Ange-

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les Regional Office, alleging that the Employer had committed unfair labor practices. The Union alleged that the Employer had violated sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing within the preceding two months to renegotiate its collective bargaining agreement with the Union.

One week later, the Regional Office began its investigation of the charges. It also mailed a copy of the charges to the Employer at 9911 West Pico Boulevard, Suite 580, in Los Angeles. As it turned out, the Employer had not conducted business from Suite 580 for about one year, even though the Employer's attorney had used that address in a representation petition presented to the Board only a few days before the filing of the charges at issue here. [1] Although it is the NLRB's practice to serve copies of unfair labor practice charges to employers by certified mail, the Regional Office could not produce a return receipt from the Postal Service indicating delivery of the charges.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] In fact, Deutsch owned the building at 9911 West Pico Boulevard and occupied a suite of offices in the basement, Suite B51. The evidence showed that mail was routinely forwarded from Suite 580 to Suite B51 and that several communications from the Union on matters unrelated to this proceeding were received by the Employer despite having been addressed to Suite 580. Indeed, the NLRB complaint in this case was served by mail and received by the Employer although it was also addressed to Suite 580. *See infra.*

The Employer's attorney, Michael Schmier, somehow learned that charges had been filed and contacted NLRB attorney Beverly Ware requesting copies of the charges. [2] Ware sent Schmier an enclosure letter, which he admits receiving, but she apparently forgot to include the charges. Schmier then renewed his request for the charges. Ware mailed him a second letter that included the charges, but Schmier denied having ever received it. Although the Employer participated in the initial investigation of the charges, and although Schmier personally discussed the merits of the charges with Ware, no one ever mentioned that the Employer had not received the charges.

On November 23, 1981, the Regional Office issued a complaint and served it in the same manner as it had served the charges, *i.e.*, by certified mail to the Suite 580 address. Despite the address error, the Employer received the complaint, and on December 3, 1981, Schmier filed an answer on the Employer's behalf denying each and every allegation including service of the charges. [3]

Approximately nine months later, apparently in response to a query from the Regional Office, Schmier first claimed that the charges had not been served properly. Trial before Administrative Law Judge Pollack began on November 18, 1982, and continued for 13 sessions over the next year or so. Schmier then filed a motion to dismiss the complaint for improper service of charges. The ALJ granted the motion and dismissed the action on March 27, 1984. A three-member NLRB panel affirmed in a split decision, adopting the ALJ's order and specifically finding that the Employer had no actual notice of the charges. *Westbrook Bowl,* 274 NLRB No. 145, 118 L.R.R.M. (BNA) 1489 (1985). Board Member Patricia Dennis dissented, partially on the ground that the Employer had actual notice of the charges and had suffered no prejudice.

DISCUSSION

I. *Standard of Review*

We will enforce an NLRB order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence in the record as a whole, even

if we might have reached a different conclusion based on the same evidence. *NLRB v. International Brotherhood of Electrical Workers Local Union #46,* 793 F.2d 1026, 1028 (9th Cir.1986). Moreover, the Board's interpretation of the Act is entitled to deference and will be upheld if its interpretation is reasonably defensible. Nonetheless, we will not "rubber stamp" Board decisions that are inconsistent with a statutory mandate or that frustrate the policies underlying the Act. *NLRB v. International Brotherhood of Electrical Workers, Local 952,* 758 F.2d 436, 439 (9th Cir.1985).

II. *Actual Notice*

The Union asserts that the Employer had actual notice of the charges within the six months required under section 10(b) and so cannot now complain that service of the charges was improper. The Union points both to the Employer's participation in the initial investigation of the charges and to the fact that the Employer was served with, and answered a complaint based on, the charges within six months of the alleged violations.

A. *Failure to Raise the Contention Below*

The Board argues that we may not consider the actual-notice issue because it was not presented to the NLRB on appeal. We disagree. The record shows that the General Counsel (GC) argued the issue of actual notice before the ALJ and included the issue in its request for review and exceptions before the Board. Indeed, the Board addressed the question of actual notice in its decision, and the Dennis dissent was based in part on that issue. It is therefore clear that the issue was raised below.

We recognize that the GC never argued that service of the complaint constituted actual notice and that this form of the actual-notice argument is before us for the first time. Nonetheless, the ALJ's decision noted the uncontested fact that the Employer had received service and had answered within six months of the alleged violations. It further noted the Employer's participation in the pretrial investigation of the charges. In these circumstances, the ALJ and the Board clearly had before them facts that would permit consideration of the actual-notice question in the form in which it is now presented. Therefore, we conclude that the objection was raised at the administrative level with sufficient specificity to preserve the issue for review here. *See May Department Stores Co. v. NLRB,* 326 U.S. 376, 386–87 n. 5, 66 S.Ct. 203, 209–10 n. 5, 90 L.Ed. 145 (1945) (objection which fell "short of desirable specificity" sufficient to preserve the issue on appeal); *Hospital & Service Employees Union, Local 399 v. NLRB,* 743 F.2d 1417, 1425–26 (9th Cir.1984) (cryptic exceptions to ALJ's findings sufficient to preserve issue although it was not raised in brief to the Board).

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[2] The ALJ made no findings as to how Schmier learned that the charges had been filed.

[3] The substantive portion of the answer reads, in its entirety:

> Respondents in the above captioned case, for answer to the complaint herein, admits, denies, alleges [*sic*] as follows:
>
> 1. Denies [*sic*] the allegations contained in paragraphs 1, 2(a), 2(b), 2(c), 3, 4, 5, 6(a), 6(b), 6(c), 7(a), 7(b), 7(c), 8, 9, 10, 11, 12, 13, 14.

B. *Substantial Evidence*

As we have said, the undisputed evidence shows that the Employer participated in the investigation before the complaint was filed. The complaint was served and answered within six months of the alleged violations. As required by Board regulations, the complaint included a statement of the charges on which it was based. *See* 29 C.F.R. §§ 101.8, 102.15 (1985); *NLRB v. Carilli,* 648 F.2d 1206, 1210 (9th Cir.1981). The Board nowhere contends that the complaint did not adequately apprise the Employer of the pending charges, and it points to nothing in the record indicating an absence of actual notice. The Employer has never claimed any prejudice because of the alleged nonservice of charges, and it did not even raise the issue until well after proceedings here were under way.

The record strongly suggests that the Employer was well aware of the charges against it from the beginning and raised the service-of-charges issue only as an afterthought in an effort to delay the proceedings here. In any event, we conclude that the Board's finding that the Employer did not have actual notice of the charges is unsupported by substantial evidence on the record as a whole. *See Idaho Falls Consolidated Hospitals, Inc. v. NLRB,* 731 F.2d 1384, 1386–87 (9th Cir.1984).

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C. *The Requirements of Section 10(b)*

The fact that the Employer had actual notice of the charges does not end our inquiry. We must still consider whether actual notice satisfies the requirements of section 10(b). The question is one of first impression in this circuit.

Section 10(b) is a statute of limitations designed to ensure against stale claims, *Local Lodge No. 1424, International Ass'n of Machinists v. NLRB,* 362 U.S. 411, 424, 80 S.Ct. 822, 830, 4 L.Ed.2d 832 (1960), and to ensure that the Board issues complaints only when charges have been filed and not on its own initiative, *NLRB v. Inland Empire Meat Co.,* 611 F.2d 1235, 1237 (9th Cir.1979). The service requirement is designed to encourage an early statement of position by the party charged in the hope of quick disposition of most matters through settlement or dismissal or withdrawal of the charges. *See* 29 C.F.R. § 101.4 (1985). Moreover the charges themselves are meant only to set in motion the machinery of an inquiry, while the complaint is particularly designed to give notice of the substance of the charges.[4] *NLRB v. Fant Milling Co.,* 360 U.S. 301, 307, 79 S.Ct. 1179, 1183, 3 L.Ed.2d 1243 (1959); *Inland Empire,* 611 F.2d at 1237. All of these goals underlying section 10(b) were satisfied in this case. The charges were certainly not stale when the complaint was filed, and the complaint was clearly based on the charges. Moreover the Employer's participation in the investigation produced an early response to the charges, albeit without the desired quick resolution of the matter.

As we have said, there was no claim of prejudice to the Employer here. Although we have never faced this precise situation, we have decided cases in which charges were served within six months of the alleged violations but lacked specific allegations; greater detail was included in the complaints. In these situations, we have held that the charged party cannot complain so long as the complaint gave notice of the charges before trial. *E.g., Carilli,* 648 F.2d at 1210–11; *Inland Empire,* 611 F.2d at 1237–38. Even if the complaint fails to notify a party of a charge, we have held that no prejudice is suffered if the issue is fully and fairly litigated. *See Presto Casting Co. v. NLRB,* 708 F.2d 495, 498 (9th Cir.), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Carilli;* 648 F.2d at 1211. These precedents persuade us that, where a complaint is served within six months of the violations and the Employer suffers no prejudice, it would serve only to elevate form over substance to find that section 10(b) had been violated.[5] Because the various purposes underlying section 10(b)'s six-month rule were fully served when the complaint was both served and answered within six months, we hold that section 10(b) was satisfied.[6]

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[4] This point is illustrated by the pleadings in this case. The charges here state in conclusionary terms that the Employer had refused to renegotiate its collective bargaining agreement with the Union. By contrast, the complaint set out in detail the alleged violations of sections 8(a)(5) and (1) of the Act.

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CONCLUSION

The Board's order dismissing the complaint is REVERSED and the case is REMANDED for further proceedings.

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[5] The Courts of Appeals that have considered the question have uniformly held that section 10(b)'s six-month service rule is a statute of limitations that does not limit the Board's jurisdiction. *E.g., NLRB v. Babcock & Wilcox Co.,* 697 F.2d 724, 727 (6th Cir.1983); *NLRB v. Vitronic Division,* 630 F.2d 561, 563 (8th Cir.1979); *Shumate v. NLRB,* 452 F.2d 717, 721 (4th Cir.1971); *A.H. Belo Corp. v. NLRB,* 411 F.2d 959, 966 (5th Cir.1969), *cert. denied,* 396 U.S. 1007, 90 S.Ct. 561, 24 L.Ed.2d 498 (1970); *NLRB v. Silver Bakery, Inc.,* 351 F.2d 37, 39 (1st Cir.1965); *NLRB v. A.E. Nettleton Co.,* 241 F.2d 130, 133 (2d Cir.1957); *cf. NLRB v. MacMillan Ring-Free Oil Co.,* 394 F.2d 26, 31 (9th Cir.) (section 10(b) a statute of limitations, not a rule of evidence), *cert. denied,* 393 U.S. 914, 89 S.Ct. 237, 21 L.Ed.2d 199 (1968).

[6] To the extent the Board's ruling implies that section 10(b) cannot be satisfied by actual notice of the charges, we conclude that this is a construction of the statute that is not reasonably defensible and that frustrates the policies underlying the statute. *See IBEW Local 952,* 758 F.2d at 439.

NLRB v. Monark Boat Company

800 F.2d 191 (8th Cir.), August 29, 1986—276 NLRB 1143

On petition to enforce Board Order

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge

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FLOYD R. GIBSON, Senior Circuit Judge: The National Labor Relations Board ("Board") seeks to enforce its order[1] that Monark Boat Company ("Monark") bargain with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO ("UBC" or "Union"). This case was previously before this court, on the Board's application for enforcement of its 1982 order[2] certifying the UBC as exclusive bargaining representative. At that time we remanded the case to the Board to conduct an evidentiary hearing to determine whether certain "alleged coercive incidents had a chilling effect on the election." *NLRB v. Monark Boat Co.,* 713 F.2d 355, 362 (8th Cir.1983). On remand, the Board affirmed the conclusion of the Administrative Law Judge ("ALJ") that the environment at Monark was not so coercive as to intimidate any part of the work force at the time of the 1980 election. Because we find no abuse of discretion in the Board's actions, we enforce the Board's order.

I. FACTS

In November 1980 the Board conducted a secret ballot election in a unit of Monark's production and maintenance employees in Monark's Monticello, Arkansas plant locations. The UBC won the election by a vote of 77 to 57, with 33 eligible voters abstaining. Monark filed 48 objections to the election. After conducting an administrative investigation, the Board's Acting Regional Director overruled all of Monark's objections and certified the UBC as the exclusive bargaining representative.

The Board denied Monark's subsequent request for review. When Monark refused the UBC's request for bargaining, the UBC filed an unfair labor practice charge against Monark alleging a refusal to bargain under 29 U.S.C. § 158(a)(1), (5) (1976).

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In its response Monark alleged that it need not bargain with the UBC because it had been denied an evidentiary hearing on its objections to the election. On March 4, 1982 the Board issued its order granting the General Counsel's motion for summary judgment and ordered Monark to bargain with the UBC. *Monark Boat Co.,* 260 N.L.R.B. 615, 618–19 (1982).

The Board then petitioned this court for enforcement of its order. This court declined to enforce the order, instead remanding the case to the Board to conduct an evidentiary hearing to resolve issues of fact raised by nine of Monark's objections.[3] *Monark Boat Co.*, 713 F.2d at 362. This court rejected Monark's contentions as to misrepresentation and electioneering, but held that nine of Monark's objections, taken together, raised a sufficient inference of intimidation and coercion to require an evidentiary hearing. In so holding this court noted that the alleged coercive acts were committed by union supporters and not union agents, and that a "threat made by a company or a union agent is a weightier piece of evidence." 713 F.2d at 360. The opinion stated the appropriate standard for this case: " '[R]epresentation elections will be set aside where nonparty misconduct has taken place and such conduct is shown to have created "an atmosphere of fear and reprisal such as to render a free expression of choice impossible." ' " *Id.* (quoting *NLRB v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 870 (8th Cir.1972)).

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[1] 276 N.L.R.B. No. 121 (1985).

[2] 260 N.L.R.B. 615 (1982).

After conducting a three-day hearing on remand, the ALJ found on the basis of credibility determinations that the incidents alleged in objections 15b, c, d, e, and f had not occurred and recommended that those objections be overruled in their entirety. The ALJ further found that the incident in objection 15g involved no coercive conduct by anyone associated with the UBC, and that Monark had failed to show that the incidents in objections 23a and b and the last assertion in objection 11 were related to the election; the ALJ likewise recommended that these objections be overruled. In its order the Board affirmed the ALJ's findings and conclusions, and determining that the November 1980 election was valid, reaffirmed the UBC's certification and its 1982 order. *Monark Boat Co.*, 276 N.L.R.B. No. 121 (1985). The Board now petitions this court for enforcement of its order, and Monark cross-petitions for review of the Board's decision.

II. DISCUSSION

Monark makes three general contentions before this court: (1) that the Board's findings are not supported by substantial evidence on the record as a whole; (2) that the ALJ and the Board improperly limited the scope of the hearing on remand to the specific incidents alleged in the nine objections; and (3) that the Board applied the incorrect standard of review to Monark's objections to the election.

On review of the Board's certification determination, the standard is whether the Board reasonably exercised the " 'wide degree of discretion' vested in it by Congress regarding representation matters." *Beaird-Poulan Division, Emerson Electric Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir.1981) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327–28, 91 L.Ed. 322 (1946)). *See also Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 403 (8th Cir.1985). The Board's findings of fact, if supported by substantial evidence on the record as a whole, are conclusive. 29 U.S.C. § 160(e). This court will uphold credibility determinations made by the fact-finder, unless such determinations shock its conscience. *NLRB v. Iowa Beef Processors*, 675 F.2d 1004, 1006 (8th Cir.1982); *Beaird-Poulan Division, Emerson Electric Co.*, 649 F.2d at 592.

A. The Board's Findings

Turning first to the credibility determinations made by the ALJ, we find that the

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ALJ's Supplemental Decision details the testimony of the witnesses who testified before him, and thoroughly sets out the reasons for crediting or rejecting their statements. Among the factors relied on by the ALJ in weighing the testimony of the witnesses were their demeanor, any changes in their testimony, the state of their memories, and any obvious biases they may have harbored. We fail to find these credibility determinations shocking to the court's conscience. We uphold, then, the findings of fact made by the ALJ (and affirmed by the Board) based on these credibility determinations as supported by substantial evidence on the record as a whole. We disregard, therefore, those alleged incidents which the ALJ found not to have occurred—objections 15b, c, d, e, and f—which primarily involved various threats allegedly made by employees who supported the Union.

The ALJ found that the incident alleged in objection 15g had occurred but had involved no unlawful pressure by anyone associated with the Union. Objection 15g alleged that Union supporter, Pat Barnett, while standing in line to vote on the day of the election, yelled to employee Robert White, who was not in line, to "Just do what I told you, Robert!", after which White got in line to vote. The ALJ credited White's testimony that Barnett's "hollering" had no effect on his decision to vote; Monark admits in its brief that White stated that he was not threatened by Barnett's yelling. Monark's assertion that Barnett's conduct "had a coercive impact and placed unlawful pressure upon Mr. White * * * as well as the fourteen other employees who observed him" is without support and contrary to White's own testimony. In sum, we affirm the Board's overruling of Monark's objection 15g.

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[3] The nine objections cited by Monark as raising issues of fact are objections 15b, c, d, e, f, g, 23a and b, and the last assertion in objection 11. For a discussion of the incidents alleged in these objections, see *NLRB v. Monark Boat Co.*, 713 F.2d at 357–58.

As for the three alleged incidents in objection 23a and b and the last assertion in objection 11, the ALJ found that the incidents took place but had no connection with the Union or the election. Objection 23a alleged that Union supporter Harry Densmore engaged in sabotage against Monark by causing three "accidents" that resulted in over $1,000 in damages. Objection 23b made a similar claim of sabotage, involving work stoppage on a boat by Union supporters Clemy Lambert, Bobbie Trotter, and Linda Johnson. The last assertion in objection 11 centered on the death by rat poisoning of a dog belonging to Mac Harrison, a supervisor at Monark. The ALJ found that although Densmore was indeed involved in three work accidents, Lambert, Trotter, and Johnson did stop work during the processing of a boat, and Harrison's Doberman Pinscher was killed by rat poisoning, none of these incidents was proved to be connected to the Union campaign. Monark bore the burden at the hearing of establishing that these incidents "were in fact acts of sabotage designed to intimidate the voters." *Monark Boat Co.*, 713 F.2d at 358. The incidents do raise suspicions, but the ALJ found in each instance that Monark had failed to establish any connection between the incidents and the Union. After reviewing the record we are satisfied that the ALJ's findings as to these objections are supported by substantial evidence and we therefore affirm the Board's overruling of these objections. Although the death of Harrison's dog appears suspicious, Monark proffered no evidence to establish a link between the dog's death and the Union, in particular the visit of Union supporter Mark Huff to Harrison's home six weeks before the dog died. [4] The dog's death stands as the act of an anonymous party that may or may not be related to the Union or the election. As such, the Board did not abuse its discretion in affirming the ALJ's conclusion that the dog's death alone could not form the basis for objection to the election. *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C.Cir.1984) (anonymous conduct that may not even be related to union or election entitled to little weight).

B. The Scope of the Hearing on Remand

Monark next argues that the ALJ and the Board improperly limited the scope of the hearing on remand to the specific incidents alleged in the nine objections. The ALJ and the Board erred, contends Monark, in rejecting evidence it proffered that, while not relating to the specific incidents alleged in the nine objections, did deal with the issue of coercion. Monark's contention is clearly without merit. Our remand of this case was a limited one, requiring the Board to "hold an evidentiary hearing to resolve issues of fact raised by objections 15b, c, d, e, f, g, 23a and b, and the last assertion in objection 11." *Monark Boat Co.*, 713 F.2d at 362. In proffering evidence outside the scope of those specific factual issues, Monark attempted to expand the scope of the hearing on remand, in effect trying for a "second bite at the apple." The ALJ and the Board did not err in limiting the scope of the hearing to the nine specific incidents.

C. The Standard of Review

Monark's remaining argument is similarly without merit. Monark asserts that the Board applied the incorrect standard of review to Monark's objections to the election. In this regard Monark first contends that the Board improperly stated that the standard for third-party misconduct should apply; that is, "whether an atmosphere of fear and coercion has been created such as to render a free choice impossible." Monark argues that because in-plant organizing committee members at Monark acted as agents or alter egos of the Union, the standard for party misconduct is appropriate. Monark further contends that the Board failed to consider whether the cumulative effect of the objectionable misconduct was sufficient to invalidate the election. The short answer to both parts of this argument is that the Board found no instances of misconduct on the part of anyone connected with the Union, whether it be individual employees or Union agents. Thus under any standard the Board acted within its discretion in validating the election. Because we uphold the Board's findings that none of Monark's objections was proved to be well taken individually, we must also conclude that taken collectively the objections fail to satisfy Monark's burden of establishing the 1980 election as invalid.

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[4] The ALJ found, on the basis of a credibility resolution, that an alleged visit after the dog's death to the Harrison home by Union supporter Robert Sumpter, who was laid off at the time, never took place. Even if the ALJ had credited Harrison's testimony as to Sumpter's alleged visit, none of that testimony indicated in any way that Sumpter was responsible for or had any knowledge of the dog's death.

III. CONCLUSION

Because the Board did not abuse its discretion in ordering Monark to bargain with the UBC, the Board's order is enforced.

NLRB v. BASF Wyandotte Corp.

798 F.2d 849 (5th Cir.), September 2, 1986—274 NLRB 978

On petition to enforce Board Order

Before Jerre S. Williams, E. Grady Jolly and Patrick E. Higginbotham, Circuit Judges

Jerre S. Williams, Circuit Judge: Petitioner National Labor Relations Board (NLRB) seeks enforcement of its order decreeing that respondent BASF Wyandotte Corp. (company) committed unfair labor practices in violation of § 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(5). We grant enforcement of the order.

I. FACTS

The company owns a chemical plant in Geisman, Louisiana. It has a collective bargaining agreement with the Oil, Chemical, and Atomic Workers' Union Local 4-620 (union). Harold Nickens was union chairman until July 1983, when he resigned and was replaced by Esnard Gremillion.

The day after Gremillion took office, he was informed by the company's Manager of Human Resources that he would not be allowed the same privileges that Nickens had been allowed. Gremillion was not allowed four hours of paid time per day to conduct union business, and he could be released from his job duties for union business only with permission of both his immediate supervisor and the company's Manager of Human Resources. Gremillion was told that he would not be paid for time spent conducting union business, except for a fifteen minute meeting with employees immediately prior to a grievance proceeding. The office and telephone which Nickens had been given on company property and the right to use a company copying machine were taken from Gremillion. The

company informed Gremillion that the privileges granted to Nickens had been personal to him, and that, in any event, supplying these privileges was prohibited by § 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186.

Article 3.6 of the 1981 collective bargaining agreement provides that workers' committee members, stewards, and the chair of the workers' committee "shall be allowed a reasonable amount of time during working hours, without loss of pay, for the purpose of conferring with aggrieved employees or complainants andor representatives of the Company relative to any complaints or grievances filed by an employee or employees. The Chairperson, a Committeeperson, or Steward leaving work for these purposes shall first obtain permission as soon as working conditions reasonably permit, and . . . upon returning to their work shall report to their supervisor immediately."

The union attempted to resolve this dispute through grievance procedures, but the company denied the grievance. The company stated that its narrow interpretation of the contract provision could not be at issue because otherwise the provision was illegal. The union then filed an unfair labor practice charge with the NLRB alleging that the company had violated §§ 8(a)(1) and 8(a)(5) of the NLRA by unilaterally terminating privileges formerly extended to the union. An administrative law judge (ALJ) found that the company had violated § 8(a)(5) of the Act by unilaterally requiring union representatives to get permission from the company's Manager of Human Resources before engaging in union business; by unilaterally discontinuing the union's use of the office, telephone, and copying machine; and by unilaterally refusing permission to union representatives to conduct union business on company time. The ALJ found that the company's failure to bargain about the disallowance to Gremillion of four hours paid time per day for union business was not an unfair labor practice because the paid time was illegal under § 302 of the LMRA and § 8(a)(2) of the NLRA.

Both the union and the company appealed the ALJ's decision to the NLRB. The Board reversed the ALJ on the issue of four hours paid time. It held that four hours with pay per day to conduct union business was not a violation of § 302 or § 8(a)(2) and was not an illegal subject of bargaining and that the unilateral discontinuance of that practice was an additional § 8(a)(5) violation. In all other respects, the Board upheld the findings of the ALJ. The Board ordered the company to cease and desist from the unfair labor practices found; to reinstate the privileges formerly granted to the union that it had unilaterally rescinded; and to post appropriate notices. The Board denied, pending compliance proceedings, the company's motion for reconsideration and for stay of remedy. The Board granted the union's motion that the company reimburse the union for the four paid hours per day that the union had paid to Gremillion.

On appeal to this Court, the company contends that both the ALJ and the Board erred because: (1) the practices formerly granted to the union chairman were illegal under § 302 of the LMRA and § 8(a)(2) of the NLRA and therefore were not subject to bargaining; and (2) in any event, the collective bargaining agreement covers these subjects, so although the union may have a claim for breach of contract, it has no claim under the NLRA.

II. DUTY TO BARGAIN: ILLEGALITY CLAIM

Section 8(d) of the NLRA provides that the employer and the employee representative are obligated to bargain "with respect to wages, hours, and other terms and conditions of employment." [1] Paid time to union stewards for performance of union duties is a mandatory subject of bargaining under § 8(d). *See Axelson, Inc.*, 34 NLRB 414 (1978), *enforced, Axelson v. NLRB*, 599 F.2d 91 (5th Cir.1979).

In addition, § 8(d) makes bargaining mandatory in the context of the present case because bargaining is required over an attempt to modify a provision or change an established practice in an existing collective bargaining agreement. [2] The collective

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[1] Although the NLRA does not expressly define the phrase "other terms and conditions of employment," substantial jurisprudence has evolved defining several categories of items that are considered mandatory subjects of bargaining. For example, wage rates, hours of employment, procedures and practices relating to discharge and suspensions, procedures and practices covering safety, sanitation, and health, vacations, holidays, leaves of absences, jury duty, and sick leave are considered mandatory subjects. In addition, union security is an important subject of collective bargaining, as is the right to present grievances. We have held that the theme common to mandatory subjects is that they "benefit all of the members of the bargaining unit through encouraging the collective bargaining process and vitally affecting the relationship between the employer and employees." *Axelson*, 599 F.2d at 94.

Subjects which lawfully may be included in a labor contract but fall outside the area of "wages, hours, and other terms and conditions of employment" are classified as permissive subjects of bargaining. Permissive subjects may be proposed at the bargaining table by either party, but "the proponent may not insist on its position to the point of impasse or as a condition of reaching a agreement, and the other party may decline to discuss the issue altogether without violating the law." R. Gorma, *Basic Text on Labor Law* p. 523 (1976).

A final category consists of illegal subjects. Illegal subjects cannot be bargained over, and any party that insists upon inclusion of such a provision as a condition of a agreement has committed an unfair labor practice in violation of § 8(a)(5) or § 8(b)(3). *Id.* at 530. Examples of illegal subjects are certain forms of union security prohibited by the Act such as closed shops and preferential hiring (except under certain circumstances in the building and construction industry). In addition, union shop, agency shop, maintenance-of-membership agreements, check-offs which do not meet the statutory requirements, or any other practice forbidden by the Act is an illegal subject and cannot amount to a mandatory or permissive subject of bargaining. *See* 1985 *Guidebook to Labor Relations*, (CCH) ¶ 1202 (citing cases).

[2] Section 8(d) of the NLRA provides, in pertinent part:

> [W]here there is in effect a collective-bargaining contract covering employees in a industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
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> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
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> (2) offers to meet or confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
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> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
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> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a

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bargaining agreement provides for "a reasonable amount" of paid time to be allowed union officials to conduct union business. The privileges at issue had been granted to the local chairman of the union since Nickens took office in 1976. Where a collective bargaining agreement embodies a particular working condition and past practice demonstrates that an employer had administered that working condition in a particular manner, the employer is forbidden from changing that condition unilaterally. *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir.1970); *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 978 (8th Cir.1967); *see also Axelson*, 599 F.2d at 95 (contract interpreted in light of past practices).

There is evidence in the record that the prior incumbent, Nickens, used the supplied office and telephone and the four hours a day paid time in part at least for his own purposes and not to carry out union business. The consideration of this evidence is not called for in this case. The evidence has no relevance to the decision of the NLRB. The sole issue is whether a change by the company in practices it and the union had recognized in the past could be made unilaterally by the company or was something about which the company had to bargain. If Nickens had in the past made a sinecure of his office, this did not mean bargaining was on the ground that the union was in any way demanding that the local chairman be supplied these perquisites for his personal use rather than for the benefit of his service to the union. Thus, for purposes of our analysis we must assume, just as the NLRB assumed, that if the evidence concerning Nickens was true, it was a matter of personal misconduct and not a matter of union-company agreement. There simply can be no evidence in support of the latter possibility until after bargaining, when the nature of the demands is revealed.

The company has never disputed that absent illegality, the practices at issue in the present case constitute mandatory subjects of bargaining. Rather, the company argues that § 302 of the LMRA and § 8(a)(2) of the NLRA prohibit the practices which the union seeks to reinstate. The company is inescapably correct in its assertion that no employer may be required to bargain over or engage in illegal activity even if that activity is necessary to comply with the terms of the bargaining agreement. *Iron Workers v. Bechtel Power*, 634 F.2d 258 (6th Cir.1981). We, therefore, evaluate the company's assertion that supplying these perquisites for the carrying out of union business nevertheless violates § 302.

Section 302 provides in pertinent part: (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

> (1) to any representative or any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
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> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Section 302(c)(1) provides an exception from this prohibition for payments by an employer to any representative of its employees when that person is

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period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

29 U.S.C. § 158(d).

The company did not comply with any of the procedures outlined in § 8(d) but instead proceeded unilaterally to modify its prior performance under the collective bargaining agreement. Even had the company complied with § 8(d) notification procedures, its unilateral modification of a condition "contained in" an existing collective bargaining contract would violate § 8(d). *C & S. Indus., Inc.*, 158 N.L.R.B. 454 (1966). If a subject is "contained in" an existing agreement, "it is illegal for the employer to alter working conditions in midterm—even if it has given notification to the union. . . ." R. Gorman, *Basic Text on Labor Law* p. 464.

an employee of the employer and the payment is made as compensation for "his services as an employee." [3] The union's position is that

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these practices are not outlawed by § 302 because they are permitted under the § 302(c)(1) exception. The company responds that the phrase "services as an employee" in § 302(c)(1) means that the exception applies only to payments made to union representatives for face to-face meetings with management.

On facts almost identical to the present case, the Second Circuit Court of Appeals has rejected the company's argument that § 302 of the LMRA and § 8(a)(2) of the NLRA outlaw payments made to union representatives by employers which go beyond face to face unionmanagement meetings. *BASF Wyandotte Corp v. Local 227, International Chemical Workers Union,* 791 F.2d 1046 (2nd Cir.1986). In that case, BASF had a provision in the collective bargaining agreement which provided that the union president and secretary would be given four hours paid time per day during normal working hours of the company for the purpose of conducting union business. The company asserted it had decided that this provision violated § 302 of the LMRA, and it discontinued that practice. The union filed an unfair labor practice charge against BASF with the NLRB. BASF then filed suit in district court seeking a declaratory judgment that the four hours paid time in the collective bargaining agreement (the "no-docking" provision) violated § 302. The Second Circuit held that such payments do not violate § 302 because they come within the exception in § 302(c)(1) for payments to employees "for, or by reason of, his service as an employee of such employer."

The court first analyzed the statute logically, noting that the § 302(c)(1) exception applies to many fringe benefits—such as vacation time, sick time, military leave, and jury duty—which no more directly benefit the employer than does union business. The common thread in all of these fringe benefits was "simply that the person to whom the employer makes payment is one who performs services as an employee." *Id.* at 1049. The court noted that, "just as jury leave is designed to permit the employee to serve his community, paid time off for the conduct of the union business is designed to permit the union official to serve his fellow workers." *Id.*

The Second Circuit next bolstered its analysis through the legislative history of § 302. Section 302 of the LMRA, it made clear, was not intended to prohibit the types of practices at issue in the present case. At the time of enactment of § 302, Congress was well aware that "[e]mployers generally . . . allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant." H.R.Rep. No. 245, 80th Cong., 1st Sess. 28–29 (1947). As the court noted, there is "nothing in the history of § 302 to indicate that Congress viewed such no-docking practices as abuses or that it intended to curtail them." 791 F.2d at 1050. The intent of § 302 was to "insure the integrity of union welfare funds as trust funds for the benefit of the employees, and to insure that payments by employers to the unions would not 'degenerate into bribes.'" Id. (quoting 93 Cong. Rec. 4804 (1947)). Subsequent amendments to § 302 have reaffirmed the purpose of § 302 as the limited one of "prevent[ing] bribery, extortion, shakedowns and other corrupt practices." *See e.g.,* H.R.Rep. No. 286, 91st Cong., 1st Sess. 1–2, *reprinted in* 1969 U.S.Code Cong. & Admin.News at 1159–60.

The test of illegality is not whether the payments compensate only for face-to-face labormanagement meetings; but, rather, "§ 302(c)(1) is appropriately interpreted by focusing not on whether the activities to be engaged in during the paid period directly benefit the employer but on whether they are to be engaged in by one who is a bona fide employee of the payor." *BASF Wyandotte v. Local 227,* 791 F.2d at 1049; *see also Trailways Lines, Inc. v. Trailways Inc.,* 785 F.2d 101 (3rd Cir.1986). In the present case, the company does not contend that Gremillion is not a "bona fide

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[3] 29 U.S.C. § 186(c)(1) provides:

Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or a former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer.

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employee" of the company.[4] The *BASF Wyandotte v. Local 227* case simply confirmed a long line of NLRB and court authority. 791 F.2d at 1053. We therefore reject the company's position that the privileges at issue are illegal under § 302.

Applying the same analysis, we also reject the company's argument that § 8(a)(2)[5] of the NLRA outlaws these privileges. The legislative history of § 8(a)(2) makes clear that Congress intended it, much as § 302, to be a provision prohibiting bribery and company dominated unions, not prohibiting the kind of labormanagement cooperation necessary to collective bargaining as is at issue in the instant case. *BASF Wyandotte v. Local 227*, 791 F.2d at 1051–1053.

The company makes no claim that Gremillion has shown favoritism in carrying out his duties. Indeed, as the Board found, the evidence indicates that the union "clearly is an independent entity with a well-established history of arm's-length dealing with BASF. . . ." The practices discontinued by the company have not been shown to have had the purpose of furthering bribery and corruption of union representatives as intended to be prevented by § 302 and § 8(a)(2). This is so as to the circumstances of the case as they are now before us regardless of the unevaluated evidence concerning Nickens. Consequently, the practices at issue are not outlawed by either the LMRA or the NLRA.

We emphasize that it is not for us at this stage of the case to try to place limitations upon the bargaining on the ground that demands may be so unrealistic that insistence upon them establishes a refusal to bargain in good faith. It may be that union representation needs less in its perquisites than those granted by the company to Nickens. We point out again, however, that each element of those perquisites, the four hours paid per day for union business, an air conditioned office with telephone, the use of the copying machine, and the right to deal with employees without company permission, is justifiable and is lawful in many industrial situations.

The issue, then, is good faith bargaining about the perquisites. That issue cannot be decided by the NLRB or this Court in advance of the bargaining. We are not at this time concerned at all with the substantive aspects of the bargaining. We have authority only to consider whether bargaining was required in lieu of the company's **857** unilateral changes. On this narrow issue, the law is clear and the NLRB order correctly enforces it.

III. ONLY A CONTRACT VIOLATION?

The company next urges that this case involves only a contract violation and not an unfair labor practice. We find this position to be without merit. First, the company's argument represents a reversal of the reasons it gave for the unilateral changes to the union in 1983. When the union in 1983 filed a grievance contending that the changes violated the contract, the company stated that the changes were not made because of the contract, but because it believed the privileges formerly given to Nickens were illegal. The company then refused to accept the grievance. Thus, it is the company's own adamant refusal that barred the issue of contract violation from properly being considered through the grievance procedures. There is no authority justifying the company's claimed right now to reverse its prior position and start all over, after full litigation is completed, with a claim that the dispute should have been submitted to the grievance procedures it itself denied.

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[4] A union official put on an employee payroll but assigned no meaningful work for the employer would not amount to a "bona fide employee," and payments to him would violate § 302. *BASF Wyandotte*, 791 F.2d at 1050.

[5] The original § 8(a)(2), then § 8(2) of the 1935 NLRA, provided that it was an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." That section also provided that it did not prohibit an employer from "permitting employees to confer with him during working hours without loss of time or pay." The provision as renumbered in 1947 as § 8(a)(2) of the NLRA keeps the same wording. *See* 29 U.S.C. § 158(a)(2).

The original § 302 was introduced as a proposed amendment to the 1935 NLRA. In considering this amendment, Congress noted that many employers had taken an expanded view of § 8(2), and allowed paid time to union officials "to confer not only with the employer but as well with the employees, and to transact other union business in the plant." H.R.Rep. No. 245, 80th Cong., 1st Sess. 29 (1947). Paid time for these additional activities, however, generally was given only to officials of national or international unions and their local affiliates and was denied to officials of independent or company unions. *Id.*

Congress did not amend § 8(2). Rather, the proposal adopted by Congress became § 302 of the LMRA. The House Conference Report "makes it plain that the fact of the expansion of paid time to include union-related business other than attendance at meetings with management was not in the least disapproved by Congress. What Congress disapproved was the disparity in treatment of affiliated and nonaffiliated unions . . ." *BASF Wyandotte*, 791 F.2d at 1053. "The conference report makes clear that both branches of Congress envisioned that these privileges would continue to be the expanded ones granted in practice rather than solely the one of attendance at meetings with management provided in § 8(2) and that the expanded privileges would become more widely available." *Id; see* H.R.Conf.Rep. No. 510, 80th Cong. 1st Sess. 40 (1947), *reprinted in* 1947 U.S. Code Cong.Serv. 1146.

In any event, the company's argument rests upon the faulty premise that a contract violation cannot amount to a § 8(a)(5) violation. This view has been expressly rejected by the Supreme Court. Where the contract violation is also a unilateral change by the employer in working conditions subject to mandatory bargaining, as is the situation in this case, there can be both a contract violation and a § 8(a)(5) violation. *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967).

Nor does the fact that this dispute arose during the term of a negotiated collective bargaining agreement bar the obligation to bargain. An employer is not permitted to make unilateral changes as to contract terms which are mandatory subjects of bargaining during the term of the agreement. There is a continuing duty to bargain on such subjects during the agreement if the employer desires to change them. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967).[6] Indeed, § 8(d) of the NLRA provides that the employer must bargain in good faith with respect to questions arising under existing agreements. *See* text accompanying note 2, *supra.* Under § 8(d), the "true interpretation of a contract, as well as requested modifications, must be bargained collectively." *See* 1985 *Guidebook to Labor Relations* (CCH) ¶ 1202.

The company urges that the union agreed that the privileges were personal to Nickens and would automatically cease when Nickens left the chairman position. The ALJ, affirmed by the Board, found that no such agreement had been made. There is evidence in the record to support that determination. "Credibility resolutions are peculiarly within the province of the [administrative law judge] and the National Labor Relations Board and are entitled to affirmance unless inherently unreasonable or self-contradictory." *NLRB v. Proler International Corp.*, 635 F.2d 351, 355 (5th Cir.1981). Because we do not find the determinations of the ALJ and the Board to be unreasonable or self-contradictory, we must accept those factual findings.

IV. COMPLIANCE

The company contends that it reinstituted the practices susceptible to reinstitution[7] and then bargained to impasse with the union over them upon expiration of the collective bargaining agreement. The company complains that the Board has ordered it to redo what it has already done. We do not address this issue because it is most appropriately left to determination by the Board during the compliance stage of the proceedings. *See NLRB v. Mangurian's, Inc.*, 566 F.2d 463, 468 (5th Cir.1978).

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V. CONCLUSION

We reject the company's argument that the perquisites the company has denied the local chairman, Gremillion, are shown to be illegal under § 302 or § 8(a)(2). We hold that the Board was justified in finding that the company had violated § 8(a)(5) by making unilateral changes in the perquisites provided union representatives. We stress that the issue before the Board was whether the company had the obligation to bargain with the union about removal of the perquisites it had in the past furnished to the local union chairman. We only enforce the NLRB order requiring the company to bargain with the union as required by the NLRA instead of making unilateral changes in the interpretation of the collective agreement. We do not define legal limitations upon the bargaining. That must await possible challenge to the substantive bargaining process itself.

The Board's remedy ordered the employer to reimburse the union for four hours per day which the union had paid to Gremillion and to restore the privileges granted under the Nickens administration. This action was proper in that it preserved the status quo existing before the unilateral changes. The order of the Board is

ENFORCED.

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[6] Of course, in the absence of any attempt to make a unilateral change, the employer is not obligated to bargain about modifications to the collective bargaining agreement that the union proposes while the bargaining agreement is in force. *See* 29 U.S.C. § 158(d); R. Gorman, *Basic Text on Labor Law* p. 457.

[7] The company states that the four hours paid time to the union chairman was not susceptible of reinstitution because, at the time of the Board's decision, a lockout had commenced and the union chairman was not working. The company states that it fully bargained about this issue in negotiations for a new collective bargaining agreement.

E. GRADY JOLLY, Circuit Judge, specially concurring: I concur in Judge Williams' carefully and narrowly written opinion that decides only that the unilateral withdrawal of an established benefit whose nature relates to wages, hours and working conditions is an unfair labor practice. I write specially to express concern, however, that the particular practices in question are probably excessive in relation to their stated purpose. The benefit is estimated to be worth $20,000 per year. It includes four hours of paid time each day to process slightly more than one grievance per week. It includes a telephone and an airconditioned office that hardly appear necessary to process the few grievances arising on the floor of the plant where the union representative may conveniently visit the workers. In short, the company seems to be paying a substantial part of the union's administrative expenses. If this is so, then the benefit may exceed *in quantum* what the union can require the company to bargain over. But, as Judge Williams notes, this is an issue for another day; it is a fact specific question that cannot subsume the issues presented by the unilateral withdrawal of an established benefit that is reasonably related to wages, hours and working conditions. Because Judge Williams has written narrowly, I concur in the conclusion that the company violated section 8(a)(5) of the National Labor Relations Act when it unilaterally withdrew an established benefit.

NLRB v. Edgar Spring, Inc. d/b/a Spring Industries and Tri-State Asphalt Corporation

800 F.2d 595 (6th Cir.), September 4, 1986

On petition to enforce Board Order

Before MARTIN and GUY, Circuit Judges, and BROWN, Senior Circuit Judge

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PER CURIAM: This case is before the court on application of the National Labor Relations Board (petitioner) for enforcement of its order issued March 18, 1985 against Edgar Springs, Inc. (respondent) [1] d/b/a Tri-State Asphalt Corporation (Tri-State) and Spring Industries (Spring) finding unfair labor practices. Respondent has filed a cross-petition for review of the Board's decision and has requested that this court also set aside an order of the Board issued August 26, 1985 correcting the March 18th order. Having found no error by the Board, we grant enforcement.

I.

SUMMARY OF PROCEEDINGS BELOW

Petitioner filed three separate unfair labor practice charges against respondent in October of 1982 which were subsequently consolidated by the Board. As the charges against Spring and Tri-State arose out of unrelated events, we shall review the Board's order as to each company separately.

Unfair Labor Practices of Spring

The facts are essentially as found by the administrative law judge. Rhona Miles was hired by Spring in May of 1982 to work as a flag operator. Miles was told by Spring that in order to work for the company she would have to sign a leasing contract agreeing to the rental of certain safety equipment at the rate of five dollars per hour. Miles signed the contract, and, shortly before beginning her employment, joined Local 809 of the Laborer's International Union of North America (Local 809). Spring was a signatory to certain "project agreements" with Local 809 which required Spring to provide at no charge safety equipment to its covered employees. Although Miles was a covered employee under one of these project agreements, Spring continued to enforce its leasing contract with her and eventually stopped payment on one of her paychecks in order to collect arrearage which had accrued under her contract with the company.

The administrative law judge (ALJ) found that Spring had violated numerous provisions of the National Labor Relations Act (Act), 29 U.S.C. § 151 *et seq.* (1982), by

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enforcing its lease agreement with Miles when she was covered by project agreements requiring Spring to provide the leased equipment. Respondent did not file exceptions with respect to these findings and the ALJ's decision was subsequently adopted by the Board in its order of March 18, 1985.

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[1] Spring Industries, Inc. and Tri-State Asphalt Corporation are both engaged in the business of road repair. Glenn Straub is the vice-president, manager and principal stockholder of the two companies.

On appeal, respondent maintains that enforcement of the Board's order as to Spring is inappropriate as respondent has complied with the Board's order by reaching a monetary settlement with the Board on the issue of damages.

Unfair Labor Practices of Tri-State

Early in 1982, Spring received a contract to do highway repair on a site near Cambridge, Ohio. Because of a personnel shortage at Spring, Straub directed Tri-State project superintendent James Lampert to offer work on the project to a Tri-State crew supervised by Wilson Fulton. Straub instructed Lampert to make clear to the crew that Spring would be its employer on the project and that any overtime, therefore, would be paid in accordance with Spring's overtime policies.[2] Pursuant to Straub's request, Lampert advised the crew that Spring was its employer on the project, but failed to inform each crew member that overtime would be paid in accordance with Spring's policies. The crew accepted employment on the Cambridge site and for the first month and a half of their employment was inadvertently paid overtime under Tri-State's more generous overtime terms.

On July 12, 1982, the crew members received a memo from the payroll department informing them that their overtime had been erroneously calculated and that any such overpayments would be deducted from their future paychecks. Thereafter, members of the crew contacted their union representatives who filed on August 19, 1982 an unfair labor practice charge against Tri-State alleging that the failure to pay overtime under the terms of the Tri-State bargaining agreement violated provisions of the Act.

The crew continued to work on the site, and on August 25th were called to a meeting by Straub. Straub angrily asked the crew members whether they had been told that the Cambridge project was to be a Spring job and that overtime was to be paid in accordance with Spring's policies. The employees issued no response to Straub's queries. Straub then told the crew members that in view of their failure to deny knowledge of the stated terms of their employment, Straub was going to draft statements for their signatures indicating that they were satisfied with their wages and benefits. Straub intimated that their continued employment depended upon their signatures on the statements. Shortly thereafter, statements were prepared and distributed to the employees. All five members of the crew who refused to sign their statements were discharged. Only Wayne Anderson who signed his statement was retained by Spring on the project. Although Lampert informed two of the crew members that they were being laid off for lack of work, several days of work remained on the project following the layoffs.

The ALJ found that Tri-State violated provisions of the Act by laying off employees for their refusal to abandon their overtime grievance and by threatening to discharge employees for failure to abandon their grievance. In the course of the ALJ's discussion of the factual circumstances surrounding the discharge, the ALJ noted that the crew members who were laid off did not return to work in 1982 and were not offered employment by Tri-State until July of 1983. Although respondent filed exceptions, the Board on March 18, 1985 adopted the findings of the ALJ but found it unnecessary to determine whether the terminated employees were actually discharged or laid off by Tri-State. The Board did nevertheless indicate parenthetically in its order

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that the employees were recalled in the 1983 paving season.

On May 28, 1985, petitioner filed a motion for modification of the March 18th order, requesting that the Board leave the issue of when reinstatement was offered to the terminated employees to the compliance stage of the proceedings. On August 26, 1985, the Board issued an order correcting its earlier order by inserting the word "allegedly" at the end of the third line of footnote two of its March 18th order such that the corrected footnote read:

> We find it unnecessary to determine whether Respondent Tri-State discharged employees Murad, Kinnison, Morris, Uppole and Snodgrass as argued by the General Counsel and found by the judge, or laid them off (they were allegedly re-

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[2] Spring, a nonunion employer, paid overtime only for work performed in excess of forty hours per week. Tri-State, however, was required by a collective bargaining agreement to pay overtime for any work performed in excess of eight hours per day.

> called in the 1983 paving season). Instead, we leave to the compliance stage of this proceeding the issue of when, without unlawful motivation, the Respondent would have laid off these employees at the end of the 1982 season and would have recalled them for the 1983 season.

Joint Appendix at 12 n. 2 (correction appearing in boldface). On August 27, 1985, the Board denied petitioner's request for modification.

On appeal, respondent challenges enforcement of the March 18th order of the Board against Tri-State on the ground of lack of substantial evidence. Respondent also contends that the Board abused its discretion in issuing its August 26th order correcting its earlier finding that crew workers were recalled by Tri-State in July of 1983.

II.

DISCUSSION

A. *Board Order of March 18, 1985*

1. As to Spring

As earlier indicated, respondent alleges that enforcement of the Board's order against Spring is improper and unnecessary as Respondent has complied with the order by negotiating a monetary settlement with the Board, presumably on the issue of Miles' damages.

We find absolutely no merit in respondent's position as the Supreme Court has clearly held that an employer's compliance with an order of the Board does not render an action for enforcement moot. *NLRB v. Mexia Textile Mills, Inc.,* 339 U.S. 563, 567, 70 S.Ct. 826, 828, 94 L.Ed. 1067 (1950). *See also NLRB v. Heck's, Inc.,* 369 F.2d 370, 371 (6th Cir.1966) ("[C]ompliance with [an] order [of the Board] is no defense against the entry of a decree of enforcement."). Moreover, we note in the instant case the equity of respondent's position is seriously undermined by the fact that respondent has not even fully complied with the Board's order. The order required respondent not only to make restitution to Miles for her loss of backpay but also to cease and desist from further unfair labor practices, negotiate with the union on terms and conditions of employment and post certain notices in respondent's plant. There is no evidence in the record to suggest that respondent has complied with these additional affirmative requirements.

2. As to Tri-State

Respondent first claims that in light of the testimony presented indicating the crew members' knowledge of the proper terms of their employment at the Cambridge site, the Board erred in finding that the unfair labor practice charges brought against Tri-State were filed in good faith. *See City Disposal Systems, Inc. v. NLRB,* 766 F.2d 969, 972 (6th Cir.1985) (a charge filed with the Board must be made in an "honest and reasonable belief" that a collective bargaining right has been violated). Respondent points to the testimony of several members of the crew who either indicated that they were aware that Spring was their employer on the Cambridge site or that they understood at the beginning of their employment the proper overtime arrangements. Additionally, respondent urges us to take note of the fact that none of the employees contradicted Straub's assertion at the meeting on August 25th that crew members had been advised at the start of their work at the Cambridge site of the proper terms of their employment. One can infer from the employees' silence, **599** respondent maintains, evidence of their knowledge of the proper arrangements.

We disagree with respondent and believe that the finding of good faith made by the ALJ is supported by substantial evidence. Several members of the crew testified that they were not aware of the overtime ramifications of their jobs, although they had knowledge that Spring was their employer on the project. While Straub testified that he told Lampert and Fulton to inform the crew of the proper overtime arrangements, the unexplained failure of either Fulton or Lampert to testify at the hearing, as noted by the ALJ, suggests that their testimony may not have been supportive of Straub's contentions. Finally, crew members were paid for a month and a half after beginning their employment on the project with checks issued by Tri-State at the rate of overtime customarily paid by Tri-State. Such a fact surely could have buttressed the employees' belief that they had a right to be paid overtime in accordance with Tri-State's rate of compensation.

Respondent next argues that the Board erred in finding that the employees were laid off by Tri-

State for refusing to abandon a grievance concerning their overtime pay. Respondent claims that the decision to replace the crew on the project was implemented before respondent had any knowledge of the employees' intention not to sign the statement and was based on the poor performance of the crew on previous jobsites and the corresponding need to have his company's higher-rated crews working on the more difficult work sites. Additionally, respondent maintains that the crew would have been laid off on August 26th regardless of the overtime dispute. *See NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 241 (6th Cir.1983) (employer may show as an affirmative defense to that the discharge would have occurred even in the absence of the protected activity).

Once again, we find substantial evidence in the record to support the ALJ's determination. The ALJ found that at the August 25th meeting between Straub and the crew, Straub implied to crew members that if they did not sign the statements admitting their satisfaction with the overtime arrangements, then they would lose their jobs. The layoffs occurred only one day after the August 25th meeting and immediately following some of the employees' refusal to sign their statements. Moreover, one member of the crew who signed his statement was treated differently than the other four crew members who failed to sign their statements. Straub's proffered explanation for the discharge is belied by the fact that Lampert told the employees that they were being discharged because of a lack of work. Even Lampert's explanation for the discharge is called into question as the ALJ found that work remained on the site following the layoffs. As to respondent's claim that the company discharged the Fulton crew in order to have its higher-rated crew on the project, we find, as the ALJ did, no evidence of a formal rating system for evaluating crew performance.

B. Board Order of August 26, 1985

Respondent argues that the Board abused its discretion in issuing its August 26th order correcting its March 18th order to include the word "allegedly" in the parenthetical statement made in footnote two of the March 18th order. Respondent claims that there is no evidence in the record to support the Board's position that the correction was motivated by "inadvertence," as stated in the August 26th order. Rather, respondent suggests that the impetus for the correction was petitioner's motion for modification which requested that the Board leave to the compliance stage of the proceeding the determination of when offers of reinstatement were made to the Tri-State crew. Since petitioner failed to file exceptions to the ALJ's finding that workers were recalled in July of 1983 and did not file a timely motion for modification, respondent argues that the Board lacked the authority under its rules and regulations to modify, by its August 26th order, the finding that workers were recalled in July of 1983.

We need not decide whether the Board lacked the authority to correct its earlier order, as even if we were to agree with respondent and hold that the Board was foreclosed from correcting its finding that workers were recalled by Tri-State in July of 1983, the issue of when reinstatement was offered to the aggrieved employees is not entitled to *collateral estoppel*, as respondent suggests, and may be relitigated.

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The issue before the ALJ in the instant case was whether respondent was guilty of committing unfair labor practices. A finding that workers were recalled in July of 1983 was not essential to support either the ALJ's decision or the Board's order. [3] As such, the issue may be relitigated in the compliance stage of this proceeding, when the issue of damages will be addressed. *See NLRB v. Master Slack andor Master Trouser Corporation*, 773 F.2d 77, 81–82 (6th Cir.1985) (ALJ finding that backpay should continue past a plant shutdown was *dicta*, thus not precluding relitigation in a supplemental proceeding).

Having found no error by the Board, this court affirms the decision of the Board and enforces the order.

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[3] We suspect that our holding was not unanticipated by respondent, as we note that at the hearing before the ALJ, respondent objected on the grounds of relevancy to any testimony by Jim Murad, one of the laid off crew members, on the issue of the actual date of the recall.

NLRB v. Barker Steel Company, Inc.

800 F.2d 284 (1st Cir.), September 5, 1986—276 NLRB No. 108

On petition to enforce Board Order

Before **Campbell**, Chief Judge, **Bownes** and **Torruella**, Circuit Judges

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Torruella, Circuit Judge: This case is before us upon the application of the National Labor Relations Board (the Board) for enforcement of an order issued on September 30, 1985 against Barker Steel Company, Inc. (Barker Steel). [1] The Board found that Barker Steel violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act), 28 U.S.C. §§ 158(a)(5) and (1), by refusing to bargain with the Excavating and Building Material Teamsters, Local Union No. 379, (IBTCW & HA) (the Union), a labor-organization certified by the Board as exclusive bargaining representative of a unit of employees of Barker Steel.

This unit is the product of an agreement between the Union and Barker Steel, incorporated into a Stipulation for Certification Upon Consent Election on June 1, 1984 and thereafter approved by the Regional Director of the Board. [2] The agreed-upon unit includes:

> All full-time and regular part-time employees employed by the Employer at its 42 School Street, Watertown, Massachusetts location, but excluding office clerical employees, sales employees, managerial employees, engineers, estimators, truck drivers, guards and supervisors as defined in the Act.

Pursuant to this stipulation the Board conducted an election on July 13, 1984, the outcome of which was that nine (9) ballots

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were cast in favor of union representation and nine (9) against. There was also one additional ballot, that of Edward Backer, which was challenged by the Board agent that supervised the election because Backer's name did not appear on the voter eligibility list furnished by Barker Steel. It is Backer's eligibility to vote that lies at the heart of the present controversy.

The Regional Director initiated an administrative investigation [3] concerning Backer's voting eligibility, which concluded with a ruling by the Board that Backer's vote should be opened and counted. The underlying basis for this decision was the Board's conclusion to the effect that the consent election agreement did not clearly express an intent to exclude Backer from the bargaining unit. In view of that conclusion, the Board felt free to apply its general rules regarding the appropriateness of Backer's inclusion in the unit. It proceeded to include Backer in the unit because it found that Barker Steel and BNP Trucking Inc. (BNP), on whose payroll Backer appeared, were a single employer, and because it concluded that Backer shared a community of interests with the warehouse employees of Barker Steel, who were included in the unit.

Upon opening of the challenged ballot, it was revealed that it favored union representation. This vote, when added to the original votes cast in favor of the union, established a majority in favor of union representation. Thereafter, the Regional Director issued a certification to the Union as the collective bargaining agent of the unit in question.

On May 2, 1985, the Union requested that Barker Steel commence negotiations for a collective bargaining contract. Barker Steel, however, refused to abide by the Board's ruling or the union's demand to negotiate. The Union filed unfair labor practice charges and eventually the Board ruled that Barker Steel violated Sections 8(a)(1) and (5) of the Act. As part of that ruling, the Board issued a cease and desist order requiring, among other things, that Barker Steel bargain with the Union.

The Board's request for enforcement of this order is challenged by Barker Steel principally on the ground that the Board's decision runs contrary to the parties' election stipulation. It claims that, pursuant to this agreement, Backer is excluded from the bargaining unit because he is an employee of BNP rather than Barker Steel, who is the employer named in the Stipulation. Barker Steel also claims that Backer is a "truck driver" and is thus specifically excluded from the unit.

Interpretation of the election agreement

If a dispute arises concerning an employee's eligibility to vote in a stipulated unit election, the Board's function is limited to ascertaining the parties' intent with regard to the disputed employee. *Knapp-Sherill Co. v. N.L.R.B.*, 488 F.2d 655, 659

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[1] The Board order is reported at 276 N.L.R.B. No. 108.

[2] Board Case No. 1-RC-18170.

[3] *See* 29 C.F.R. 102.69.

(5th Cir.), *cert. denied,* 419 U.S. 829, 95 S.Ct. 50, 42 L.Ed.2d 53 (1974). If the intent of the parties concerning the challenged voter is expressed in the stipulation in clear and unambiguous terms, the Board will hold the parties to their literal agreement. *Methodist Home v. N.L.R.B.,* 596 F.2d 1173, 1176 (4th Cir.1979). If the stipulation is ambiguous, however, as in the case of any contract, "the primary question . . . is [determining] what the parties meant." *N.L.R.B. v. Sonoma Vineyards, Inc.,* 727 F.2d 860, 866 (9th Cir.), *cert. denied,* —— U.S. ——, 105 S.Ct. 130, 83 L.Ed.2d 71 (1984). Thus, the Board "has authority to interpret the agreement according to what it finds to have been the intent of the parties." *New England Lumber v. N.L.R.B.,* 646 F.2d 1, 3 (1st Cir.1981). The Board's findings must be sustained if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *N.L.R.B. v. Pilgrim Foods, Inc.,* 591 F.2d 110, 111 (1st Cir.1978).

Testing the Board's decision against the legal standards previously enunciated, we cannot agree with its reasoning or conclusions or that they are supported by the record as a whole.

Paragraph 8 of the Stipulation, describes "[t]he Employer, *Barker Steel Company, Inc.,*" as a "Massachusetts Corporation engaged in the fabrication of steel reinforcing bars at its 42 School Street, Watertown, Massachusetts location." (Emphasis supplied). The language of Paragraph 12, indicates that it was the "employees employed by [*this*] Employer" that the parties intended to include in the appropriate collective unit. *Id.* It is *that* employer's payroll which was designated in Paragraph 10 as the basis for the preparation of the eligibility list, and on whose premises Paragraph 11 stated that the election would be held. Moreover, Barker Steel was the one signing the agreement with the Union, and to whom the Regional Director imparted his approval of the stipulation. Further, the description of the Employer in Paragraph 8 simply does not fit BNP. BNP is engaged in the *transportation* of Steel products, not in manufacture, as is Barker Steel.

In view of the above, it is spurious to contend that it was the intention of either Barker Steel or the Union at the time of the signing of the stipulation, to include in the unit the employees of BNP. Had this been the intention of the parties they could easily have specified that additional entity as an employer or as a joint employer, *e.g.,* Barker Steel/BNP. In contrast, however, there is no evidence that *any* mention was even made by anyone concerning BNP. Further, there is no evidence that the Union representative protested the failure to include BNP employees on the eligibility list when he inspected the list prior to the election. In a unit as small as the present one, it would not be farfetched to assume that the representative of the Union would have been alerted by the exclusion of a substantial number of eligible employees, *e.g.,* all the BNP employees not on the list, if it had been the intention of the parties to include such persons in the agreed unit. It is also fair to assume that it was not by mere coincidence that no other employee of BNP attempted to vote in this election. All of these circumstances add up to a clear indication that *none* of the parties to this agreement considered BNP employees as belonging to the stipulated unit.

The joint employer issue is a red herring. It has no relevance to a determination regarding the *intention* of the parties in signing the consent agreement. As we have indicated, the Board need go no further than the plain words of the Stipulation to determine who is the employer named in that document. More in point, however, the issue raised by this appeal is not whether the Board could find that a joint unit of Barker Steel and BNP employees would be appropriate because they are a joint employer. We shall grant *arguendo* that such a finding could be made either after consent of the parties or by use of the Board's adjudicative-administrative procedures. That, however, is not presently in contention. What is at issue is whether the parties *agreed* to an election in which the named employer was a joint employer composed of Barker Steel/BNP employees. On that issue, *i.e.,* the determination of intention of the parties, the question of whether the Board has the *power* to make such a ruling under other circumstances, is totally irrelevant. On that issue only the intention of the parties at the time of the signing of the agreement is relevant.

We have already concluded that the intention of the parties was to include only Barker Steel employees in this unit. Because our ruling on this issue is dispositive, we need not discuss or decide the remaining questions raised by the parties.

The request for enforcement of the Board order is denied.

Veronica Lewis v. NLRB

800 F.2d 818 (8th Cir.), September 17, 1986

On petition to review Board Order

Before John R. Gibson, Wollman, Circuit Judges, and Harris, Senior District Judge [*]

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Oren Harris, Senior District Judge: Veronica Lewis filed this petition for review subsequent to the dismissal of her unfair labor practice complaint by the National Labor Relations Board. [1] In her complaint Lewis alleged that her employer, Spann Building Maintenance Company, violated Section 8(a)(1) of the National Labor Relations Act by discharging her in retaliation for the exercise of her rights under the collective bargaining agreement.

Lewis was employed as a cleaning services worker at the Meramec Building in St. Louis, Missouri, by Spann. In January, 1983, Spann implemented a reduction in force at the Meramac. Lewis was among the employees effected by this reduction, notwithstanding her status as the second ranking senior employee at the Meramec. The union contract contained an express provision which protected employees on a seniority basis. She was offered a transfer to another location, West Port Plaza, where Spann performed like services. Lewis refused the offer to transfer, initially citing her lack of reliable transportation. She later attempted to invoke the contractual protections.

Lewis and another employee confronted her supervisor in regard to the proposed transfer, in the Meramec building. Following a loud exchange, both Lewis and the co-employee were suspended. On February 4, 1983, Lewis was terminated for improper conduct and use of abusive language.

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The union filed a grievance on behalf of Lewis. The contract established a three-step grievance procedure culminating in arbitration, at the option of the union. The Lewis grievance proceeded through the first and second steps in the procedure without settlement of the dispute. The union, in accordance with the terms of the agreement, notified Spann of its desire to arbitrate the grievance, and twice requested that an arbitrator be selected.

There ensued negotiations concerning settlement of the grievance, with Spann offering reinstatement without backpay or seniority to Lewis. This offer was rejected. The union, through internal decision, determined that the purposes of the grievance of procedure had been satisfied by the offer of reinstatement and therefore it would not pursue arbitration. However, this decision was not communicated to Spann. Neither did the union withdraw its request for selection of an arbitrator nor the grievance filed on behalf of Lewis. Thereafter, Lewis filed her unfair labor practice charge with the NLRB.

The Board reviewed the matter and issued its opinion that the contentions raised by Lewis' complaint could be resolved under the grievance and arbitration provision of the collective bargaining agreement. The Board found that the union had invoked the procedures on Lewis' behalf and that the contractual process had not been completed. Thereupon, the Board, under the policy reaffirmed in *United Technologies Corp.*, 268 NLRB 557 (1984), concluded that it must defer to the contractual procedures which had been invoked and dismissed the complaint.

The issue on appeal is whether the Board acted within its discretion in deferring action upon Lewis' claim of an unfair labor practice pending the completion of the grievance-arbitration procedure invoked on her behalf by the union as provided in the collective bargaining agreement between Spann and the union.

In the *United Technologies* decision, the Board stated:

> It is fundamental to the concept of collective bargaining that the parties to the collective bargaining agreement are bound by the terms of their contract. Where an employer and a union

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[*] The Honorable Oren Harris, Senior District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

[1] In its opinion the Board dismissed the complaint but retained jurisdiction over the matter for the limited purpose of entertaining any subsequent motion for further consideration upon a showing that (1) the employer is resisting or impeding prompt processing of the grievance filed on Lewis' behalf, or (2) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the National Labor Relations Act.

have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. [footnote omitted]. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief. [Ibid.]

268 NLRB at 559; Board decision at page 4.

The Board expressed that the "core concept" of *United Technologies* is "where contractual grievance-arbitration procedures have been invoked voluntarily, we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures." 268 NLRB at 560, fn. 17; Board's decision at page 4.

The union, with Lewis' knowledge and consent, commenced the arbitration-grievance process. This procedure has yet to run its full course. While the in-house decision was made by the union to not pursue the arbitration, this was not communicated to Spann prior to commencement of this action. The demand for arbitration has not been withdrawn, and remains of record at this time.

This Court reviews the decisions of the Board under the abuse of discretion standard. The appellate court yields to the Board's reasonable interpretations and ap-

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plications of the Act. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 105 S.Ct. 984, 83 L.Ed.2d 986 (1985).

Although the Board has the authority to adjudicate the matter in dispute here, it is within the Board's discretion to decline to exercise that authority when the purposes and the fundamental aims of the Act are served by deferral. Encouragement of dispute resolution under the collective bargaining agreement through arbitration is a fundamental aim of the Act and is a matter of public policy. 29 U.S.C. §§ 151, 173(d).

The deferral policy is a proper and reasonable exercise of the discretion of the Board where the proceeding appears to have been fair and regular, all parties have agreed to be bound, and the decision is not clearly repugnant to the Act. *Carey v. Westinghouse*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964), citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

Deferral in this case meets these requirements. While the contractual proceeding has not brought about a full resolution of the issues presented, the matter remains to be decided under the agreed-upon dispute resolution procedure. The matter has not "run its course". There has never been a formal withdrawal of the arbitration request. Until such request is withdrawn or the matter proceeds through arbitration, the matter is not final.

As found in the District of Columbia Circuit in *Associated Press v. NLRB*, 492 F.2d 662 (D.C.Cir.1974), without the doctrine of deferral, "the parties would be encouraged to circumvent grievance and arbitration procedures for which they had contracted whenever they felt they had a better chance for favorable resolution by quickly filing an unfair practice charge before the Board." 492 F.2d at 668.

Although Lewis asserts that her interests are adverse or contrary to those of the union, i.e. the in-house decision to not proceed with the grievance, this Court is of the opinion that her voluntary invocation of the contractual dispute resolution mechanism and the union's active role in negotiating for favorable treatment are factors which militate in favor of deferral. The Board acknowledges that in certain cases the union's interests are not compatible with the employee's interest, thus, deferral is not proper. However, the Board's decision here is reasonable. These interests are not competing, but, rather, harmonious.

Additionally, the Board's retention of jurisdiction over the matter for the specified reasons provides protection to Lewis' individual rights under the collective bargaining agreement. Therefore, she will not be denied her statutory rights if the agreement procedures fail to function in a manner consistent with the Act based upon the Board's retention of jurisdiction. The remedial powers of the Board shall be available to rectify any result repugnant to or inconsistent with the Act. However, the Court finds that the matter should be remanded for further consideration of the extent and propriety of the retention of jurisdiction by the Board.

Lewis contends that the Board's retention of jurisdiction is limited by its terms to only instances where Spain resists or impedes arbitration. There is concern over whether this retention of jurisdiction applies likewise to the conduct of the Union in the arbitration proceeding. This issue should be resolved upon remand.

In summary, this Court finds that the deferral policy of the Board was reasonably and properly exercised in this matter and the Board acted within its discretion in deferring to the dispute resolution procedures contained in the collective-bargaining agreement in dismissing the complaint of the petitioner Veronica Lewis. Therefore, the petition for review is denied. The case is remanded to the Board to consider the limited issue of the propriety and extent of the Board's retention of jurisdiction.

D & D Distribution Company, A Division of D & D Sewing Company v. NLRB

801 F.2d 636 (3d Cir.), September 18, 1986—277 NLRB 909

On petition to review Board Order

Before SEITZ, ADAMS, and STAPLETON, Circuit Judges

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STAPLETON, Circuit Judge: D & D Distribution Company (D & D) appeals an order of the National Labor Relations Board (Board) directing that employee Rick Hock be reinstated and compensated for any loss of earnings. The Board seeks enforcement of its order. The Board found that Hock was fired in retaliation for engaging in "concerted activities" and that D & D thereby committed an unfair labor practice under section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) (1982). We hold that the Board's decision was supported by substantial evidence and is in accordance with the applicable law.

We have jurisdiction to review the Board's order under 29 U.S.C. § 160(f) (1982). Jurisdiction over the Board's application for enforcement is conferred by 29 U.S.C. § 160(e) (1982).

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Factual determinations of the Board "if supported by substantial evidence on the record considered as a whole . . . [are] conclusive." 29 U.S.C. § 160(e) (1982). The Supreme Court addressed the meaning of "substantial evidence" in *Universal Camera Corp. v. Labor Board,* 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951):

> "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939).

Review of the Board's application of legal precepts to facts is plenary. *Allbritton Communications Co. v. NLRB,* 766 F.2d 812, 817 (3rd Cir.1985), *cert. denied,* —— U.S. ——, 106 S.Ct. 850, 88 L.Ed.2d 891 (1986).

D & D contends that the Board's findings are not supported by substantial evidence. In particular, D & D challenges the Board's findings that: 1) Hock's actions were "concerted activities" under § 7 of the NLRA, 2) D & D had knowledge of Hock's protected activities, and 3) Hock's termination was motivated, at least in part, by retaliation for protected activities. D & D also argues that the Board erred when it declined to find that Hock would have been discharged for tardiness and absenteeism even if he had not engaged in protected activity.

The following facts were found by the Administrative Law Judge (ALJ) and accepted by a majority of the members of the Board. Chairman Dotson dissented, concluding that there was insufficient evidence to support the finding that D & D had knowledge of Hock's protected activities.

I.

Hock was hired by D & D as a warehouse employee in January 1979. Beginning in early 1981. Hock's attendance and promptness record began to deteriorate. On March 24, 1981, after Hock had been late or absent on over half on the workdays during the first three months of the year, Donald Masemer, D & D's administrative director, specifically warned Hock about his habitual tardiness. Although Hock denied that such a verbal warning was issued, the ALJ credited Masemer's account. On November 16, 1981, after two absences and six late arrivals on eight consecutive days, Masemer issued another warning, this time having Hock sign a memorandum regarding promptness and absenteeism. The memorandum stated in part: "An improvement in your attendance is necessary. Otherwise appropriate disciplinary actions will need to be administered." [169a].

Masemer testified that he had issued verbal warnings to Hock on several occasions after the November written warning. Hock denied that these warnings were given, and the ALJ credited Hock.

Hock testified that in late January 1982 he was given a good job performance review by Masemer and was offered the position of assistant foreman which he declined to take. The ALJ credited Hock's description of this performance review and offer of promotion over the denials of the D & D company officials.

D & D's employee handbook contains a statement concerning absence and tardiness. It provides that, upon the first offense, a verbal warning is given. Upon the second offense, a written warning is issued. After the third offense, the employee is subject to immediate discharge. The ALJ found that in practice "the procedure was not so rigid." [173a] He noted that Masemer's November warning threatened "appropriate disciplinary actions" rather than termination.

Beginning in late 1981, Hock began to have conversations with two of his coworkers, Mike Zorbaugh and Troy Shenberger, concerning the adequacy of their wage rates. He complained that the twenty-five cents per hour raise given in April 1981 was too small and stated that they deserved a one dollar per hour raise in April 1982, when the wages would next be reviewed. Similar conversations among these three coworkers continued, and in March 1982, approximately one week before Hock was fired, Hock recommended that they contact a union representative in the event their April pay raise was not satisfactory. Foreman Schaefer was within earshot on the warehouse floor when some of these conversations took place, and in particular when the union representation was mentioned. These findings were based primarily on the testimony of Hock. Schaefer denied overhearing any discussion of union activity.

In late 1981, the word "union" and a statement advocating a one dollar per hour pay increase appeared among the graffiti in the men's room of the warehouse. After the wall was repainted in January 1982, the word "union" reappeared. Dallmeyer, the chief executive officer of D & D, testified that he believed Hock had written the graffiti, but that it did not enter into the decision to terminate him because Dallmeyer had no proof that Hock was responsible.

On Friday, March 12, 1982, after Hock had been late on Monday, Thursday and Friday of that week, Masemer decided to recommend to Dallmeyer, a co-owner of D & D, that Hock be fired. Dallmeyer was not in his office on the Monday and Tuesday, March 15 and 16, but on the morning of March 17, Dallmeyer and Masemer discussed the proposed discharge and Dallmeyer approved the termination. At the end of the work day, Masemer informed Hock that he was being discharged, indicating that the reason for the discharge was his absences and lateness.

Hock went to Dallmeyer to discuss his discharge. The ALJ found that "Dallmeyer told him that the reason for his termination was not really his lateness but that it was more because of his attitude toward the Company that they did not like, but declined to elaborate further." [171a] Dallmeyer gave a conflicting account, but the ALJ credited Hock's version.

During the investigation of Hock's charge, Zorbaugh gave a sworn statement that included an account of a conversation he had with Masemer and Schaefer on the day following Hock's discharge. According to that account, which the ALJ credited, Masemer told Zorbaugh that he had said things about the Company that Masemer did not like and that Zorbaugh was either to stop saying them or leave. Masemer also said that he did not like Zorbaugh's attitude toward the company and that if Zorbaugh did not change his attitude they would let him go. At the hearing, both Masemer and Schaefer denied that such statements were made. Zorbaugh recalled Masemer's warning but did not remember any statement concerning his attitude. The ALJ felt that Zorbaugh, who was still employed by D & D at the time of the hearing, was "holding back what he knew in support of the complaint." [166a].

Based on these factual findings, the ALJ and the Board concluded that Hock had engaged in concerted activities, that employer knowledge of such activities could be inferred from the evidence, and that anti-union animus, not simply the employee's chronic tardiness, played a role in motivating the termination.

II.

Section 8(a)(1) of the NLRA defines as "unfair labor practices" acts of employers which "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1982). Section 7 of the NLRA, 29 U.S.C. § 157 (1982), states that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

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D & D contends that Hock's activities were not "concerted activities for the purpose of collective bargaining or other mutual aid or protection," but were instead idle, self-interested complaints.

In *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C.Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 313, 352, 88 L.Ed.2d 294, 320, the Board held that "to find an employee's activity to be 'concerted,' . . . it [must] be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." (footnote omitted) Moreover, statements in the nature of complaints, as distinct from the preparation for concerted activity, are not protected.

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir.1964). Simply complaining about low wages by itself does not constitute "activity." *See NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 841 (2nd Cir.1953).

The ALJ found that Hock's conversations concerned the wage rates for at least three of the employees and the desirability of making contact with a union if the next raise was disappointing. Thus, Hock's comments were not merely self-interested and did include a proposal that he and his colleagues pursue concerted activity. We, therefore, conclude that Hock's activities were protected.

We also conclude that these factual findings are supported by substantial evidence. The ALJ credited Hock's testimony concerning his own activities. The only contrary testimony came from Zorbaugh who confirmed that the conversation about the upcoming wage increase occurred but denied that Hock spoke other than about his own raise. The ALJ discounted this testimony because he believed Zorbaugh feared for his job and was holding back. Under these circumstances, we will not disturb the Board's finding that Hock engaged in concerted activities.

III.

D & D's termination of Hock was not in violation of § 8(a)(1) unless D & D knew that Hock was engaged in protected activities. The burden of proving knowledge of union or pre-union activity rests squarely on the NLRB, *American Manufacturing Associates, Inc. v. NLRB*, 594 F.2d 30, 33 (4th Cir.1979), and a finding of knowledge cannot rest alone on "suspicion, surmise, implications, or plainly incredible evidence." *Id.*, quoting *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 484, 71 S.Ct. 456, 462, 95 L.Ed. 456 (1951).

There is concededly no direct testimony supporting employer knowledge and there is much direct testimony denying it. The evidence of knowledge accepted by the ALJ and the Board, and contested by the dissenting Chairman Dotson, is circumstantial. The ALJ described some of that circumstantial evidence in the following passage:

> At best Hock could only testify that Schaefer could have overheard some of the conversations and particularly the one within a week of his dis-

charge. Schaefer, Masemer, and Dallmeyer denied knowledge of his activities. The General Counsel points to the small size of the plant and graffiti on the men's room wall, both before and after the wall was repainted, as warranting the inference that Respondent knew of Hock's activity. I find these factors sufficient to support the inference. Moreover, in the light of Dallmeyer's testimony that Respondent believed Hock responsible for the graffiti and Masemer's admonition to Zorbaugh the day after Hock's discharge, I find that the inference should be drawn over the denials of Respondent's officials. I find that Dallmeyer and Masemer knew or had reason to

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believe that Hock had been talking to other employees about larger than usual wage increases and the possibility of seeking union representation if Respondent did not grant them.

[170a].

D & D contends that the ALJ misapplied the small shop doctrine. That doctrine enables the Board to infer employer knowledge of union or pre-union activities where the number of employees in the workplace is small. [1] D & D argues that the small shop doctrine applies only where there is "other, affirmative, evidence indicating the likelihood that the employer in fact knew." *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (1st Cir.1966). We may accept this assertion for present purposes because, as hereafter indicated, the ALJ in this case credited other testimony from which employer knowledge could be independently inferred. Accordingly, the ALJ's use of the small shop doctrine was appropriate.

D & D also maintains that the factual inferences drawn by the ALJ and the Board should not be granted the same high level of deference applied to findings based on direct evidence and credibility determinations. *See Board of Publication of the Methodist Church v. NLRB*, 297 F.2d 379, 380 (6th Cir.1962) ("The Board's findings of fact are binding upon an appellate court if supported by substantial evidence from the record but factual inferences to have the same conclusive effect must be drawn from undisputed basic facts.") However, the rule in this circuit is otherwise. Where the Board's inferences are reasonable, they are entitled to acceptance on review, *Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3rd Cir.1980), *cert. denied*, 450 U.S. 996, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981), even if the Court would have drawn a different inference had it been deciding the case *de novo. See Kenworth Trucks of Philadelphia, Inc. v. NLRB*, 580 F.2d 55, 59 (3rd Cir.1978). This Court may review the inferences made below, but the question to be asked is whether they are reasonable.

In this case, the inference that D & D possessed knowledge of Hock's activities is supported by credible evidence that (1) foreman Schaefer was close enough to the conversations to hear them, (2) D & D's warehouse facility was a small one employing only eight or nine individuals, (3) Dallmeyer believed Hock to be responsible for the men's room graffiti, (4) Hock's discharge came only a week after a conversation suggesting a union, (5) Masemer told Hock he was being discharged because of his attitude, and (6) one day after the discharge, Masemer complained about Zorbaugh saying things D & D did not like. Based on this evidence, the ALJ and the Board were not required to credit the denials of knowledge by D & D's management.

IV.

The General Counsel bears the burden of proving, by a preponderance of the evidence, "that the employee's protected conduct was a substantial or motivating factor in the adverse action." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401, 103 S.Ct. 2469, 2474, 76 L.Ed.2d 667 (1982). The conclusion of the ALJ and the Board that protected conduct was the motivating factor is supported by findings that: 1) Dallmeyer stated Hock was fired because of his attitude, not for his tardiness; 2) Masemer commented to Zorbaugh about his attitude the day after Hock's termination; and 3) the firing followed closely after Hock's comment about contacting a union. The ALJ discounted D & D's counterargument that the termination was motivated entirely by Hock's tardiness because of findings that: 1) Hock received no warnings about tardiness after November 1981; 2) Hock was not docked for tardiness and was no more than five minutes late on any one occasion in 1982;

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[1] "The essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor. *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir.1980).'" *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir.1986).

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and 3) Hock was given a positive performance review and offered a promotion in late January 1982. Evaluating the record as a whole we conclude that there is substantial evidence to support the conclusion that Hock's concerted activity was a motivating factor in his discharge.

V.

Even if the General Counsel persuades the Board that protected activities were in fact a motivating factor in the action, an employer can escape liability by showing, as an affirmative defense, that his actions would have been the same regardless of the forbidden motivation. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 401–02, 103 S.Ct. 2469, 2474–75, 76 L.Ed.2d 667 (1982). D & D argues that the Board erred in failing to accept its contention that Hock would have been discharged for tardiness in any event.

There is no dispute that Hock had an abysmal attendance and lateness record. D & D claims that three other employees with less horrendous records had been discharged under the company's tardiness and absenteeism policy and that the company's progressive disciplinary system virtually mandated that Hock be discharged for the same reason. The ALJ analyzed the evidence on which these claims are made and reasonably found them unpersuasive. The conclusion that Hock would not have been fired in March absent improper motivation was based on findings that: 1) there were no warnings concerning tardiness after November; 2) Masemer did not mention tardiness in the January job review; 3) Hock was not docked and was not more than five minutes late in 1982; and 4) the attendance policy was flexible, and did not necessarily require termination, given the warning in the November memorandum of "appropriate disciplinary actions." The ALJ also discounted D & D's claims that three employees had previously been fired for comparable reasons, distinguishing those cases on the facts. We conclude that the Board was justified in finding that D & D was not sufficiently concerned about Hock's record to have discharged him in the absence of his concerted activities.

D & D urges that this court's decision in *Hanlon & Wilson Co. v. NLRB,* 738 F.2d 606, 616–18 (3rd Cir.1984), should guide our decision in this case. In *Hanlon & Wilson,* this court reversed the Board and found that employee Krivakuca, who was secretary of his union, was fired because of attendance policy violations, not unlawful discrimination. Krivakuca was fired in conformity with company policy that provided for discharge after nine unexcused absences in a calender year. The employer refused to accept a written excuse for three days on which Krivakuca was absent to care for his seriously ill child. The Board had concluded that the company's "sudden hard-hearted attitude," manifested in strict enforcement of the company policy of accepting medical excuses only if the employee himself or herself was ill, could only be attributed to discrimination based on the employee's union activity. *Id.* at 617. The court found that there was nothing preventing an employer from taking a hard-hearted position with an employee who had the worst attendance record and who was aware of the company's concern for attendance. The court concluded that:

> Although we sympathize with Krivakuca's unfortunate situation, we also understand an employer's need to employ dependable workers, and we conclude that H & W satisfied its burden of showing that Krivakuca would have been discharged without regard to his Union activities on account of his abysmal attendance record. Finding no substantial evidence to support the Board's contrary conclusion, we therefore decline to enforce that part of the Board's order that dealt with Gregory Krivakuca.

Id. at 618.

In *Hanlon & Wilson,* the rules concerning termination for absenteeism were quite specific and Krivakuca "was on constant

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notice" that his attendance was a problem, supporting Hanlon & Wilson's claim that discharge would predictably occur if the conditions for discharge were met. *Id.* at 616. There was no substantial evidence to the contrary. In contrast, the ALJ in the instant case found that "repeated lateness," the offense sanctioned by D & D's rules, was an "elastic term" and that the conditions for disciplinary discharge were not rigid. [173a] Moreover, D & D's argument that Hock's lateness alone would have resulted in discharge is undercut by the evidence that Hock, after November, was given no warnings concerning his tardiness, was not docked any pay, and received a positive evaluation and an offer of promotion. Thus, unlike the case of Krivakuca, the Board's conclusion that Hock would not have been discharged in March 1982 in the absence of his concerted activities is supported by substantial evidence.

VI.

This is a fact case in which there was much conflicting testimony. In resolving the factual disputes, the ALJ had to believe one side or the other. He made credibility determinations and, for the most part, credited Hock's testimony. It is not a case, however, where the result rests solely on the testimony of the charging party. The ALJ and later the Board carefully canvassed all of the evidence and found that the circumstantial evidence fitted together in patterns which made Hock's account the more likely one. We cannot fault their performance. Accordingly, we will deny the petition for review and grant enforcement of the order.

ADAMS, Judge, dissenting: This Court is required to accept factual determinations of the National Labor Relations Board only "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) (1982). In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951), the seminal case in this area, the Supreme Court explained that substantial evidence

> "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . Accordingly, it "must do more than create a suspicion of the existence of the fact to be established . . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

(quoting *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 216–17, 83 L.Ed. 126 (1938), and *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939)).

The Administrative Law Judge here found, in a determination that constitutes the linchpin of the case, that the petitioner had knowledge that Hock had engaged in activities protected under the National Labor Relations Act. On this record I cannot say that this finding is supported by substantial evidence. There is no direct evidence that the petitioner was aware of Hock's activities, and such indirect evidence as exists is inferential, at best. I therefore respectfully dissent from the order of the Court which, despite the fact that Hock's record of absences and lateness is nothing short of deplorable, would require his re-employment with back pay.

Southern Maryland Hospital Center v. NLRB

801 F.2d 666 (4th Cir.), September 18, 1986—276 NLRB 1349

On petition to review Board Order

Before WIDENER, HALL, and CHAPMAN, Circuit Judges

CHAPMAN, Circuit Judge: This case comes before us upon the petition of Southern Maryland Hospital Center to review and set aside an order of the National Labor Relations Board (NLRB or Board). The Board has filed a cross-application for enforcement of its order. The Office and Professional Employees International Union, Local No. 2 (OPEIU or the union), the charging party before the Board, has intervened in support of enforcement.

The petitioner is a full-service general hospital located in Clinton, Maryland. The hospital opened in 1977 under the direct control of its Chief Executive Officer and principal stockholder, Dr. Francis Chiaramonte. It employed approximately 1300 persons during the time period relevant to this suit. In the spring of 1981, five labor organizations, including intervenor OPEIU, began what would become a thirteen-month organizational effort at the hospital. The effort culminated on June 11, 1982, with a representation election in which no labor organization won a majority. This case arises from union charges filed January 25, 1982, claiming that the hospital committed a long list of unfair labor practices during the organizational campaign in violation of § 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), (3) (1982).

The administrative law judge found numerous violations of § 8(a)(1) and two violations of § 8(a)(1) and (3). The Board affirmed, in substance, all but one of the ALJ's findings and conclusions and issued a remedial order. [1] *Southern Maryland*

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Hospital Center and Office and Professional Employees International Union, Local No. 2, AFL-CIO, 276 N.L.R.B. 153 (1985). In reviewing these violations pursuant to 29 U.S.C. § 160(e), (f), we are mindful that we must sustain them and grant enforcement of the order if the findings are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); *NLRB v. Kiawah Island Co.,* 650 F.2d 485, 489 (4th Cir.1981). We find that there is substantial evidence in the record as to most of the § 8(a)(1) violations and grant enforcement on that portion of the order. We deny enforcement as to the two claimed § 8(a)(1) and (3) violations and three other claimed § 8(a)(1) violations.

I

THE BONUS ISSUE

The most significant issue arises from the Board's finding that the hospital violated § 8(a)(1) and (3) of the Act by "withholding" a year-end bonus in 1981. The Board found that even though the hospital had given just one such bonus in the past, the evidence indicated that the hospital intended to give a bonus in 1981 but chose not to out of anti-union animus. The Board adopted the ALJ's recommended remedy, requiring the hospital to pay its 1981 employees a bonus similar in amount to the $215,000 bonus of 1980, along with interest.

The hospital contends that the 1980 bonus was a one-time gift which it had no intention of repeating in 1981. In particular, Dr. Chiaramonte testified that the 1980 bonus was a spur-of-the-moment gift which he authorized because the cash was on hand and because he wanted to repay the hospital employees for their support in a personal crisis—his sixteen year-old daughter had been fatally injured in an automobile accident and had received care at the hospital. The hospital further contends that its yearly contributions to an employee pension plan illustrate that the hospital preferred this system of employee recognition over a bonus system. The hospital had contributed $195,000 to the plan in 1980 and $175,000 in 1981. Finally, the hospital contends that even if it had intended to give a 1981 bonus, cash flow problems at the time prevented it from paying out funds to the employees.

The Board found, contrary to the hospital's contention, that the 1980 bonus was not a one-time "gift", that the hospital intended to give a bonus in 1981, that the bonus was withheld out of anti-union animus, and that the cash flow problems put forth as a separate business justification for the hospital's inability to grant a bonus were pretextual. The Board concluded that the withholding of the bonus was an attempt to coerce and restrain employees into not supporting the union and therefore violative of § 8(a)(1) and (3). *See NLRB v. Tamper, Inc.,* 522 F.2d 781, 785 (4th Cir.1975).

A.

There is general agreement that when an employer by promises or by a continuous course of conduct has made a particular benefit part of the established wage or compensation system, then the withholding of that benefit during an organizational campaign raises the inference of improper employer conduct. *NLRB v. Dothan Eagle, Inc.,* 434 F.2d 93, 98 (5th Cir.1970); *Gossen Company v. NLRB,* 719 F.2d 1354, 1356–57 (7th Cir.1983); *Plasticrafts, Inc. v.*

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NLRB, 586 F.2d 185, 188–89 (10th Cir.1978); *Free-Flow Packaging Corp. v. NLRB,* 566 F.2d 1124, 1129 (9th Cir.1978). An employer can avoid the finding of a violation in such a case only if he can separately justify his action with a legitimate business purpose. *NLRB v. Otis Hospital,* 545 F.2d 252, 256 (1st Cir.1976).

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[1] In particular, the Board found that: the hospital violated sections 8(a)(3) and (1) of the Act by failing to grant its approximately 1,300 employees a year-end bonus in 1981; the hospital violated section 8(a)(1) of the Act by various acts and conduct on the part of certain of its managers and supervisors during the period November 1981 through March 1982; the hospital violated section 8(a)(1) of the Act by instituting an "Employee of the Month" award in order to discourage employees' support for the union; the hospital violated section 8(a)(1) of the Act by soliciting grievances from employees and remedying those grievances in order to discourage their support for the union; the hospital violated section 8(a)(1) of the Act by restricting access of employees to union organizers in the hospital cafeteria; and the hospital violated sections 8(a)(3) and (1) of the Act by issuing disciplinary warnings to former employee Patricia Vass on September 30 and December 23, 1981.

On the other hand, when there is no "established practice" of granting benefits, the General Counsel must show that the employers' withholding of particular benefits was motivated by anti-union sentiment to prove a violation of the Act. *Plasticrafts,* 586 F.2d at 188–89. This is so because "in such an ambiguous situation the employee is unlikely to draw a predictable conclusion [that the employer seeks to influence the election] from the employer's course of conduct." *Id; see also Gossen,* 719 F.2d at 1356–58; *Free-Flow Packaging,* 566 F.2d at 1129–30.

B.

The initial determination to be made is whether an employer by promises or by a continuous course of conduct has made a particular benefit part of its "established practice." The focus in such a situation should be upon the employer, who is confronted with the dilemma of deciding whether his past promises or grants of benefits have created a clear *status quo* that he must maintain during the pre-election period. *See Free-Flow Packaging,* 566 F.2d at 1129. The standard then is whether it would be clearly apparent to an objectively reasonable employer that his grant or denial of a benefit, at the time the action is taken, conforms to the *status quo. Plasticrafts,* 586 F.2d at 188.

Upon review of the record in this case, we find no substantial evidence to support a conclusion that Southern Maryland Hospital Center had established a practice, through prior promises or conduct, of granting an annual year-end bonus. Turning first to the hospital's past conduct, we refuse to give any credence to the proposition that a one-time gift such as that given by Dr. Chiaramonte in 1980, standing alone, could in any way establish a policy or practice of yearly bonuses. Christmas bonuses are generally discretionary in nature and must be given over a significant period of time before they can be considered part of the *status quo. See, e.g., NLRB v. McCann Steel Co.,* 448 F.2d 277, 279 (6th Cir.1971); *Beacon Journal Publishing Co. v. NLRB,* 401 F.2d 366, 367 (6th Cir.1968).

The Board found, however, that several publications and conversations between management and employees during 1981 indicate that the hospital intended to give a Christmas bonus that year. Specifically, the Board relies upon a recruiting advertisement for nurses in the *Washington Post,* two recruiting pamphlets listing hospital employee benefits, and a half-dozen isolated conversations between various members of the hospital management, low-level supervisory staff, and employees. Assuming, as we must, that this evidence is credible and true, we nonetheless hold that it is insufficient as a matter of law to prove that the hospital made the kind of promises that would elevate the year-end bonus in this case to the status of an established practice. At best, the evidence shows that an ambiguity existed as to whether a year-end bonus should be given in 1981.

The Board found that the *Washington Post* ad contained language indicating that nurses were to receive a year-end bonus as an employment benefit. While this is one interpretation, the language of the ad is far from clear and could just as easily be read to refer to another benefit which allowed nurses to take a "bonus" day off if they did not take their five annual sick leave days.[2]

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The two recruiting pamphlets relied upon by the Board both contained a list of employee benefits, one of which was a "year-end bonus." There is evidence that the first of the two pamphlets was posted on hospital bulletin boards and distributed to some employees; however, the explicit purpose of this flyer was to persuade some of approximately 100 former nurses to return to work for the hospital. There is evidence that the flyer produced at most seven inquiries. In any event, the employee who drafted the pamphlet testified without contradiction that she published the documents without Dr. Chiaramonte's approval or authorization. Upon receiving a copy of the first pamphlet, Dr. Chiaramonte reprimanded the employee, explaining that three of the benefits listed, including the year-end bonus, were nonexistent. The second pamphlet, a more polished brochure to be used for recruitment and orientation, was edited before it was released, and there is no evidence that any employee saw the pamphlet in its uncorrected form.

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[2] The advertisement read:

Excellent working conditions. Benefits include: Fully Paid Life, Disability; Hospitalization, Dental Insurance; vacation; holidays; sick leave & bonus. The Board's interpretation of this advertisement is not a finding of fact to which we must defer, as courts may engage in legal interpretation of the written word. *NLRB v. Big Three Industrial Gas & Equipment Co.,* 441 F.2d 774, 777 (5th Cir.1971).

The conversations and statements relied upon by the Board are similarly isolated incidents not amounting to the type of authoritative and generally disseminated promises necessary to create an established practice. Most of the conversations occurred during December 1981, a month in which rumors concerning a possible year-end bonus were widespread.[3] The conversations generally consisted of an individual or small group of employees inquiring of supervisors or low-level managers whether there would be a bonus in 1981. While the evidence concerning Comptroller Wesley Melvin indicates that he seemed to think that there might be a bonus, it also plainly shows that he was not the decision maker and that the final decision on whether to give a bonus had not been made.

Meanwhile, there is no evidence that the ultimate decision maker, Dr. Chiaramonte, had at any time given any indication that the one-time gift of 1980 was to be continued as a year-end bonus in 1981 and beyond. The doctor made no statements, and more importantly, there was never an authoritative, general announcement of any kind stating that the 1300 hospital employees would receive a 1981 Christmas bonus. This is not a case such as *NLRB v. Otis Hospital,* 545 F.2d 252 (1st Cir.1976). In that case, the Hospital Administrator issued a general announcement, posted on all bulletin boards, that employees would receive a cost-of-living salary increase. When the union began its organizational drive, the administrator refused to implement the wage increase. The court upheld the Board's finding of a § 8(a)(1) and (3) violation reasoning, "A clear impression was publicly conveyed to all employees that a wage increase was imminent, and an employee would scarcely expect this employer to renege in such circumstances." 545 F.2d at 256. The hospital's actions in the present case could not have conveyed such a "clear impression" to anyone and, at most, evidenced that the bonus issue was mired in ambiguity.

Based upon this record, we find that it would not have been clearly apparent to a reasonable employer in the hospital's situation that the Christmas bonus was such an established employee benefit that its withholding would raise an inference of improper conduct on the part of the hospital.

C.

Since there was no established practice in this case, the Board may find a violation of the Act only if it is affirmatively shown that the hospital was motivated by anti-union sentiment in withholding the benefit. *Plasticrafts, supra; Gossen, supra; Free-Flow Packaging, supra.* The Board found anti-union animus based upon (1) a statement by an assistant maintenance supervisor to an employee; (2) a

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statement by Comptroller Melvin to one employee, overheard by a second employee; and (3) Dr. Chiaramonte's general anti-union animus and his *silence* concerning the bonus. We hold that this is insufficient evidence to show the type of coercive and manipulative motivation necessary for a violation of the Act.

The statement by Assistant Operations Director Morris to employee Kearney consisted of a cryptic response to a confidential question.[4] According to Kearny, Morris acknowledged that the reason no bonus had been given was because of "union activities at the shop." This isolated comment made by a low-echelon supervisor during a confidential conversation with an individual employee can hardly be classified as the type of coercive statement proving the anti-union animus of the employer. *See NLRB v. Big Three Industrial Gas & Equipment Co.,* 579 F.2d 304, 310–11 (5th Cir.1978); *Federal-Mogul Corp. v. NLRB,* 566 F.2d 1245, 1257 (5th Cir.1978).

The second statement was made by Comptroller Melvin in response to employee Diggs' question about the bonus. Employee Westfield testified that she overheard Melvin tell Diggs that there would be no Christmas bonus because of the union, but that "we may receive one after the union election." Melvin denied making the statement, but the ALJ and Board chose to credit Westfield's testimony. Again, we are struck by the casual and isolated nature of this particular conversation. Melvin was informally answering a question about the bonus from an individual employee, and his response reached the ears of at most three employees. We are also uncertain that the substance of Melvin's explanation was of such a coercive nature to constitute an unfair labor practice. *See Gossen,* 719 F.2d at 1356–58; *see also NLRB v. Dorn's Transportation Co.,* 405 F.2d 706, 715 (2d Cir.1969) ("This is not a situation where the employer has by public announcement specifically advised the employees that the union is causing them to lose a [benefit] they would otherwise have received.")

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[3] The union itself was a leading contributor of grist to the rumor-generating mill. The December 10, 1981 edition of the OPEIU newsletter, *Solid Rock,* contained the passage, "Rumor has it that Dr. C is not sure if he can pay Christmas Bonuses again this year or not due to 'union activity'."

[4] Kearney testified that his question to Morris was: "Jim, between me and you as workers, is the union really—what is the reason that we didn't get the bonus? Was it the union?"

Finally, the ALJ and Board found that Dr. Chiaramonte's total silence on the bonus matter "sent a message loud and clear [to the employees] that any benefits they might receive would be bestowed by his fiat and not wrung from him by outside coercion." There is no factual basis for this conclusion. While it is true that Dr. Chiaramonte generally showed no love for the unions in his actions, such dislike is not an unfair labor practice. Instead of being detrimental to his cause, the fact that Dr. Chiaramonte was *silent* on the bonus issue weighs in his favor. The doctor was confronted with a situation during late 1981 in which a great deal of ambiguity existed as to whether or not he was required to give a Christmas bonus. The usually outspoken doctor chose to say nothing instead of issuing explanatory statements which could later have been viewed as manipulative. There was absolutely no evidence introduced to suggest that Dr. Chiaramonte's silence was intended to influence or manipulate the votes of the hospital employees. More likely, the doctor's silence evidences a "good faith effort to conform to the requirements of the law." *Dorn Transportation Co.,* 405 F.2d at 715; *see also J.J. Newberry Co. v. NLRB,* 442 F.2d 897, 900 (2d Cir.1971); *Free-Flow Packaging,* 566 F.2d at 1130.

In summary, we find no support for a finding that the hospital committed an unfair labor practice by not giving a 1981 Christmas bonus. There was no evidence to indicate that a yearly Christmas bonus was an established practice, nor was there substantial evidence that the hospital withheld the bonus in an attempt to influence the election. As a consequence, we refuse to enforce the Board order finding violations of § 8(a)(1) and (3) and requiring payment of a 1981 bonus to affected employees.

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II

OTHER CLAIMED VIOLATIONS

Beyond the bonus issue, there are three additional unfair labor practice findings which we refuse to enforce: (1) the finding of a § 8(a)(1) violation based upon Dr. Chiaramonte's "confiscation" of union campaign literature; (2) the finding of a § 8(a)(1) violation resulting from the hospital's creation of an "Employee of the Month" award; and (3) the finding of a § 8(a)(1) and (3) violation for discriminatory discipline of a union-supporting employee.

A.

The facts concerning the confiscation issue are uncontroverted. On September 17, 1981, employee Mary Cox was distributing copies of the OPEIU newsletter at the cafeteria entrance. Dr. Chiaramonte came upon her and asked what she was doing. She offered him a copy of the newsletter. The doctor grabbed the eight to ten copies she had in hand and proceeded to the cafeteria kitchen where he offered the newsletters to kitchen workers with the words, "Does anybody want these?" He returned to Cox's table about five minutes later and returned the one copy of the newsletter he had not distributed. During the doctor's absence, Cox had reached into a nearby box for more copies of the newsletter, which she continued to distribute.

The Board found that Dr. Chiaramonte interfered with his employees' § 7 rights by confiscating union campaign materials. There is no support for this finding. The evidence shows that the doctor distributed to employees most of the eight to ten newsletters he took. He returned to employee Cox the one copy that he did not pass out. Also, Cox had a box full of newsletters available to her to replenish her supply upon the doctor's departure. There was no finding that Cox or any other employee was intimidated by the incident; indeed, Cox continued to distribute newsletters during the doctor's absence. We find that the doctor's conduct in this case was at most minimal intrusion upon employees § 7 rights and was not violative of the Act. *See Graham Architectural Products Corp. v. NLRB,* 697 F.2d 534, 541–42 (3rd Cir.1983); *NLRB v. First*

National Bank of Pueblo, 623 F.2d 686, 692 (10th Cir.1980).

B.

The facts surrounding the creation of an "Employee of the Month" award are similarly undisputed. Hospital Special Projects Director Margaret Greenway testified that when she came to work at the hospital in August 1981 as a special assistant to Dr. Chiaramonte for public relations matters, she discussed with him the desirability of reinstituting a program of employee recognition. She claimed that she was unable to uncover details of the former program since the previous public relations director was no longer employed at the hospital. The record is unclear as to the exact nature of the earlier program, but evidence indicates that the hospital had held annual banquets in past years at which prizes and awards were given to deserving employees. In October 1981, Greenway released a bulletin announcing the "Employee of the Month" program which offered a prize of $100 to the individual winner each month.

The ALJ adopted the presumption that because of its timing, the award was granted for the purpose of influencing employees to vote against the union. The judge went on to dismiss the hospital's explanation that it was merely reintroducing a previously-established employee recognition program. The Board qualified this finding in a footnote to its order stating that it agreed that there was a § 8(a)(1) violation, but that "we find it unnecessary to rely on the Board's policy of presuming the unlawfulness of grants of benefits during the pre-election period."

We refuse to enforce the Board's order on this point. As a technical matter, the Board's decision not to rely on the presumption of unlawful motivation is fatal to the Board's finding. Without the presumption, there is absolutely no evidence

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that the hospital reinstituted this employee recognition program for the purpose of influencing the election. Moreover, even if the presumption were invoked, we are unconvinced that the effect of the award, given the context of its creation, was substantial enough to constitute a violation of the Act. Considering both the length of the organizational drive and the large number of hospital employees, the designation of one individual as employee of the month can not reasonably be said to be so significant as to influence in any way the attitude of the employees or the outcome of the election.

C.

The Board found that the hospital committed violations of § 8(a)(1) and (3) of the Act by disciplining employee and union supporter Patricia Vass "for conduct it would have ignored were it committed by others." In particular, the Board found that the hospital discriminatorily applied its no solicitation rule against Vass on two separate occasions because of her known union activism.

The first incident occurred on September 30, 1981, when Nurse Elizabeth Wustner observed Nurse Vass, who was not known to Nurse Wustner at the time, looking at a departmental time roster on a desk top at the nurse's station. When Wustner asked Vass what she was going, Vass replied that she wanted to find out how many registered and practical nurses were on the roster. Vass was wearing a union button, and when asked if she was gathering information for the union, Vass responded that the information was for her personal use. Wustner told Vass to come back later to ask the head nurse for permission to view the list. Subsequently, Wustner reported the incident to Head Nurse McCormick, who recognized the description of Vass, a known union supporter. McCormick asked Wustner to prepare a written statement and submit it to Director of Nurses Margaret Miller.

Miller, in accordance with her usual practice in such matters, wrote up a verbal counseling report with the intention of then calling in Vass to discuss it. Miller testified that if Vass had been able to explain satisfactorily her conduct, then Miller would have destroyed the report. Vass, however, refused to meet with Miller, claiming that she had a right to be accompanied by a union representative.[8]

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[8] Vass did not raise before the Board this alleged pre-election right to union representation in a disciplinary matter. The Supreme Court has acknowledged an employee's right to representation in such matters once a union has been certified. *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). Other circuits have struggled with the question of whether employees have a *Weingarten* right in non-union situations or prior to union certification. *See E.I. du Pont de Nemours and Company, Inc. v. NLRB,* 707 F.2d 1076 (9th Cir.1983); *Anchortank, Inc. v. NLRB,* 618 F.2d 1153, 1161 (5th Cir.1980). This circuit has never recognized a pre-election right to representation in disciplinary matters. Since Vass did not raise the issue before the Board, we assume, without deciding, that Vass had no right to the presence of a union representative in her meetings with Miller.

Miller told Vass that she had no such right, and when Vass refused again to discuss the matter, Miller let the report stand.

The second event occurred in December 1981. According to the record, Pharmacy Technician Hanaa Malaty was serving as a translator for Vass and several other nurses with an Arabic patient. As Vass and Malaty left the patient's room, Vass asked for a list of telephone numbers of pharmacy employees. Malaty agreed to bring the list, which she delivered to Vass on her next round. Later, a supervisor recognized Malaty's description of Vass and chastised Malaty for giving the list, which the hospital maintains was confidential, to a union supporter.

The Director of Pharmacy Stanley Sherman, sent an incident report to Miller. Miller then drafted an official reprimand in which she noted that this was the second time that Vass had been caught interrupting the work of another employee. The reprimand warned of a possible termination or suspension if Vass's conduct continued. Miller called Vass to discuss the report, but

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again Vass claimed a right to the presence of a union representative and refused to discuss the matter in any way. Under the circumstances, Miller had no choice but to let the reprimand stand.

The Supreme Court and the NLRB have both recognized a hospital's right to prohibit solicitation in patient care areas. *See Beth Israel Hospital v. NLRB,* 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978); *St. John's Hospital & School of Nursing, Inc.,* 222 N.L.R.B. 1150 (1976). The rationale behind this rule is that "the primary function of a hospital is patient care and . . . a tranquil atmosphere is essential to the carrying out of that function." *St. John's Hospital,* 222 N.L.R.B. at 1150. In this case, Southern Maryland Hospital Center had such a no solicitation rule for patient areas. The issue before us is whether the hospital's application of the rule with respect to employee Vass constituted an unfair labor practice. There is no substantial evidence to support such a conclusion.

Under the Board rule approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), in order to show a violation of § 8(a)(1) and (3), the General Counsel must prove as part of his *prima facie* case that an employee's protected § 7 conduct was a substantial or motivating factor in the adverse action taken against the employee. The employer may then avoid being charged with an unfair labor practice by showing what his actions would have been regardless of his forbidden motivation. *Id.* 462 U.S. at 401–02, 103 S.Ct. 2474.

The Board found that the General Counsel successfully showed anti-union animus as a possible motivating factor in the disciplining of Vass. We defer to the Board's finding of fact on this motivational issue as it is based upon substantial evidence. The record reveals, however, that the hospital had a rule which explicitly forbade the type of conduct in which Vass engaged. Union solicitation was liberally allowed in various parts of the hospital, but not in patient areas, and if Vass was unaware of this prior to the incident with Nurse Wustner, she was certainly aware of it when she interrupted the work of Technician Malaty to obtain the telephone list. Director of Nurses Miller followed her normal procedure upon receiving the complaints about Vass, writing up a counseling report in the first case and a reprimand in the second case, and then asking Vass to come in to discuss the matters. Vass refused to appear without a union representative, and Miller therefore had to let the reprimands stand. Had Vass agreed to talk to Miller, it is possible that the two reports would have been destroyed and thus would not have been included in Vass's file.

In dismissing the hospital's explanation for the discipline, the Board relied heavily on evidence that some raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach under the hospital's rule. The Board submits that this proves discriminatory application of the rule. However, to follow the Board's reasoning to its logical conclusion, the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice. The care of patients is too important to allow such a result. As a consequence, we refuse to enforce the Board's order on this point, finding that the hospital undisputedly showed (1) a violation of its no solicitation rule, (2) a failed attempt to resolve the dispute and possibly withdraw the discipline, and (3) final disciplinary actions in proportion to the conduct involved.

III

To summarize, we refuse to enforce paragraphs 1(a), (b), (e), (i) and (j), and 2(a), (b) and (c) of the Board's order because they were not supported by substantial evidence on the record as a whole. We find, however, that the numerous remaining § 8(a)(1) violations found by the Board are supported by substantial evidence and are entitled to enforcement.

ENFORCED IN PART, REFUSED IN PART.

NLRB v. Indianapolis Mack Sales and Service, Inc.

802 F.2d 280 (7th Cir.), September 25, 1986–272 NLRB 690

On petition to enforce Board Order

Before CUDAHY, COFFEY, Circuit Judges, and ESCHBACH, Senior Circuit Judge

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ESCHBACH, Senior Circuit Judge: The primary question we will address in considering this application for enforcement of an order of the National Labor Relations Board ("NLRB" or "Board") is whether the NLRB's determination con-

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cerning the appropriateness of the bargaining unit at issue was supported by substantial evidence. For the reasons stated below, we find that it was not and will, therefore, deny the application and remand the action to the Board for further proceedings consistent with this opinion.

I

Mack Truck, Inc. ("Mack Truck"), a factory branch and district office of the national corporation of the same name, was engaged in the business of selling and servicing Mack trucks in Indianapolis and the surrounding area. The company's workforce was divided into four primary categories: service department employees, parts department employees, office clerical workers, and salesmen. Since 1964, the service and parts departments were maintained as two separate bargaining units and both were represented by the International Association of Machinists and Aerospace Workers, District Lodge No. 90 ("Union") and covered by different collective-bargaining agreements.

In June of 1982, the respondent, Indianapolis Mack Sales and Service, Inc. ("Indianapolis Mack"), entered into an agreement with the parent corporation of Mack Truck to acquire the factory branch and to operate it as an independent dealership. Prior to the effective date of the changeover (August 1982), Mack Truck advised the Union of the sale. The Union then sent a letter to the owner of Indianapolis Mack informing him that it represented the service and parts department employees and requesting that he sign the current collective-bargaining agreements.

Mack Truck closed permanently on Saturday, July 31, 1982. On August 2, Indianapolis Mack opened for business. By a letter mailed on August 3, the Union again informed the owner of Indianapolis Mack that it represented the service and parts departments and requested recognition and bargaining. On August 9, the owner rejected the request on the ground that he had a good-faith doubt regarding the Union's majority support.

The Union filed a charge with the NLRB in which it alleged that Indianapolis Mack, as the successor company to Mack Truck, had engaged in an unfair labor practice in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act"), codified as amended at 29 U.S.C. § 158(a)(1) and (5), when it refused to recognize and to bargain with the Union as the duly certified collective bargaining representative of the service department employees of the predecessor company. Indianapolis Mack maintained that it was not the legal successor and, therefore, that it was not required to recognize or bargain with the Union as there was no substantial continuity between its business operations and those of Mack Truck. It also claimed that by the time it had a complete work complement, the employees who were formerly part of the represented service department unit at Mack Truck no longer constituted a majority of the same department in the new company. In addition, Indianapolis Mack denied in its answer to the charge that the bargaining unit was appropriate and refused to enter into a stipulation as to the appropriateness of the unit.

At the subsequent administrative hearing, counsel for Indianapolis Mack stated that there had not been a determination of the appropriateness of the bargaining unit in question. The Administrative Law Judge ("ALJ") concluded—incorrectly—that the appropriateness of the unit was not an issue she could "take cognizance of." Indianapolis Mack again voiced its objection and was assured by the ALJ that the contention had been preserved. No record was made at the hearing on the question of appropriateness. In her order dated May 31, 1983, the ALJ did not analyze in any way the nature of the bargaining unit at issue, but only observed in a footnote that Indianapolis Mack did not "admit the appropriateness of the unit." Although the ALJ had stated at the hearing that she could not reach the question, she nonetheless concluded in her order that, as a matter of law, the "described

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unit [of service department employees was] appropriate for the purposes of collective-bargaining." She also found that Indianapolis Mack was the successor of Mack Truck and thus had violated §§ 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union as the representative of the described service department bargaining unit.

Indianapolis Mack sought review before the NLRB. It took exception to, among other things, the ALJ's finding of appropriateness and requested that the record be reopened for submission of evidence on that issue. The NLRB (which had delegated its authority to a three-member panel) denied the request, apparently on the ground that Indianapolis Mack had not adequately objected and had failed to introduce evidence on the question at the hearing. In addition, the Board stated that the unit was appropriate "[i]n light of the employees' common work interests and their history of separate representation." The Board adopted the recommended order of the ALJ. One member of the panel, however, dissented on the ground that the record failed to support the finding that the bargaining unit was appropriate. He noted that the Board had long held that automobile service departments should not be fragmented into multiple units. Implicit in his reasoning was the conclusion that only the bargaining history of the predecessor, *not* the common work interest of the employees, was described in the record and that this history, standing alone, should not control the issue of a bargaining unit's appropriateness. This application for enforcement followed.

II

Section 9(b) of the NLRA, codified as amended at 29 U.S.C. § 159(b), provides in relevant part:

> The Board shall decide *in each case* whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(emphasis added.)

Although the Board exercises broad discretion in determining the appropriateness of a unit, § 9(b) nonetheless imposes a nondelegable obligation on that agency to make such a determination "in each case." Thus, the NLRB fails to perform its statutory duty when it does not exercise its discretion under that section. *See NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965); *NLRB v. Cardox Division,* 699 F.2d 148 (3d Cir.1983).

In its brief to this court, the Board acknowledges that an appropriateness determination must be made in a successorship dispute. We, of course, must verify that any determination the Board makes is supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Manley Truck Line, Inc.,* 779 F.2d 1327, 1330 (7th Cir.1985); *Cardox,* 699 F.2d at 156; *NLRB v. Chicago Health & Tennis Clubs, Inc.,* 567 F.2d 331, 334–35 (7th Cir.1977), *cert. denied,* 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978). Although this standard of review accords the Board considerable discretion, it does not mean that we will simply rubber-stamp its decisions, thereby substituting judicial abdication for judicial review. *See NLRB v. Harvstone Mfg. Co.,* 785 F.2d 570, 574 (7th Cir.1986). After a thorough review of the evidence presented to the Board, we find in the instant case that the NLRB failed to discharge its obligation under § 9(b).

As noted above, the Board is required, with or without arguments from the parties, to determine the appropriateness of a bargaining unit. In addition, there is no question in this case that Indianapolis Mack expressly contested the appropriateness in its pleadings and at the hearing. The ALJ, however, concluded incorrectly at the hearing that the question was not before her and did not allow the introduction of any evidence on the matter. In addition, she expressly assured Indianapolis Mack that it had not waived its objection. Despite these rulings, the ALJ decided in her order that the unit was appropriate. The Board subsequently denied Indianapolis Mack's request to reopen the record, but relying on the *same* record that was before the ALJ concluded that the unit was appropriate, both in view of the "bargaining history" and the "community of interest" of the employees.

This is a troubling conclusion from the NLRB for three reasons. First, the Board has a long-standing rule that employees in a dealership's parts and service departments should be in the *same* bargaining unit, *unless* there is an affirmative showing that there is no substantial community of interest between the two groups of employees. *See Jensen's Motorcycle, Inc. d/b/a Honda of San Diego,* 254 N.L.R.B. 1248, 1263 (1981); *see also Gregory Chevrolet,* 258 N.L.R.B. 233, 238 (1981); *Graneto-Datsun,* 203 N.L.R.B. 550, 550 (1973); *Harry Brown Motor Co.,* 86 N.L.R.B. 652, 654 (1949). When an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sound reasons for, the change, and that it has shown that the new rule is consistent with the agency's statutory duties. *See New York Council, Association of Civilian Technicians v. FLRA,* 757 F.2d 502, 508 (2d Cir.), *cert. denied,* —— U.S. ——, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985). In the instant case, the Board offered no explanation for the refusal to follow its prior rule regarding parts and service department employees, except to note, without elaboration, that *Graneto-Datsun* involved an initial organization. This unadorned conclusion does not explain the Board's decision in this case to view the *Graneto-Datsun* rule as inapplicable in the successorship context. Certainly there is no language in that prior decision that requires, or even suggests, such a limitation. The Board must abide by its own rules. We conclude then that, until the Board expressly modifies or repudiates the rule of *Harry Brown Motor Co.* and its progeny in a reasoned manner consistent with the Act, the agency is bound by it.

Second, the Board apparently concluded below, and now argues to this court, that Indianapolis Mack "waived" the objection to appropriateness. This is a disingenuous position. Section 9(b) imposes a nondelegable duty on the Board to determine appropriateness. Thus, the NLRB cannot discharge that obligation by simply finding that the parties did not vigorously pursue the issue. Furthermore, it is unclear to us just how pugnacious the NLRB would require Indianapolis Mack to be. Counsel for the company refused to stipulate to appropriateness and stated emphatically at the hearing that the ALJ should not accept the bargaining unit. Despite the mandate of § 9(b), the ALJ refused to consider the question, but assured Indianapolis Mack nonetheless that its objection had been preserved. Perhaps Indianapolis Mack would have been better advised to have made an offer of proof. Still, we find it unwarranted under the circumstances of this case to require it to have pursued the position with greater tenacity. In view of the ALJ's inaccurate rulings in this case, Indianapolis Mack should not bear the risk of a procedural default, as it was no doubt lulled into acquiescence by the ALJ.

Finally, the record simply does not support the NLRB's conclusion regarding community of interest. Of course, the Board may, consistent with its present rule, decide that a specific set of facts requires segregation of the service and parts department employees into two units, and we would uphold its determination on review if it were supported by substantial evidence. *See NLRB v. Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 752 (7th Cir.), *cert. denied,* 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981). In passing on the appropriateness of that segregation of employees, however, the Board, under the precedents discussed above, must consider the interests of the employees of the parts department as well as those of the service department. Otherwise, any statement about the community of interest between the two groups of workers is meaningless. Yet, the ALJ in

this case did not receive any evidence about Indianapolis Mack's parts department that would permit a ruling on the parts department employees. The Board refused to reopen the record, yet somehow was able to rule on the community of interest issue. However, no evidence cannot be substantial evidence. We must, therefore, agree with the dissenting member of the Board that the record does not support the appropriateness determination.

The NLRB offers this court several *post hoc* explanations for its decision and that of the ALJ. We first note that these arguments made after the initial decision and in support of the application for enforcement are inherently suspect and do not merit our consideration. *See Metropolitan Life,* 380 U.S. at 443–44, 85 S.Ct. at 1064–65. An administrative agency's decisions, unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning. *See Bowen v. American Hospital Association,* ––– U.S. –––, –––, 106 S.Ct. 2101, 2113, 90 L.Ed.2d 584 (1986); *FTC v. Indiana Federation of Dentists,* ––– U.S. –––, –––, 106 S.Ct. 2009, 2016, 90 L.Ed.2d 445 (1986); *SEC v. Chenery Corp.,* 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943); *Slaughter v. NLRB,* 794 F.2d 120, 122, 128 (3d Cir.1986); *Prill v. NLRB,* 755 F.2d 941, 947–48 (D.C.Cir.1985). One of the fundamental justifications for the administrative process is that an agency possesses an expertise in a particular subject area (here labor relations) that the judiciary, as it is presently structured, cannot acquire at an acceptable cost. That justification comes into play in a particular case only when the agency has in fact applied its expertise. *Brock v. Dow Chemical U.S.A.,* 801 F.2d 926, 931–932 (7th Cir.1986); *see also Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 48–50, 52, 57, 103 S.Ct. 2856, 2869–70, 2871, 2874, 77 L.Ed.2d 443 (1983); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 853–54, 85 L.Ed. 1271 (1941). The incantation of terms of art in the absence of a factual or logical basis (as in the present case) is inadequate to implicate the Board's expertise and undermines the integrity of the administrative process. *Cf. National Realty & Construction Co. v. OSHRC,* 489 F.2d 1257, 1267 (D.C.Cir.1973) ("To merit judicial deference, the [agency's] expertise must operate upon, not seek to replace, record evidence."). The Board's appellate counsel cannot fill in the holes in the agency's decision; stated in another manner, it is the Board's order, not its petition for enforcement, that is the subject of our review. Thus, the *post hoc* arguments come too late.

In addition, if we were to consider the Board's arguments, we would find them unpersuasive. First, the Board now in essence asserts that (although its decision referred to both the bargaining history and community of interest) it may rely on the bargaining history alone to find that the unit was appropriate, apparently because that history, without more, is an indicator of a community of interests. We are not persuaded by this argument, which appears to be nothing more than a litigation tactic designed to obscure the lacunae in the record. Ordinarily, bargaining history is but one factor; the community of interests must also be considered. *See Saks & Co. v. NLRB,* 634 F.2d 681, 686 n. 4 (2d Cir.1980); *International Union of Electrical, Radio & Machine Workers,* 604 F.2d 689, 696 (D.C.Cir.1979). A bargaining unit may have been in existence for some time before the change in ownership. However, the issue here is one of successorship, so that the Board must determine whether the unit was appropriate and remains so in the alleged successor. It begs the question to rely on the bargaining history of the predecessor alone, because one must then assume that the duties of the service and parts department employees remained substantially the same under Indianapolis Mack as they were under Mack Truck. Perhaps they did, but the Board must examine the facts and cannot simply rely on an attenuated inference based on the bargaining history of the predecessor in the absence of the necessary factual predicate.

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Finally, the Board claims that the finding of substantial continuity between the structure and operation of Mack Truck and Indianapolis Mack satisfies § 9(b). This position suffers from the same bootstrapping character as that examined in the preceding paragraph. The Board, of course, does not suggest that the converse would also be true, *i.e.,* that if continuity is not found, then the unit must be inappropriate. In any event, as we understand the Board's obligations under the NLRA, appropriateness and continuity are to be determined independently. The fact that some of the same evidence may bear on both questions does not mean that the two are continuous. There may have been substantial continuity between the businesses as a whole, but changes made to a specific department may call for a reconsideration of the appropriateness determination. In any event, even if we are wrong in our interpretation of the Act, the paucity of the record with regard to the parts department employees, especially in view of the rule that these workers should ordinarily be in the same unit as service personnel, means that continuity alone is not enough.

III

For the reasons stated above, the application for enforcement is DENIED and the action is REMANDED to the Board for further proceedings consistent with this opinion.

CUDAHY, *Circuit Judge,* dissenting: I think Indianapolis Mack's failure to make an offer of proof here as to the appropriateness of the bargaining unit should be of much greater consequence than the majority would grant. The Board found, and its finding is fully supported by the evidence, that Indianapolis Mack was a "successor" to Mack Truck, the former owner. Under these circumstances, there is no automatic presumption that an 18-year-old service department unit should be reexamined or restructured. Whatever may be the presumption in an *initial* certification of parts and service department units, it defies common sense to invoke such a presumption to derail a successful bargaining history of many years standing. *See The Great Atlantic & Pacific Tea Co., Inc.,* 153 NLRB 1549, 1550, 59 LRRM 1679 (1965) (the Board "will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstances"); *see also Rock-Tenn Co.,* 118 LRRM 1377 (1985); *Crown Zellerbach Corp.,* 102 LRRM 1434 (1979).

The Board in its brief argues that "the record supports the conclusion that the common work interests of the mechanics during their 18 years of separate representation in the bargaining unit were basically unaffected by any changes introduced by the Company following the takeover and their shared community of interests remained intact." Board's Brief at 16. The majority, on the other hand, advances the possibility that the change of ownership may have had a substantial impact on the duties of the service and of the parts departments and on the community of interest existing in them. Had Indianapolis Mack offered to prove facts showing some change affecting the community of interest within the service department, I could readily accept the majority's approach. But there was no offer of proof putting the appropriateness of the bargaining unit in doubt. Under those circumstances, I think the presumption must be that relationships existing before the change of ownership continue in force and the appropriateness of the bargaining unit can be inferred from prior history. Hence, absent any showing of facts pointing in some other direction, the Board did not act arbitrarily in accepting the historical bargaining unit.

I therefore respectfully dissent.

Restaurant Corporation of America v. NLRB

801 F.2d 1390 (D.C. Cir.), September 26, 1986—
271 NLRB 1080

On petition to review and cross-application to enforce Board Order

Before BORK and SCALIA, Circuit Judges, and MACKINNON, Senior Circuit Judge

Opinion for the Court filed by Circuit Judge BORK

Opinion dissenting in part and concurring in part filed by Senior Judge MACKINNON

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BORK, Circuit Judge: Restaurant Corporation of America ("petitioner" or "RCA") petitions for review of a decision and order of the National Labor Relations Board ("NLRB" or "Board"). The Board found that RCA violated section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(1) and (3) (1982), by its disparate enforcement of a facially valid no-solicitation rule and consequent discharge of two employees. The Board cross-petitions for enforcement of its order. Because we con-

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clude that the Board's finding misconstrues the Act, is not supported by substantial evidence, and departs without explanation from previous decisions of the Board, we grant the petition for review, deny enforcement, and remand to the Board for further proceedings consistent with this opinion.

I.

Petitioner operates food service facilities at the Watergate complex in the District of Columbia. These facilities include the Les Champs Restaurant, the Peacock Lounge, and the Terrace Restaurant. Since 1975, RCA maintained the following no-solicitation rule, posted at entrances and on employee bulletin boards:

> SOLICITATION OF ANY KIND, INCLUDING SOLICITATION FOR CLUBS, ORGANIZATIONS, POLITICAL PARTIES, CHARITIES, ETC. IS *not* PERMITTED ON WORKING TIME OR IN CUSTOMER AREAS. DISTRIBUTION OF LITERATURE OF ANY KIND IS *not* PERMITTED ON WORKING TIME OR IN WORKING AREAS. OFF-SHIFT EMPLOYEES ARE *not* ALLOWED ON THE PREMISES.

Joint Appendix ("J.A.") at 18 n. 6.

In early 1981, Roxie Herbekian sought work in an organized restaurant through the Hotel and Restaurant Employees Union, Local 25. Upon being advised that such work was unavailable and learning that an organizing effort was underway at the Watergate complex, Herbekian applied for work and was hired there by RCA as a room service operator. A few months later, Herbekian also began working as a waitress at the Peacock Lounge. Herbekian then spoke with the union about an organizing effort among the food service employees at the complex. With the consent of the union, Herbekian began in May 1981 to solicit her co-workers at the Peacock Lounge and the physically adjacent Less Champs Restaurant about organizing a local union. She testified that her solicitation ran as follows:

> Generally, what I would say to them is that, in January I had attended a meeting with employees of the Terrace [Restaurant], a Union meeting. And, several of the employees there were interested in organizing. Yet, in order to continue the campaign, we would have to include people in the other restaurants and shops of the Watergate.
>
> And are you—the individual I was speaking to—would you be interested in pursuing getting a Union?

Hearing Transcript ("Tr.") at 32. Herbekian testified that she spoke with twelve people on work time concerning the union campaign prior to June 2, 1981. Tr. at 70–77.

Among those solicited by Herbekian was Sherwood Dameron, a waiter at the Les Champs Restaurant. Herbekian, Dameron, and six other employees attended a union-sponsored meeting on June 2, 1981, to discuss the prospect of organizing the employees of the Watergate complex. At this meeting each person received a list containing the names of fellow employees to contact about signing union authorization cards.

Herbekian subsequently contacted approximately ten employees on work time. Herbekian testified that she met with "[a]bout ten" employees following the June 2 meeting, Tr. at 40, talking with nine specific employees on work time and in the workplace. Tr. at 82–92.

Dameron also spoke with seven employees about the union organizing effort. Though five of these conversations did not occur during work time, two did. Dameron testified that these two solicitations lasted five to ten minutes. Tr. at 299.

On June 9, 1981, the General Manager of the Watergate facilities, Gene Flick, suspended Herbekian and Dameron pending investigation of their alleged violations of the no-solicitation rule. Dameron called Flick the next day to inquire about his employment status and was informed that he had been fired. On June 15, Herbekian was also fired.

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II.

On June 12, 1981, the Union filed a charge with the NLRB alleging that petitioner violated section 8(a)(1) and (3) of the NLRA and on August 26, 1981, the NLRB General Counsel issued a complaint.

Section 8(a) of the NLRB provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. § 158(a)(1), (3) (1982).

After conducting a hearing, the Administrative Law Judge concluded that RCA violated section 8(a)(1) and (3) of the Act by disparately enforcing its no-solicitation rule against Herbekian and Dameron. The ALJ based his conclusion on evidence that, during the year prior to the discharges, RCA permitted six nonunion "solicitations." These consisted of the following: (1) sometime in 1980, a collection was taken up to buy a going-away cake for a Les Champs waiter; (2) in December 1980, Les Champs manager Renee Loustaunau helped collect contributions to buy a blazer as a going-away gift for the assistant manager; (3) in December 1980, after Loustaunau mentioned at a staff meeting that the chef's wife was expecting a baby, several employees contributed $1.00 each for the purchase of a spoon as a gift; (4) in December 1980, employees contributed toward the purchase of a birthday cake for a Les Champs waiter; (5) in February 1981, Loustaunau and four employees chipped in to buy a going-away gift for a housekeeper; and (6) in March 1981, employees collected a total of $12.00 to buy a birthday cake for a Les Champs bartender. The ALJ found that these solicitations occurred, at least in part, on work time.

On August 21, 1984, the Board adopted the ALJ's findings and conclusions in pertinent part and ordered RCA, among other things, to cease and desist from disparately applying its no-solicitation rule, to offer Herbekian and Dameron reinstatement to their former positions, and to remove from its files any references to the unlawful discharges.

III.

It is not disputed that Herbekian and Dameron violated RCA's no-solicitation rule by engaging in union solicitation during work time. Rather, the Union claimed and the Board found that RCA committed an unfair labor practice by enforcing its no-solicitation rule against Herbekian and Dameron while tolerating the six instances of social solicitation among its employees. [1] Though we recognize that we must accept the Board's findings of fact if supported by substantial evidence, 29 U.S.C. § 160(e) (1982); *see Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and that we owe deference to the Board's interpretations of the NLRA, we think the Board's decision in this case misconstrues the Act, is unsupported by substantial evidence, and departs without explanation from prior decisions of the Board.

It is well-settled that an employer does not violate section 8(a) simply by maintaining, and enforcing against union activity, a valid no-solicitation rule. *See, e.g., The Seng Co.,* 210 N.L.R.B. 936 (1974); *Atkins Pickle Co.,* 181 N.L.R.B. 935 (1970).

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Both the ALJ and the Board found that RCA's no-solicitation rule was valid on its face, *see* J.A. at 6, 21, and we have no occasion to question that conclusion here.

The Board reasoned that RCA's enforcement of its no-solicitation rule against union solicitations but not against social solicitations amounted to disparate application of the rule in violation of section 8(a). It should be noted, however, that the Board has never held, and does not now contend, that tolerance of *any* nonunion solicitation is sufficient to make out a violation of the Act. Rather, the Board's decisions establish that a finding of disparate enforcement depends upon the nature and frequency of the nonunion solicitations permitted. *See The Seng Co.,* 210 N.L.R.B. 936 (1974). Unless the nonunion solicitations have "a potential for interference with work *substantially equivalent* to that of union solicitations," *Central Freight Lines v. NLRB,* 653 F.2d 1023, 1026 (5th Cir.1981) (emphasis added), a finding of disparate application is not warranted. *Cf. Atkins Pickle Co.,* 181 N.L.R.B. at 935 (no-solicitation rule aimed only at union solicitation does not violate section 8(a)(1) where "nothing in the record [indicates] that the isolated instances of other permitted [nonunion] solicitations . . . resulted in a corresponding interference with production").

We readily accept the Board's findings of fact concerning both the union and nonunion solicitations that occurred on work time during the relevant one-year period. It does not follow from these facts, however, that RCA engaged in illegal discrimination. The Board must carry its "affirmative burden," *Midwest Stock Exchange v. NLRB,* 635 F.2d 1255, 1259 (7th Cir.1980), of showing by substantial evidence that the permitted solicitations "had a potential for interference with work substantially equivalent to that of union solicitations."

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[1] We accept for purposes of discussion the Board's assumption that the collections for social purposes violated the terms of the employer's no-solicitation rule—though that strikes us as not inevitably true. Whether it did or not, the legal analysis would be the same, since a no-solicitation rule crafted to discriminate against union activity is no better than one lawfully crafted but discriminatorily applied. *Compare Central Freight Lines v. NLRB,* 653 F.2d 1023, 1026 (5th Cir.1981), *with United Aircraft Corp. v. NLRB,* 440 F.2d 85, 96 (2d Cir.1971).

Central Freight Lines, 653 F.2d at 1026. Though the ALJ characterized the nonunion solicitations in this case as "numerous and substantial," J.A. at 23, and the Board stated that "the incidents of permitted nonunion solicitations were not isolated," *id.* at 5 n. 3, these observations cannot substitute for the requisite finding that the union and nonunion solicitations had substantially equivalent potentials for disruption of work. Both the Board and the ALJ simply failed to consider the relevant potentials. This alone suffices to deny enforcement of the Board's order. [2]

In addition, we believe that the particular examples of nonunion solicitation involved here could seldom, if ever, support such a finding of equivalent disruptive potential. All were instances of intra-employee generosity designed to express appreciation of fellow employees on occasions such as birthdays or departures. Whatever minimal disruptive effect such solicitations may have is counter-balanced by an accompanying increase in employee morale and cohesion. It is indeed difficult to contemplate a pleasant workplace in which a reasonable number of such solicitations (if those social amenities which common humanity inspires can even be given that inappropriate term) did not occur. In these circumstances, we hold that the solicitations permitted in this case are not substantially equivalent to union solicitation and that, therefore, RCA's failure to treat the two alike does not constitute "discrimination" within the meaning of section 8(a) of the Act. Any other holding would render maintenance of a no-solicitation rule practically impossible. For instance, under the Board's approach, even a brief exchange between two employees about getting together after work could not be tolerated by employers without engaging in illegal discrimination. Unless employers were willing to enforce no-solicitation rules against such conduct, they would be forced to forgo enforcement of the rule to prevent oth-

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er, more disruptive, forms of solicitation. The Act does not require that choice.

Our conclusion is bolstered by the fact that the Board has cited no case, and we are aware of none, in which the type of nonunion solicitation RCA permitted has been held sufficient by itself to support a finding of disparate enforcement. Instead, the prior cases suggest strongly that such a finding is not justified. Nowhere in its decision in this case did the Board attempt to explain its apparent departure from such cases.

The Seng Co., 210 N.L.R.B. 936 (1974), is analogous to the case at bar. There, the Board rejected an ALJ's conclusion that an employer discriminatorily enforced its no-solicitation rule by permitting solicitations among its employees to collect funds for the needy family of a terminated employee, to buy a Christmas gift for their supervisor, and to purchase flowers to send to the funeral of a coworker's deceased mother. According to the Board, these "beneficent collections . . . were too isolated to establish disparate application of the [employer's] lawful rule." *Id.* at 936. Though *The Seng Co.* involved three instances of intra-employee generosity and this case involves six, we think it is more the nature than the number of permitted nonunion solicitations that precludes a finding of disparate enforcement in both cases.

Regardless, other cases have refused to find unlawful discrimination even when incidents of permitted nonunion solicitation were both more numerous and of a somewhat different character than those permitted in *The Seng Co.* For example, in *Serv-Air, Inc.,* 175 N.L.R.B. 801 (1969), the Board held that disparate enforcement was not established by an employer's permission of at least three solicitations to pay for flowers to be sent to the widows of deceased employees and to the hospitalized wife of an employee as well as two solicitations regarding employee contributions to the Community Chest and the Red Cross. Likewise, in *United Aircraft Corp. v. NLRB,* 440 F.2d 85, 96–97 (2d Cir.1971), the Board found no disparate enforcement of a no-solicitation rule even though the employer permitted "isolated instances" of solicitation for charities and gifts.

Though the solicitations permitted in *Serv-Air* and *United Aircraft* were limited to "beneficent acts," they differ from the solicitations permitted in this case because solicitations on behalf of charities involve outside organizations. In this respect, charitable solicitations are more like union solicitations than are solicitations that represent employees' generosity to one another. Thus, it is significant that the Board has identified no case basing a finding of disparate enforcement solely on an employer's permission of charitable solicitations. [3]

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[2] Our decision today is based upon the finding that the Board's decision is not supported by substantial evidence—a finding which is clearly within our prerogative upon review of a decision by the Board. *See* 29 U.S.C. § 160(e) (1982). Thus, the Dissent's assertion that we have "trenche[d] on important policymaking prerogatives" of the Board, *see* Dissent at 1403, reflects a misperception of our decision.

The cases cited by the Board and by the Dissent do not support the Board's decision in this case. For example, in *Midwest Stock Exchange v. NLRB,* 635 F.2d 1255 (7th Cir.1980), the court found that an employer discriminatorily enforced its no-solicitation rule by strictly enforcing the rule against union activities but permitting "[s]uch drives as the Crusade of Mercy, collection of blood in a bloodmobile . . . [on the employers'] premises, the selling of Avon products, Tupperware, boat cruise tickets, raffle tickets, Girl Scout cookies, and a number of other items." *Id.* at 1270. Of course, these numerous and varied solicitations were not limited to acts of employee generosity to fellow employees or even to charitable solicitations. Rather, they involved solicitations for personal profit as well as highly organized campaigns on behalf of outside business organizations and thus posed a much greater potential for interference with work than the solicitations RCA permitted here.

The remaining cases cited by the Board are simply inapposite. Though some involved acts of generosity between employees, all permitted anti-union or pro-company solicitation, solicitation that is unquestionably "substantially equivalent" to union solicitation. *See, e.g., Midwest Regional Joint Board v. NLRB,* 564 F.2d 434, 446 (D.C.Cir.1977) (disparate enforcement found where "Company countenanced distribution of pro-Company literature . . ., while strictly enforcing the rule with respect to the distribution of pro-Union activity"); *Ridgewood Management Co. v. NLRB,* 410 F.2d 738, 740 (5th Cir.) (no-solicitation rule discriminatory where employer permitted solicitations ranging from candy sales to church donations as well as solicitations designed to persuade employees not to unionize), *cert. denied,* 396 U.S. 832, 90 S.Ct. 87, 24 L.Ed.2d 83 (1969); *NLRB v. Electro Plastic Fabrics,* 381 F.2d 374, 376 (4th Cir.1967) (no-solicitation rule found discriminatory where employer permitted collections for gifts for employees, sales of cosmetics and other merchandise, and anti-union solicitations). The fact that the employer permitted anti-union or pro-company solicitations in all of these cases conclusively distinguishes the present case.

For these reasons the petition for review is granted, the cross-petition for enforcement is denied, and the case is remanded to the Board for further proceedings consistent with this opinion.

It is so ordered.

MACKINNON, Senior Circuit Judge (dissenting in part and concurring in part):

I dissent because of the disparity evident in upholding RCA's discharge of Dameron for "[*l*]*ess than five minutes* . . ." (Tr. 287, 289) he spent, while "off the clock," in union solicitation of only two cashier employees at one time, *who were not actually working,* while justifying those more numerous occasions when there was "interference with work" of a great many more employees for non-union purposes in six general solicitations. The disparity is obvious since the employer's Rule is absolute, prohibiting "solicitation of *any kind,* including . . . charities, etc. . . ." (J.A. 18). Thus, to uphold the firing of Dameron for *less* than five minutes of union solicitation while permitting non-union solicitation of more substantial magnitude would be to favor that solicitation which constituted a more substantial *actual interference with work.* In my opinion the majority refuse to follow the settled law on these issues. I would thus uphold the Board's cross-petition to enforce its order as to Dameron and deny it as to Hebekian. My reasoning on the entire case follows:

I.

The Restaurant Corporation of America, Inc. (the "Company") owns and operates food service facilities in the Watergate complex in the District of Columbia, including Les Champs Restaurant, the Peacock Lounge, the Terrace Restaurant, the Espresso Cafe, a pastry shop, and a delicatessen. Approximately 230 persons, fourteen of whom are supervisory employees, are employed by the Company in the aforementioned enterprises. The Company's food service employees are not represented by a union. Approximately thirty food service employees and three supervisory employees work in Les Champs Restaurant and the Peacock Lounge. In 1975 the Company adopted the following no-solicitation rule applicable to all employees:

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[3] Depending on the number and intrusiveness of the solicitations, we assume that such permission could amount to disparate enforcement if the Board found the relevant charitable solicitations to be substantially equivalent to union solicitation in terms of its potential interference with work.

> Solicitation of any kind, including solicitation for clubs, organizations, political parties, charities, etc. is *not* permitted on working time or in customer areas. Distribution of literature of any kind is *not* permitted on working time or working areas. Off-shift employees are *not* allowed on the premises.

(J.A. 5).

In early 1981 Roxie Herbekian inquired of the Hotel and Restaurant Employees Union, Local 25, AFL–CIO, as to the possibility of finding work in a restaurant with an organized union. When told that such work was available, Herkekian asked whether she might find work in a restaurant that had the prospect of being organized. The union advised her that an organizing campaign was underway in the Watergate facilities operated by the Company.

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Herbekian was hired by the Company in January 1981 to work half-time as a morning room-service operator. The union organizing campaign, however, did not reach fruition. In mid-March Herbekian took on additional work two or three days a week as a cocktail waitress in the Peacock lounge. Herbekian then spoke with the union about an organizing effort among the food service employees of the Company. With the approval of the union Herbekian began speaking to her co-workers about organizing a union local beginning sometime in May 1981. At this point Herbekian was speaking only with employees in the physically adjacent Les Champs Restaurant and Peacock Lounge. Herbekian testified that her solicitation ran as follows:

> Generally, what I would say to them is that, in January I had attended a meeting with employees of the Terrace [Restaurant], a Union meeting. And, several of the employees there were interested in organizing. Yet, in order to continue the campaign, we would have to include people in the other restaurants and shops of the Watergate.
>
> And, are you—the individual I was speaking to—would you be interested in pursuing getting a Union?

(Hearing Transcript (Tr.) 32). At this time Herbekian had neither union authorization cards nor union literature. Herbekian testified that she spoke with twelve people on work time concerning the union campaign prior to June 2, 1981 (Tr. 70–77).

Among those solicited by Herbekian was Sherwood Dameron, a waiter at Les Champs. Dameron, Herbekian, and six other employees attended a union-sponsored meeting on June 2, 1981 to discuss the prospect of organizing the employees of the Watergate complex. At this meeting each person received a list containing the names of fellow employees to contact about signing union authorization cards. Herbekian's list contained five names, Dameron's contained six (Tr. 81, 297).

Herbekian met with approximately ten people following the June 2, 1981 meeting. All of the meetings apparently occurred on work time. Herbekian testified that she met with "[a]bout ten" people following the June 2 meeting (Tr. 40), talking with nine specific employees on work time and in the workplace (Tr. 82–92). Herbekian described these meetings as follows:

> I spoke to employees, and I asked employees to sign cards. And, I took those cards. I asked them to sign them, and then they gave them back to me. And, I reported to a number of people who asked me about the meeting, what had happened at the meeting.

(Tr. 40). As a result of these solicitations, Herbekian received seven signed authorization cards (Tr. 42).

Meanwhile, Sherwood Dameron spoke with seven employees about the union organizing effort. Five of the conversations took place entirely *outside* of work time (Tr. 297–300). Dameron spoke with Tiep Bui and Charatsri Maneepanth, *cashiers* at the Espresso Cafe, while Dameron was off the clock, but while Bui and Maneepanth were sitting down together behind the counter, *not actually working* but during work time (Tr. 287, 299). Dameron gave Bui and Maneepanth union authorization cards. He testified that Bui and Maneepanth were not busy, and that the solicitation of Bui and Maneepanth lasted "[l]ess than five minutes" total (Tr. 287, 299).

One of Dameron's non-work time conversations was with Victor Sangster, a chef's helper at Les Champs. Richard Sultoni, a chef at Les Champs affiliated with management, thereafter asked Sangster whether he had been approached recently by anyone concerning a union. Sangster replied negatively. Sultoni asked Sangster what he thought of unions; Sangster replied that he did not know much about unions, but that he would inform Sultoni if he were to be approached regarding a union (Tr. 248–49). Tiep Bui, the cashier in the Espresso Cafe, was also questioned by Sultoni. But told Sultoni that Dameron had given her a union authorization card, but that she had left it at home (Tr. 109). Charatsri Maneepanth was questioned by Sultoni the day after receiving an authorization card from Dameron. Maneepanth named Dameron as the source of the card.

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On the morning of Tuesday, June 9, 1981 Roxie Herbekian was summoned to the office of Gene Flick, the general manager of the Company's Watergate facilities. Flick asked whether Herbekian was aware of the Company's no-solicitation rule. Herbekian answered that she was unaware of the rule. Flick gave Herbekian a copy of the rule and reminded her that the rule was prominently posted by the timeclock, in the employee locker room, and on the employee bulletin board in Les Champs and the Peacock Lounge. Flick then suspended Herbekian for three days pending investigation of her alleged violations of the no-solicitation rule. When Herbekian returned to work the following Monday, she was fired by Flick.

Flick called Dameron into his office the afternoon of June 9, 1981, and likewise gave Dameron a three-day suspension pending investigation into the alleged solicitations. Dameron called Flick the next day to inquire into his employment status, whereupon Flick informed him that he had been fired.

II.

On June 12, 1981 the Union filed a charge with the NLRB alleging that the Company had violated §§ 8(a)(1) & (3) of the National Labor Relations Act. [1] Of importance in the present appeal, the union alleged that the Company had promulgated an overly broad no-solicitation rule, had engaged in several instances of unlawful interrogation of employees, and had disparately enforced its no-solicitation rule in discharging Herbekian and Dameron, thus violating the statutorily protected right of employees to form a labor union. On August 26, 1981 the Board General Counsel issued a complaint.

Following a hearing the Administrative Law Judge held that Sultoni's interrogation, for the Company, of Sangster, Bui, and Maneepanth constituted an unfair labor practice under § 8(a)(1) (J.A. 20–21). With respect to the discharges of Herbekian and Dameron the Administrative Law Judge held that the Company's no-solicitation rule was facially valid, but that the no-solicitation rule had been disparately enforced in violation of § 8(a)(3) (J.A. 21–23). The decision of the Administrative Law Judge that the Company had disparately enforced the rule was based on evidence that, during the year prior to the firings of Herbekian and Dameron, there had been six unpenalized general solicitations among the employees of Les Champs and Peacock Lounge, some of which had the approval and participation of management. The record indicates that these were social solicitations for beneficent purposes that took place at least in part on work time.

At some point in 1980 a collection was taken up to buy a cake as a going-away present for Renee Sanjines, a Les Champs waiter. Sherwood Dameron was among those employees who contributed $1.00 toward the cake (Tr. 265). The cake was presented to Sanjines in the presence of the Les Champs and Peacock Lounge employees (Tr. 266).

Three collections occurred during December 1980. Renee Loustaunau, the manager of Les Champs, helped in the collection of money in order to buy the Les Champs assistant manager a blazer as a going-away gift. One employee testified that she gave $5.00 toward the blazer (Tr. 162–63). At a staff meeting in 1980 man-

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[1] Section 8(a)(1) provides:

It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [National Labor Relations Act § 7]. . . .

29 U.S.C. § 158(a)(1) (1982).

Section 7 guarantees employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

* * *

29 U.S.C. § 157(1982).

Section 8(a)(3) provides:

It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. § 158(a)(3) (1982).

ager Loustaunau mentioned that the chef's wife was expecting a baby. Several employees, including Sherwood Dameron, contributed $1.00 apiece toward the purchase of a spoon as a gift (Tr. 232–34, 250, 266–68). In December 1980 a collection was taken in order to purchase a birthday cake for a Les Champs waiter. Sherwood Dameron was among the contributors and attended the presentation of the cake by the Les Champs waiters and a couple of people from the Peacock Lounge (Tr. 260–61).

In February 1981 four employees and manager Loustaunau contributed money toward a gift for a housekeeper who was leaving the Company's employ (Tr. 164–65, 315–16).

In March 1981 $12.00 was collected to buy a birthday cake for a Les Champs bartender. The cake was presented by the waiters of Les Champs and manager Loustaunau during break time (Tr. 157–58, 261–64).

The Administrative Law Judge characterized these solicitations as "numerous and substantial" (J.A. 23). His opinion states:

> [T]he record [does not] disclose any adverse Respondent reaction to any of these nonunion situations. Against this background of condoned employee and supervisory solicitations, in violation of the rule, Dameron and Herbekian began to organize for the Union. Like the nonunion solicitations, these were conducted, at least in substantial part, on work-time. However, unlike the nonunion solicitations, these were not condoned. Within a week after the union solicitation began, the non-solicitation rule was promptly and vigorously enforced with the discharge of Herbekian and Dameron. It is clear, as a matter of Board and Court precedent, that the selective and disparate enforcement of a no-solicitation rule to prevent union solicitation is unlawful. (J.A. 23).

The Administrative Law Judge therefore recommended that the Company be ordered to cease and desist from disparately enforcing its no-solicitation rule. In addition, he recommended that Herbekian and Dameron receive backpay and be offered reinstatement to their former jobs or substantially equivalent employment (J.A. 24–25).

The NLRB General Counsel and the Company filed exceptions and supporting briefs with the NLRB. In a Board decision dated August 21, 1984 the NLRB in large measure affirmed the findings and conclusions of the Administrative Law Judge, and adopted his proposed order without substantial modification (J.A. 8–9).

The Company subsequently petitioned this court for review.

III.

We must determine whether the decision of the Board is supported by substantial evidence, *see Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951), in deciding that the facially valid no-solicitation rule prohibiting solicitation "of *any* kind" was applied in a fashion that discriminated against the statutorily protected right of employees to form a union. The law is clear that a valid no-solicitation rule applied in a discriminatory manner or maintained for discriminatory reasons may not be enforced against union solicitation. *See Midwest Regional Joint Board v. NLRB,* 564 F.2d 434, 446 (D.C.Cir.1977); *William L. Bonnell Co. v. NLRB,* 405 F.2d 593, 595 (5th Cir.1969).

The statutorily protected organizing rights of employees may be limited only by the legitimate interests of the employer in discipline, workplace efficiency, and property protection. In *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945), the Supreme Court held that such cases require "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Id.* at 797–98, 65 S.Ct. at 985–86. In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), a case decided after passage of the Taft-Hartley Act, the Court indicated approvingly that the Board, in an earlier case, had "[r]ecogniz[ed] that the employer could restrict employees' union activities when necessary to maintain plant discipline or production." *Id.* at 110, 76 S.Ct. at 683. The Court again stated: "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *Id.* at 113, 76 S.Ct. at 684 (citing *Republic Aviation,* 324 U.S. at 803, 65 S.Ct. at 987).

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In *Baylor University Medical Center v. NLRB,* 578 F.2d 351 (D.C.Cir.1978), this court upheld a broadly worded no-solicitation rule that prohibited "solicitation of employees . . . by other employees or distribution of literature between employees during work time and/or in work areas." *Id.* at 352. This court held, *inter alia,* that it was not an unfair labor practice for the employer to bar solicitation in the corridors of the medical center, which were defined as "work areas," because solicitation was "the most probable potential recurrent cause of disruption in the corridors. . . . Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable source of anxiety for persons [patients and visitors] already hard-taxed emotionally." *Id.* at 356. It was therefore the *disruption of the workplace rationale,* extending to the corridors, that this court relied on. *See also id.* at 360–61 (Leventhal, J., concurring in part and dissenting in part). In this respect the court was upheld by the Supreme Court in *NLRB v. Baylor University Medical Center,* 439 U.S. 9, 99 S.Ct. 299, 58 L.Ed.2d 202 (1978).

Decisions of the NLRB are in accord, as stated most clearly in a 1972 decision:

> The [National Labor Relations] Act establishes and protects [an employee's] right to engage [in union solicitation], so long as there is no interference with production. Only a substantial business justification, such as a genuine interference with the progress of the work, justifies any restriction on this right of solicitation. A no-solicitation rule is *presumptively,* and only presumptively, valid if it is limited to prohibiting solicitation during the time an employee is expected to be working and not during breaktime, lunchtime, or the like.[2] Such a rule is valid because it is presumed to be directed toward, and to have the effect of, preventing interference with production.

Daylin Inc., Discount Division, 198 NLRB 281, 281 (1972), *enf'd,* 496 F.2d 484 (6th Cir.1974). *See also Atkins Pickle Co.,* 181 NLRB 935, 937 (1970); *Emerson Electric Co.,* 187 NLRB 294, 300 (1970); *Hanes Hosiery, Inc.,* 219 NLRB 338, 350 (1975); *Sunnyland Packing Co.,* 227 NLRB 590, 594 (1976) (no-solicitation rule is permissible "provided that the rule or regulation is promulgated in good faith and bears some reasonable relation to *efficient operation of the plant,* and is not merely a device to obstruct or impede self-organization.") (emphasis added); *George Washington University Hospital,* 227 NLRB 1362, 1373–74 (1977) ("The factual recital shows that the prospective solicitation policy generally was widely ignored in practice in respect to nonunion matters which were neither more essential to nor less disruptive of the effective functioning of the hospital than the exercise of the statutory rights here involved. . . ."); *Paceco, A Division of Fruehauf Corp.,* 237 NLRB 399, 401 (1978). *See generally* 2 T. Kheel, Labor Law ch. 9A (1984).

Carefully developed legal doctrine indicates that restrictions on union solicitation must be justified by the employer's legitimate concerns for workplace efficiency. This is the only sensible way to reconcile

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the cases in this area. Thus, a ban on solicitation on working time and in working areas is presumptively valid; conversely, an employer may not generally prohibit union solicitation or the distribution of union literature by employees during nonworking times or in nonworking areas. *See NLRB v. Babcock & Wilcox, Inc.,* 351 U.S. at 112–13, 76 S.Ct. at 684–85; *Republic Aviation Corp. v. NLRB,* 324 U.S. at 797–98, 65 S.Ct. at 985. Employees may be restricted to distributing union literature and materials to nonworking time and nonworking hours. *See id.* Retail stores may ban solicitation from selling areas, though not from nonselling areas during break time or waiting time. *See Marshall Field & Co.,* 98 NLRB 88 (1952), *enf'd,* 200 F.2d 375 (7th Cir.1953); *Daylin, Inc.,* 198 NLRB 281 (1972), *enf'd,* 496 F.2d 484 (6th Cir.1974). Restaurants may ban employee solicitation during nonworking time to noncustomer areas, *see Bankers Club, Inc.,* 218 NLRB 22 (1975), as hospitals may ban solicitation from patient care areas. *See Beth Israel Hospital v. NLRB,* 437 U.S. 483, 500–07, 98 S.Ct. 2463, 2473–76, 57 L.Ed.2d 370 (1978).

Disparate enforcement inherently requires a finding that the employer treated similar conduct differently. *Midwest Regional Joint Board v. NLRB, supra,* at 442. This is a fact-based inquiry in which the Board proceeds on a case-by-case basis. *See, e.g., Hammary Manufacturing Corp.,* 265 NLRB 57,

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[2] Where it could be shown from the characteristics of the work that union solicitation during worktime would in no way interfere with performance of the work, for example, Lil Abner's mattress-testing job, a no-solicitation rule of any kind would be invalid.

57 n. 4 (1982); *Saint Vincent's Hospital,* 265 NLRB 38, 38–41, *enf'd,* 729 F.2d 730, 735 (11th Cir.1984). This court must therefore determine whether, in terms of actual interference with workplace production and discipline, the union solicitations by Herbekian and Dameron were substantially equivalent to the condoned instances of employee collections for social purposes.

IV.

As mentioned above, the Company had condoned six general instances of solicitations for social purposes during the year prior to the discharge of Herbekian and Dameron. These solicitations, however, were nothing more than the ordinary, *ad hoc* expressions of friendship that naturally occur among small groups of people. Most of the solicitations involved individual requests for contributions of $1.00 among a small group of friends and co-workers. These solicitations took only a few seconds.

Herbekian's solicitations on behalf of the union stand in marked contrast to the condoned non-union solicitations. Over scarcely more than a month Herbekian spoke on twenty-two occasions with other employees about the union. Each solicitation occurred on work time in clear violation of the Company's rule. Moreover, Herbekian violated the no-solicitation rule in a systematic fashion quite different from the spontaneous social collections that had occurred on six occasions over the past year. It is equally obvious that Herbekian's solicitations on behalf of the union were significantly more involved than, say, a simple request to chip in for a birthday cake. According to Herbekian's testimony, her solicitations on behalf of the union often involved an explanation of the comparative merits of the union's dental, hospitalization, and legal plans (Tr. 97–98). I therefore conclude, after considering the comparative *disruption of the workplace* that resulted from the solicitations for the union by Herbekian and the solicitations of some employees for purely social purposes, that there is no substantial evidence that the Company disparately enforced its no-solicitation rule to the prejudice of Herbekian. The object of the rule is to protect against interference in the workplace, and the interference by Herbekian was very substantial and concentrated while the interference caused by the social solicitations was very minimal and irregular. Since the degree of interference varied greatly the facts do not support the Board's finding of a disparate application of the rule.

With respect to Sherwood Dameron, he violated the no-solicitation rule in his conversation with Bui and Maneepanth. According to Dameron's testimony, the conversation lasted a total of "[l]ess than five **1402** minutes" (Tr. 299), during which time he presented some of the merits of forming a union (Tr. 286–88). Dameron spoke with five other employees regarding the union, but these conversations took place outside of work time and thus could not form the basis for valid enforcement of the Company's rule. The interference in the workplace caused by Dameron's solicitation was very substantially less than that caused by Herbekian's solicitations.

It bears repeating that the "essence of discrimination in violation of section 8(a)(3) is treating like cases differently." *Midwest Regional Joint Board v. NLRB, supra,* at 442. Dameron was discharged because of his solicitation of two employees on work time, which clearly violated the Company's no-solicitation rule. [2] Of course, the social solicitations

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[2] On appeal the Company argues that Dameron's discharge must be understood in the context of the union's intention to solicit all 200 of the employees in the Watergate complex. *See, e.g.,* Company Brief at 23, 31. However, such reasoning distorts the statutory scheme, and misinterprets the law dealing with no-solicitation rules.

Assessing the validity of no-solicitation rules requires the Board to serve two sometimes-conflicting precepts: first, the imperative right of the employer to preserve the efficiency of the workplace; and, second, the statutorily protected right of employees to form labor unions. Thus, a broad no-solicitation rule, such as the one in this case, may validly provide for a general prohibition on work time solicitations. However, when employee solicitations are made pursuant to the statutorily protected right to form labor unions, the Board must ensure that the rule is enforced without regard to the content of the solicitation. Moreover, since the underlying premise of the no-solicitation rule lies in preserving an efficient workplace, our focus must be on the *actual disruption* that occurs in the breach of the rule. In determining the validity of *Dameron's* discharge, it is therefore irrelevant that Herbekian violated the rule on numerous occasions or that the union had designs on organizing the Company's employees, because the Board's focus must be on whether *Dameron's* actions by themselves were sufficient to warrant a valid discharge when compared with unpunished instances of non-union solicitation. In the same fashion, it is irrelevant that Dameron solicited five employees outside of work time—and thus outside of the no-solicitation rule in this case—because the five solicitations could not form the basis of a valid discharge.

The Company additionally seems to misconstrue the very notion of disparate enforcement, *i.e.,* treating like things differently. *See Midwest Regional Joint Board v. NLRB, supra,* at 442. The Company assumes that there exists some threshold level of non-enforcement, under which the

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engaged in by the Company's employees were also admittedly in violation of the no-solicitation rule. We must decide whether, in terms of the *actual disruption of the workplace,* the respective solicitations were substantially equivalent. The social solicitations permitted by the Company were only nominally disruptive of the workplace, but the same is true of Dameron's solicitation of Bui and Maneepanth. And although the six instances of condoned solicitations lasted only a few seconds, each instance apparently involved between three and twelve employees. Dameron's joint solicitation, while he was "off the clock," of the two employees who were not working lasted "[l]ess than five minutes," (Tr. 299), and was thus of lesser duration than the six condoned solicitations of substantially more employees, and Dameron's violative solicitation involved only two employees.

On the factual record the Administrative Law Judge's characterization of the condoned solicitations as numerous and substantial is unsupported. However, in terms of workplace disruption, Dameron's prohibited solicitation and the condoned social solicitations were both *de minimis,* and thus substantially equivalent. For purposes of our inquiry, then, the condoned

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solicitations and the solicitations of Dameron both violated the rule prohibiting "[s]olicitation of any kind . . ." and were like cases treated differently by the Company. I therefore find substantial evidence that the Company in its discharge of Dameron disparately enforced its no-solicitation rule in violation of § 8(a)(3). [3]

V.

Despite the clarity of the controlling law, the majority opinion ignores it and trenches on important policymaking prerogatives of the National Labor Relations Board. First, the broad mandate of the National Labor Relations Act simply cannot negate the Board's decision in this case. The Act gives the Board authority to define the contours of § 7 rights. *See Hudgens v. NLRB,* 424 U.S. 507, 522, 96 S.Ct. 1029, 1037, 47 L.Ed.2d 196 (1976). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). *Cf. United States v. Fulton,* ––– U.S. –––, –––, 106 S.Ct. 1422, 1426, 89 L.Ed.2d 661 (1986) ("We must uphold [the agencies'] interpretation if the statute yields up no definitive contrary legislative command and if the agencies' approach is a reasonable one.").

Therefore, I cannot accept the majority's reluctance to accept the Board's long-standing treatment of social solicitations in cases such as the present one. The majority asserts:

> In addition, we believe that the particular examples of nonunion solicitation involved here could seldom, if ever, support such a finding of equivalent disruptive potential. All were instances of intra-employee generosity designed to express appreciation of fellow employees on occasions such as birthdays or departures. Whatever minimal disruptive effect such solicitations may have is counterbalanced by an accompanying increase in employee morale and cohesion. It is indeed difficult to contemplate a pleasant workplace in which a reasonable number of such solicitations (if those social solicitations which common humanity inspires can even be given that name) did not occur.

Maj.Op. at 1394. This attempt to distinguish beneficient collections for fellow employees from other solicitations is a pure statement of policy. Board decisions have consistently demonstrated that social solicitations should be considered along with union solicitations in addressing claims of disparate treatment under an absolute no-solicitation rule such as is involved here. *See, e.g., The Seng Co.,* 210 NLRB 936 (1974); *Daylin Inc., Discount Divi-*

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no-solicitation rule remains valid and over which the rule is invalid when applied to labor union solicitations. *See* Company Reply Brief at 4. The majority opinion unfortunately seems dangerously close to accepting such a position. Maj.Op. at 1395 ("no case . . . in which the type of nonunion solicitation RCA permitted has been held sufficient *by itself* to support a finding of disparate enforcement."). The disparate enforcement inquiry does not, however, give the Board license to make such distinctions. The Board instead must measure, in terms of the *actual disruption to the workplace,* the instances of condoned, non-union solicitations against the instances of union solicitations that led to the employee's discharge. *See* text at p. 1395, *et seq.* Only then can the Board, and this court on review, determine whether the employer "treat[ed] like cases differently." *Midwest Regional Joint Board, supra.*

[3] The Board invites us on appeal to link the § 8(a)(1) violations committed by Sultoni with Dameron's discharge. *See, e.g.,* NLRB Brief at 15–16. However, neither the Administrative Law Judge nor the Board relied on Sultoni's § 8(a)(3) violation in the discharge of Dameron, and such *post hoc* rationalization cannot support the Board's decision.

sion, 198 NLRB 281 (1972), *enf'd,* 496 F.2d 484 (6th Cir.1974); *Hanes Hosiery, Inc.,* 219 NLRB 338 (1975); *Sunnyland Packing Co.,* 227 NLRB 590 (1976); *George Washington University Hospital,* 227 NLRB 1362 (1977); *Saint Vincent's Hospital,* 265 NLRB 38 (1982), *enf'd,* 729 F.2d 730 (11th Cir.1984); *Lance, Inc.,* 241 NLRB 655 (1979); *Montgomery Ward & Co.,* 224 NLRB 104 (1976).

Although the majority insists that it is merely holding that "the Board's decision is not supported by substantial evidence," Maj.Op. at 1394, footnote 2, the majority erroneously evaluates the evidence according to a new legal standard—that a Board finding of disparate application of a no-solicitation rule will not be deemed to be supported by substantial evidence absent a finding that "non-union solicitations have 'a potential for interference with work *substantially equivalent* to that of union solicitation.' " Maj.Op. at 1394 (quoting *Central Freight Lines v. NLRB,* 653 F.2d

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1023, 1026 (5th Cir.1981)), The "potential for interference" standard employed by the majority, however, derives not from a Board decision, but from *dicta* in a Fifth Circuit decision that *denied enforcement* to a decision of the Board. The majority's decision thus is hardly compelled by the weight of authority. As set forth above, the well-settled rule requires an evaluation of the *actual interference* with the efficiency or discipline of the workplace. *See supra* at 1394–1396. Even if we were to apply the rule advocated by the majority it would not justify the disparate treatment involved in the discharge of Dameron for less than five minutes of off duty solicitation of two cashiers who were not working.

VI.

In conclusion, I would affirm the Board's holding that the Company's discharge of Sherwood Dameron for conduct that involved only very minimal actual interference with the workplace, constituted disparate treatment in violation of § 8(a)(3) of the Act. With respect to Roxie Herbekian, her union solicitations in violation of the no-solicitation rule were substantial, concentrated and disrupted the workplace and thus her discharge was not disparate treatment in violation of § 8(a)(3). I would therefore deny enforcement of the Board's decision that the company violated § 8(a)(3) in the discharge of Herbekian. Dameron is entitled to receive backpay and reinstatement to his former job or substantially similar employment. It is noted that Dameron's eligibility for an award of backpay is subject to be mitigated by any money he earned or could have earned between the time of discharge and the time of our decision. The Company does not challenge the Board's decision that the Company violated § 8(a)(1) of the Act by interrogating employees about union activities. I would therefore affirm the Board in this respect and remand the case to the NLRB for further action not inconsistent with this opinion.

Herrick & Smith v. NLRB

802 F.2d 565 (1st Cir.), September 29, 1986—275 NLRB 398

On petition to review Board Order

Before CAMPBELL, Chief Judge, ALDRICH and ROSENN, * Senior Circuit Judges

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BAILEY ALDRICH, Senior Circuit Judge: On May 11, 1983, charging party Mary Moran, a legal secretary employed by the now dissolved Boston law firm of Herrick & Smith, accompanied by a small number of other secretaries, met, at the suggestion of one of the partners, with the firm's managing partner, Remis. The purpose of the meeting, for which Moran had prepared an agenda, was to voice dissatisfaction with employee relationships, and to air specific complaints. The National Labor Relations Board warrantably found that this was activity protected by Section 7 of the Act. 29 U.S.C. § 157. The meeting was pleasantly conducted on both sides, and, even on the firm's evidence, there were airable grievances. [1] On June 17, 1983, Moran was discharged. The ALJ, although, at one point, finding that petitioner did have a valid complaint, found that the real reason for the discharge was her having "engaged in concerted activities." Stating that it had carefully examined the record, the Board affirmed the findings and

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* Of the Third Circuit, sitting by designation.

[1] Summarizing the agenda, after a very courteous introduction thanking the managing partner for receiving them, the general matters presented were the secretaries' alleged low morale (noting the number who had recently left); the feeling that the lawyers did not treat them with courtesy and respect (to which partner Anninger contributed, post), that Cashman, post, did not give them sufficient response and that her assistant was highly disliked, and that they were asked for uncompensated overtime on account of pro bono work.

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proposed order without opinion. Petitioner seeks review.

Whether the ALJ was correct or not, on this single question of fact this is the most inflated case about a minimum matter—one secretary, no general course of improper conduct, no union, and no novel principle—that it has ever been our misfortune to encounter. The ALJ, who never once suggested curtailment, permitted the trial to extend over 14 days between October 31, 1983 and March 13, 1984. The resulting transcript ran to 2400 pages, [2] "abbreviated" for us to 1072 pages. Even thus abbreviated, we are treated, not only to endless repetition, but to pages of whether a partner signed two overtime slips, or three, or whether an absence was on a Wednesday or a Thursday, all of no conceivable significance except to demonstrate that memories were not perfect, and that no detail of office life was too unimportant to escape minute and unrestricted exploration. [3] This was not foot dragging by petitioner. General Counsel introduced 52 exhibits, of which those reproduced fill 156 pages of appendix, giving us a total of 1344 pages to review in addition to the ALJ's decision. [4]

Having embarked on such a scrutiny, the ALJ followed it up, on November 20, 1984, with a Decision of 52 tightly written pages, each with over 50 lines of text, if no footnotes. By sampling segments, we compute the Decision to run over 30,000 words. The expense of all this, in time and money, is not our concern, but the burden on our time for obligatory review most certainly is. The Board may choose to express its approval in a single sentence, but even a superficial reading of the Decision convinced us that there could well be weaknesses that its extraordinary length served to conceal. Study reveals this to be so.

Preliminarily, we comment upon the ALJ's methodology. It is, of course, proper, indeed usual, to form an opinion that a particular witness is credible, or not credible. And it is also true that a generally credible witness may sometimes not speak the truth. But the degree that the ALJ switched back and forth between individual witnesses is almost startling. Again, a witness will be rejected on one occasion because self-serving, but accepted the next without apparent hesitation. In one conference each participant was the credible one sometimes, and not credible others. All these things are possible, but in a lifetime on both sides of the bench the present writer has never possessed such total confidence in his discernment. Unfortunately, as will appear, it here led to trouble.

Coming to the merits, to start with the high points, as already mentioned the May 11 meeting, on which the ALJ relied, was not hostilely formed, but was suggested by a member of the firm, was agreeably presented, and was admittedly justifiable. In fact, the basis for the ALJ's decision was the self-drawn inference—the Board has not answered petitioner's pointing out that there were no expressions, or indications of any kind, unless the discharge itself be such—that annoyance at the airing of justifiable complaints caused the discharge. This is a damned-if-you-do, damned-if-you-don't, approach. Annoyance would seem equally inferable, and perhaps more so, if the complaints had been wholly unjustified. Under the circumstances, we think there should be something more tangible than the mere fact there was a meeting. It would seem an extraordinary policy if simply because there was a meeting, even one suggested by the employer, and later someone was discharged, an ALJ

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could, without more, infer impropriety. Particularly this should be so when the ALJ found, post, that Moran did thereafter furnish cause for legitimate employer dissatisfaction.

To continue, Moran was what was known as a "floater," a secretary who would be assigned for extra work, or to fill in for secretaries who were absent, for one reason or another. Sometimes one assignment would be for a considerably long period, as occurred from late 1981 to the spring of

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[2] As a matter of interest, this is 38% of what we hear was the total transcript in the recent half-billion dollar, anti-trust action between the two national football leagues.

[3] We note, in passing, that several times the ALJ mentioned other witnesses not having been called, omissions we cannot regret.

[4] The briefs of the parties required us to read much of this record; petitioner's because of frequent recital, as facts, of testimony that need not be accepted, and the Board's because of omission of parts of the evidence that were not, and, in some cases could not be, rejected; in both instances putting the case in a much too favorable light.

1983. The ALJ found that over the long run, her performance reports ranged from the excellent to the critical, and in between.

In May, 1983, Moran was assigned to a partner, Thomas Anninger, who had lost his regular secretary and was looking for a new one. He appears to have been difficult to please, and erratic in his views, but, at least to some extent, he and Moran hit it off. In fact, they did so sufficiently well that when Anninger testified that, two or three weeks before the final episode, he told Mrs. Cashman, the personnel director, that when he returned from his vacation week of June 13th, he did not wish Moran back, the ALJ refused to believe him. In relying simply on the fact that things were going well, the ALJ failed to look back to a finding, eight Decision pages earlier, that, though no date was set, it was clearly understood from the beginning that this was a temporary assignment.

Prior to the week of June 6 Anninger had told Moran that he was going on vacation the 13th, and that the week of the 6th was to be very busy. Monday morning, the 6th, Moran had to be in court on a personal matter, but, without his knowledge or assent, she took the rest of the day off. Thereafter, on either Wednesday or Thursday, she was out sick. The ALJ found that Anninger complained to Cashman on Thursday that, to quote the ALJ, "he 'had it up to here with Moran' and could not count on her; that the week had been 'horrible,' and that he wanted a different secretary when he returned." Cashman asked him for a written appraisal. He came in on Saturday the 11th to clean up, and wrote an unfavorable appraisal, concluding that he felt Moran should be discharged. The ALJ refused to believe Cashman's testimony that he had recommended this last on Thursday because, in his own testimony, he had failed to recall it. There is no reason why Anninger would make this recommendation Saturday and not Thursday, and nothing of substance turned on it, but Cashman, who was credited in many matters, was disbelieved here because she was not corroborated.

Continuing with Anninger, we would have thought that his upset about his prevacation week, which we consider many lawyers less high strung would sympathize with, would figure in the ALJ's thinking in weighing the causes for his recommending Moran's discharge. Instead, it is entirely discounted in favor of the May meeting. "Anninger impressed me as a man who does not take criticism lightly," and that was that.

While it is not a determinative matter, it might not be amiss to note the revelation that Moran made on May 11 as to Anninger's conduct that is found to have annoyed him so much that on June 11, if not on June 9, he recommended her discharge. On an occasion in early May, having been told by Moran that she could not stay after 5:00, Anninger had expressed his irritation by saying, "Shit, shit, shit." Moran said nothing at the time, but the next day she reported it, with a written memo, to the personnel director. "This is how we are treated, Mrs. Cashman." Cashman told her that, in the future, she should speak up and complain directly to Anninger. [5] Our problem is not so much that we have difficulty in regarding Moran's raising this at the May meeting as so serious in Anninger's mind that he wanted her discharged, [6] as it is in following the ALJ's thinking. How could the criticism have affected him so little that, following the meeting, their relations were so fundamentally good that the ALJ was unable to credit his testimony that he told Cashman he did not want her back after his vacation, but affected him so much that his reaction to the week of June 6 was just make-believe, a cover-up excuse for seeking her discharge? The logic of this entirely escapes us. The ALJ does, it is true, point to some favorable appraisals that Anninger gave Moran after May 11, but here, why would he have done this quite unnecessary act if criticism of him at the meeting was rankling? The ALJ travels both sides of the street, seemingly without recognizing it, and, at any rate, without explaining it.

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Turning to Cashman, the ALJ found that she "was not as unconcerned about the complaints made about her to Remis as she testified to being." Again, as with Anninger, there was no affirmative evidence of this concern, unless shown by the June events themselves. The ALJ even disbelieved Moran's account that Cashman avoided her. Concern was found by the process of disbelieving Cashman's testimony that she was *not* concerned. Though tempting, it is fallacious to think that disbelief of testimony warrants an affirmative finding to the contrary. If a plaintiff must show that it rained on Saturday and calls the defendant, who testifies that it did not rain, no amount of confidence of the trier in his ability to conclude that defendant was lying can serve to constitute proof of a rainfall. *Cf. NLRB v. Joseph Antell, Inc.*, 358 F.2d 880 (1st Cir.1966). Were the rule otherwise, any plaintiff could prove any case in the world simply by calling his opponent and getting him to deny it, and then arguing he was a liar. The Board does not like this principle, but it faces more than our own decision. *Cf. Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (disbelief of libel defendant's testimony of his good faith cannot warrant a finding of lack of good faith, viz., of malice).

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[5] We note that the ALJ believed Cashman's version of this incident and disbelieved Moran's testimony that Cashman threw the memo on the desk, said she wanted no more such, and criticized Moran for being inflexible. It seems that Moran was given to the dramatic. When a partner to whom she had earlier been assigned had complained of her being ten minutes late, he "screamed" at her, and when administrative manager Clark discharged her he "screamed" and "yelled." The ALJ disbelieved this last, too. *See* post.

[6] While we do not approve it, at the same time we do wonder at the seriousness. This was a, so-to-speak, intransitive expletive, as distinguished from another not uncommon, four-letter-word expression, listener-directed.

On June 16, Cashman met with Moran to discuss Anninger's unfavorable appraisal, together with other matters, including reports that she had been "bad-mouthing" the firm. Moran reacted very hostilely, saying it was all "ludicrous," and wanting, instead, to discuss her own complaints. With respect to this conference, and the one the next day, the ALJ credited Cashman over Moran in all respects but one. A memo was prepared of what had been said, and, admittedly, Moran refused to sign it. The ALJ found, "Moran credibly testified that she did not recall Cashman telling her that she only wanted Moran to sign a memo to acknowledge that the conversation took place, and not as an indication that she agreed with the substance of what she had been told." Four pages later this became, "Moran denied in her testimony . . . that she was told that she was not being asked to acknowledge that the contents of the memo were substantially accurate, but only that it correctly reflected what was said the day before. At that point Moran appeared more forthright and candid than did Cashman, and I therefore credit Moran." In point of fact, Moran testified three times that she did not recall, but when asked whether she would deny, refused to do so. Ergo, Moran appears "candid" in saying something she did not even say at all.

Finally, the memorandum itself, which Moran testified was given her to read, concluded with the following:

> I have read and understand the contents of this memorandum.
>
> ________________
>
> Mary M. Moran

In point of fact, at no time did Moran, or anyone else, testify that she was asked to

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acknowledge that the complaints against her were factually correct.

On June 17 there was a further meeting, this time including Michael Clark, an administrative manager of the firm. We again quote from the ALJ's Decision.

> According to Moran, Clark then told her that he wanted her to sign the memo and she either did not respond or refused to sign.[LB30] Moran testified that Clark then told her again to sign the memo and when she refused he became 'very red' and, leaning over his desk, pointed his finger at her and 'screamed' that she was fired. However, both Cashman and Clark credibly denied that Clark had acted in this way.

The ALJ's account of the June 16 and 17 meetings is highly elaborate and has internal inconsistencies. In addition to the alleged denial, at one point the ALJ said that Moran's "statement that Cashman told her that her continued employment would depend on whether she signed the memo, seemed to me to be more of an attempt to bolster her theory of why she was ultimately discharged than to accurately recount the events at issue." Yet, elsewhere, the ALJ found that, on June 17, "Cashman sent a memo to Remis" stating, in part, "She refused to sign. Mike told her we had no alternative but to terminate her employment.' " Still elsewhere, the ALJ affirmatively found that Clark did say this to Moran. Thus Moran is not only found candid when she said something she did not say; she is charged with a self-serving departure when her testimony agrees with the record. (The

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[30] On direct examination Clark testified that the first time Clark told her to sign the memo she refused, whole on cross-examination she testified that when Clark first gave her that instruction she did not say anything.

Clark memo was very abbreviated. Even on her own testimony Moran was uncooperative in the total discussion.)

To continue with the admitted refusal to sign, although the ALJ went into extensive detail in an attempt to find that Moran was unusually treated, the evidence showed, backed by a number of exhibits, that all employees who were called in for review signed the memorandum thereof with the same acknowledgement presented to Moran. Moran's only given reason for not signing was that the "warning notice not only is an insult, but also a clear blatant act on your part to set me up to be fired." In this circumstance the ALJ found that the "refusal to sign was also a factor in her discharge."

This finding would seem inescapably correct. An employer with 70 secretaries cannot permit one, already under criticism, whether claimed "ludicrous" or not, to reject its practices and, in effect, tell it to go jump. This finding, however, was never mentioned again, nor was it placed in juxtaposition with, or weighed against, in any articulate fashion, the annoyances inferred as flowing from the May meeting.

On pages 50 and 51 the ALJ finally disposed of petitioner's reasons for discharging Moran, doing so on the basis of the individuals involved. For Anninger, whose unfavorable report prior to leaving on vacation sparked the discharge, the ALJ, having disbelieved the testimony that he requested a reassignment two or three weeks before because inconsistent with the good post-May 11 relations, was able to say that the fact that his recommendation was "based on the events of only one week strongly supports the inference, which I draw, that Anninger was trying to build a case for Moran's discharge and that he was motivated by concerns other than her performance as a secretary." This, we might again call flexible logic, was followed by, "Moreover there is no contention that Moran was not entitled to the time she took off the week of June 6." Of course there was. Even assuming she was in fact sick on Wednesday or Thursday, she took Monday afternoon off on her own, just when she knew Anninger particularly needed her. However, it seems that Anninger, in describing the week as "horrible," was making it up to conceal his real feeling about the May 11 meeting.

The ALJ's ease in ascribing improper motives is even carried to the extent of finding such in Anninger's having wanted Cashman to be present at the May meeting. For a substantive meeting involving personnel policies, who might be thought a more important attender than the personnel director?[7] To use a mild term, we cannot follow the ALJ's thinking process with respect to Anninger.

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For Cashman, the ALJ starts out by referring to the previous affirmative finding of her "concern" over the May meeting, a finding we have pointed out was erroneously reached. With that gone, there was neither act nor word on which to predicate a finding of concern. The ALJ's next step was to say that Cashman stimulated Anninger to write an unfavorable report so that she could use it to obtain her ends. Yet Anninger quite obviously needed no encouragement. He was the one who initially voiced the complaint; Cashman, in her capacity as personnel director, merely asked him to submit the complaint in writing. As a finale, the ALJ concludes that Moran "was under no obligation to acknowledge the validity of Anninger's criticisms." As we have laboriously stated, she was not asked to.

Finally, Clark, the active discharger, is under the same cloud, although here the ALJ does not even point to any basis for his resentment, unless mere disbelief of some of his testimony on collateral matters could be thought such. (It could not be, of course, ante.) He was not at the May meeting; he was not involved, nor criticized. While the ALJ found that Clark "was looking for a basis for either causing Moran to resign or discharging her," no support for this finding exists.

The ALJ concludes, "Clark's assigning Moran's refusal to sign as grounds for discharging her is the final indication that the Respondent's agents were motivated [by her] concerted activity." Forgotten is the finding, 15 pages earlier, "I find Moran's refusal to sign was also a factor in her discharge." If, conceivably, this had not been forgotten, the ALJ is saying that if an employer advances a bona fide reason, this in itself is indicative of impropriety.

It is black letter law that the Board's initial burden is to make a prima facie showing that the employee's protected conduct was a substantial or motivating factor for the discharge, after which the burden of going forward shifts to the employer. E.g., *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 27 (1st Cir.1985). The Board's showing must, of course, stand, if supported by substantial evidence on the record, viewed as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). Yet here the mildest form of employee-employer meeting, employer suggested, agreeably conducted, and followed by no unpleasant acts or words, became the sound basis of an unfair labor act, [8] because an ALJ, as to one person involved, was "impressed that he did not take criticism lightly," and that another "was not . . . unconcerned." In the course of this gossamer case the ALJ misstated evidence, reasoned illogically, and reached an unsupported and unsupportable result. On the record as a whole, confirmed by an analysis of the Decision itself, we find the Board did not adequately meet its initial burden. It is not a heavy burden, but to find otherwise here would make it meaningless.

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[7] We will not take space to describe the misunderstanding that had led to her absence.

In view of the exhausting work we have been put to we feel justified in saying that General Counsel may present any case he wants to, but, with all due respect, even had it been errorless, this had become a gross imposition that the Board, with its supervisory authority over trial counsel and ALJs, should never have inflicted on us. If its staff has nothing better to do, we have. We call its attention to a recent remark by the incoming Chief Judge of the D.C. Circuit. "A particular need in this circuit is for a special calendar for the complex administrative law cases, which take so much of our time." *New D.C. Circuit Chief Judge Wald Interviewed,* Third Branch, July 1986, at 1, 6. Complex cases have to be complex. If we had not seen it, we would have found it difficult to think the present case was for real.

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The petition for review is granted; the order will not be enforced. Costs are charged against the Board.

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[8] We will not take space to review the ALJ's separate finding that respondent's warning Moran against "bad-mouthing" the firm was an unfair labor practice. It could not rise above the discharge.

Marie E. Darr v. NLRB

801 F.2d 1404 (D.C. Cir.), October 2, 1986—273 NLRB 1515

On petition to review Board Order

Before GINSBURG, STARR and SILBERMAN, Circuit Judges

Opinion for the Court filed by Circuit Judge SILBERMAN

1405

SILBERMAN, Circuit Judge: Petitioner, Marie Darr, challenges a National Labor Relations Board decision to defer to an arbitrator's award denying her backpay as a remedy for an unlawful discharge. She argues that the arbitrator's findings establish that the discharge violated the National Labor Relations Act and that Board precedent requires a make-whole remedy. Because we find the Board's justification for deferring inadequate, we remand the case to the Board for further consideration (or explanation) of why deferral is appropriate.

I.

This case arose following the discharge of three shop stewards by Cone Mills Corporation (the Company). [1] Darr, also a union steward, began circulating a petition protesting the discharges. The Company learned of the petition activity and shortly thereafter changed the break schedules of Darr and approximately seventy employees in various job classifications throughout the plant. Darr protested that the new break schedule interfered with her ability to perform her duties as a union steward. She continued to take her breaks according to the previous schedule, but the Company took no action to enforce the new break schedule until three days later when Darr's supervisor again advised her that she must follow the new schedule.

Later during the same shift, the Company Overseer confiscated the petition Darr was circulating. Darr and several other employees complained and repeatedly asked the Overseer to return the petition. In the course of these discussions, Darr also protested the break schedule and was again told that she must adhere to the new schedule. An hour and a half later, Darr and a group of employees went to the Overseer's office in an attempt to recover the petition. The other employees were on their regularly scheduled break, but Darr was not. She had worked past her scheduled break and taken a later break without permission so that she could accompany the other employees to discuss the confiscation of the petition. The Overseer again refused to return the petition. He then suspended Darr for flagrant refusal to follow her assigned break schedule and instructed her to go home. Darr, however, refused to leave the plant and returned to her job. The Overseer called in a Company security official and two police officers, but, upon consulting with the Department Head, subsequently decided to allow Darr to finish her shift.

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[1] The Company's plant is organized by Local 391 of the Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC (the Union).

Two days later, Darr met with the Department Head and other Company officials. They informed her that she was being discharged for altering her scheduled break without notifying her supervisor and for refusing to leave the plant when requested to do so by the Overseer. The following week, Darr filed a grievance contending that her discharge violated the just cause provision of the collective bargaining agreement. Pursuant to the agreement's grievance procedure, the matter was referred to arbitration. Darr also filed an unfair labor practice charge with the NLRB, but the Board deferred its proceedings pending the outcome of the arbitration.

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The arbitrator's opinion divided its analysis into two parts: the "contract issues" and the "NLRA issues." Interpreting the contract, the arbitrator held that petitioner was discharged without "just cause," finding that Darr's deviation from her break schedule did not interfere with Company operations and was "provoked" by the wrongful confiscation of the petition. Darr's refusal to leave the plant after being improperly suspended, however, was not excusable and in the arbitrator's opinion constituted insubordination. Commenting that the "grievant must recognize and accept managerial authority and use the grievance procedure to resolve private contract disputes," he concluded Darr should be reinstated, but not receive backpay for the nine month period since her discharge. Implicit in his determination was his conclusion that the Company had just cause to discipline petitioner but not to discharge her.

Turning to the NLRA issues, the arbitrator described the Act as creating "public rights" separate from the "private rights" derived from the labor agreement. He saw the NLRB and the courts as ultimately charged with the enforcement of public rights, and arbitrators as responsible for applying labor agreements to determine private rights. Nevertheless, he proceeded to discuss the NLRA issue in a tentative fashion, concluding that because the "primary motive" of the company in taking disciplinary action was Darr's union activity, the discharge was a violation of Sections 8(a)(1) and 8(a)(3) of the Act [2] and therefore "the Board probably would issue a standard order—[including]—backpay." The arbitrator elliptically stated, that "the value of an Arbitration opinion in the determination of public rights has been and will continue to be a subject of debate among arbitrators, labor law attorneys and others." Leaving that issue to the NLRB and the courts, he did not purport to reconcile the two different bodies of applicable law, explaining that "the discussion of NLRA issues is presented as a response to the Union's arguments and is available for NLRB review."

The Administrative Law Judge declined to defer to the arbitrator's award, finding it "repugnant to the Act." He did not reach the general counsel's contention that the remedy, reinstatement without backpay, is per se repugnant, but rather held that because the discipline imposed on petitioner was triggered by her union activities and because those activities were "so inextricably intertwined with the alleged insubordination," no punishment was warranted. He thus concluded that the arbitrator's interpretation of the collective bargaining agreement as authorizing the employer to discipline petitioner was itself repugnant to the Act.

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[2] Section 8(a)(1) provides:

> It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by [section 7].

29 U.S.C. § 158(a)(1) (1982).

Section 7, to which section 8(a)(1) refers, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

29 U.S.C. § 157 (1982).

Section 8(a)(3) provides:

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. § 158(a)(3) (1982).

The Board rejected the ALJ's findings, concluding that the judge had substituted his judgment for that of the arbitrator's

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contrary to the principles of deference mandated by *Olin Corp.*, 268 N.L.R.B. 573 (1984) and *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Under those precedents, the Board will defer to the arbitrator as long as his award is not "clearly repugnant" to the policies of the Act. The Board reasoned:

> It is the essential nature of the arbitration process to balance the competing claims of the parties by adjusting the equities involved to reach a harmonious result. That is what the parties have agreed upon as an acceptable resolution of their labor-management dispute.

The Board noted that although the arbitrator found no justifiable reason for discharge, he did find just cause for *some* discipline. Declaring that the failure of the arbitrator to provide a "make-whole remedy" (backpay) did not render his award clearly repugnant, [3] the Board concluded that deference was appropriate.

II.

Petitioner presents essentially the same argument to us that the general counsel presented to the ALJ: that it is repugnant to the NLRA for the Board to defer to an arbitrator's award that provides an incomplete remedy that the Board itself would not fashion. To do so, according to petitioner, is to abridge employee rights bestowed by Congress. These statutory rights exist wholly apart from any additional rights an employee gains under a collective bargaining agreement. The NLRB responds that even the Board is not obliged under the NLRA to provide backpay along with reinstatement.

We think it plain, however, that under Board precedent if the Board had found what the arbitrator did, it would have ordered make-whole relief—backpay as well as reinstatement. Although Section 10(c) of the Act (29 U.S.C. 160(c)) gives the Board some discretion to determine when backpay is an appropriate remedy, [4] the need to compensate a wrongfully discharged employee and the importance of deterring future wrongful conduct by the employer generally require that the Board award a make-whole remedy. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 13, 61 S.Ct. 77, 80, 85 L.Ed. 6 (1940); *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941). Indeed, "the Board, since its inception, has awarded backpay as a matter of course." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20, 95 S.Ct. 2362, 2372, 2373, 45 L.Ed.2d 280 (1975). In support of its position, the Board points to exceptional situations where it has determined that an award of backpay will not further the policies of the Act. For example, the Board has denied reinstatement and backpay where an unlawfully discharged employee subsequently engages in violent criminal conduct. *See, e.g., Renfro Hosiery Mills, Inc.*, 122 N.L.R.B. 929 (1959) (employee assaulted supervisor); *NLRB v. Bin-Director Co.*, 356 F.2d 210 (6th Cir.1966) (employee threatened supervisors with mayhem). Similarly, relief has been denied to employees who committed previous illegal or dishonest acts that would have independently led to their discharge. *See, e.g., Uniform Rental Service, Inc.*, 161 N.L.R.B. 187, 190 (1966), *rev'd on other grounds*, 398 F.2d 812 (6th Cir.1968) (employee pilfered letter from employer's private office); *Offner Electronics, Inc.*, 134 N.L.R.B. 1064, 1077 (1961) (employee attempted to steal documents); *Keco Industries, Inc.*, 121 N.L.R.B. 1213, 1227 (1958) (employee had prior criminal convictions). But in all the cases of denial of backpay cited by the Board, *reinstatement was also denied.* Here, by contrast, the arbitrator ordered Darr reinstated, finding that her insubordination in

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response to her illegal suspension did not warrant her discharge. [5]

The question for us, then, is whether the Board may defer to an arbitrator's award that is doctrinally different from Board precedent. The answer may well depend on why the Board proposes to defer. The Board's deferral policy, beginning with *Spielberg,* 112 N.L.R.B. 1080 (1955), and through its various twists and turns,[6] has seemed to interweave at least four separate theories supporting deferral. The first is a collateral estoppel theory—the notion that the NLRA issue is sufficiently close to the contract question as to have been fully litigated; the second is that the Board applies a limited scope of review as if it were an appellate body reviewing an arbitrator's application of the NLRA (presumably as incorporated into the agreement); the third involves deference to a contract interpretation upon which the application of the NLRA depends; and the fourth is the theory that the parties to a collective bargaining agreement have waived the statutory rights that the Board is empowered to enforce and instead rely on a different body of contract law.[7]

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[3] The Board relied for that proposition on *Combustion Engineering, Inc.*, 272 N.L.R.B. 215 (1984).

[4] Under section 10(c), the Board is authorized to order an employer to cease and desist an unfair labor practice and "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c) (1982).

[5] Even assuming the statute authorizes the Board to withhold backpay, the Board would have to justify such a change in policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

We cannot clearly discern from the Board's decision in the case why it deferred to the arbitrator's award; its decision (as does the *Olin* case on which it relies) appears based on an admixture of theories. The Board's comment that the arbitrator's balancing of equities "is what the parties have agreed upon" seems to partake of the fourth theory that the parties agreed to a contractual standard governing discipline that is different—providing in some cases less protection and in some greater—than that afforded by the NLRA. But the Board does not explicitly set forth a waiver theory or even consider whether a union can legitimately waive an individual employee's rights under Section 8(a)(1) and (3) of the Act, and if so whether the agreement in this case has in fact done so.[8] Nor does the Board explain whether the arbitrator's interpretation of the agreement permits a finding of waiver even in the absence of an express waiver in the agreement itself. *Cf. Metropolitan Edison,* 460 U.S. at 709 n. 13, 103 S.Ct. at 1477 n. 13 (arbitrator's decision may be relevant in establishing waiver of NLRA rights).

If instead the Board's decision was based on a theory of deferral predicated on the premise that Darr's NLRA rights were litigated before the arbitrator, the Board must explain how the statutory claim merged into the contract claim when the arbitrator himself treated the NLRA cause of action as outside his jurisdiction. It is also not at all clear why the Board concludes that an arbitrator can gain authority to apply the NLRA to a grievance under a collective bargaining agreement. Does the Board view section 203(d) of the Act,[9] which declares that private resolution of contract issues is preferred, as granting that authority to an arbitrator? If so, how does it explain Section 10(a) of the Act,[10] which provides that the Board's *power* to prevent unfair labor practices "shall not be affected by any other means of adjustment"? And how does an arbitrator differ from a state court, which does not have authority to interpret or apply the NLRA? *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241–45, 79 S.Ct. 773, 777–779, 3 L.Ed.2d 775 (1959). If an arbitrator holds that the parties agreed by their collective bargaining contract to incorporate the NLRA by reference (rather than waive it) it might be thought that the arbitrator gains authority to apply the Act. But if the Board proceeds under that theory, it would seem it must, at minimum, determine that the arbitrator has in fact so held.

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[6] In chronological order, see *Raytheon Co.,* 140 N.L.R.B. 883, 887 (1963) (unfair labor practice issue must have been "fully and fairly litigated" at arbitration level to justify deferral by the Board); *Electronics Reproduction Service Corp.,* 213 N.L.R.B. 758, 764 (1974) (deferring to arbitral findings unless "special circumstances" precluded a "full and fair opportunity" to present evidence of an unfair labor practice); *Suburban Motor Freight, Inc.,* 247 N.L.R.B. 146 (1980) (no deference to an arbitration award that "bears no indication that the arbitrator ruled on the statutory issue"); *Olin Corp.,* 268 N.L.R.B. 573, 574 (1984) (deferral appropriate if contractual issue before arbitrator is "factually parallel" to the statutory issue and facts presented were generally relevant to resolving that issue).

[7] We have on several occasions affirmed the Board's application of its deferral doctrines. Nevertheless, our cases have not been uniform in their analytical approach, and they do not provide clear directions for the instant case. *See, e.g., Bakery, Confectionery and Tobacco Workers v. N.L.R.B.,* 730 F.2d 812, 814–16 (D.C. Cir.1984) (deferral appropriate where statutory violation turns on arbitrator's interpretation of a collective bargaining agreement and arbitrator's award not "clearly repugnant" to the Act); *American Freight System, Inc. v. N.L.R.B.,* 722 F.2d 828, 832–34 (D.C.Cir.1983) (Board required to defer when contract waived statutory right and arbitrator fully considered and decided contractual issue); *Bloom v. N.L.R.B.,* 603 F.2d 1015, 1018–21 (D.C.Cir.1979) (deferral appropriate where both contractual and statutory issues hinged on same factual considerations and where record justified inference that the arbitration panel decided statutory issue).

[8] Petitioner argues implicitly, and amici Public Citizen and Teamsters for a Democratic Union, explicitly, that a waiver theory could not justify the Board's deference to this arbitrator's award. Although the Supreme Court has held that a union cannot waive an employee's rights under the FLSA, *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 740, 101 S.Ct. 1437, 1444, 1445, 67 L.Ed.2d 641 (1981), or Title VII of the Civil Rights Act of 1964, *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 51, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147 (1974), it has treated rights under the NLRA differently. *See Metropolitan Edison Co. v. N.L.R.B.,* 460 U.S. 693, 705–08, 103 S.Ct. 1467, 1475, 1477, 75 L.Ed.2d 387 (1983); *Mastro Plastics Corp. v. N.L.R.B.,* 350 U.S. 270, 280, 76 S.Ct. 349, 356, 357, 100 L.Ed. 309 (1956). *See generally* Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB,* 46 Ohio St.L.J. 23 (1985). We reserve the question whether a union can waive employees' NLRA protection against discrimination based on the employee's union activity in return for different collective bargaining rights. Since the Board has not explicitly adopted that theory, it would be premature to express our view on the issue. And, of course, it follows that we similarly express no opinion on whether this contract contained such a waiver.

[9] 29 U.S.C. § 173(d) (1982).

[10] 29 U.S.C. § 160(a) (1982).

Finally, does the scope of the Board's reservation of authority to overturn an arbitrator's award that is "clearly repugnant to the Act," depend on its theory of deferral? Would the Board, for instance, look more closely at the award if the arbitrator is applying the NLRA, than it would if it concluded that the union has waived its members' rights under the NLRA (assuming there is no allegation of a breach of fair representation)? *See Kohls v. N.L.R.B.,* 629 F.2d 173, 178–79 (D.C.Cir.1980) (Board has no authority to resolve contractual disputes unrelated to an unfair labor practice).

We have profound doubts that the Board may defer to an arbitrator's award merely because the award is roughly analogous to that which the Board would grant—a sort of "Kentucky Windage" approach—without explicitly articulating its view of the interrelationship between the law of a particular collective bargaining agreement and the NLRA.[11] But consistent with the well-established principles articulated in *SEC v. Chenery Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed.2d 626 (1943), we must confine our "review to a judgment upon the validity of the grounds upon which the Commission itself based its action." *Id.* at 88, 63 S.Ct. at 459. Ultimately, our review will depend on how the Board articulates not only its general theory of deference, but how it applies it in a particular case. We therefore remand the case to the NLRB for further consideration (or explanation) of its reasons for deferring to the arbitrator's award.

It is so ordered.

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[11] We realize the General Counsel might well adopt such an approach in determining whether to issue a complaint, but her discretion is virtually unreviewable.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 449 v. NLRB

802 F.2d 969 (7th Cir.), October 3, 1986—276 NLRB 90

On petition to review Board Order

Before POSNER and EASTERBROOK, Circuit Judges, and CAMPBELL, Senior District Judge *

POSNER, Circuit Judge: The United Automobile Workers ask us to vacate a decision by the National Labor Relations Board dismissing the union's charge that National Lock Corporation refused to bargain in good faith over the movement of operations at one of its plants to another state, in violation of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). The Board held that the union had waived any statutory right it might have had to bargain over the move. *National Metalcrafters, Inc.,* 276 N.L.R.B. No. 14 (Aug. 27, 1985).

Workers represented by the union made locks and other hardware at the company's plant in Rockford, Illinois. Section 1.1(b) of the collective bargaining agreement provided that "in the event the Company contemplates the relocation of any of its operations conducted at its present divisions in Rockford, Illinois, the Company agrees to discuss such relocation in advance and to negotiate with the Union concerning the effect of such relocation on employees." Faced with high production (including labor) costs in Rockford, and unable to obtain wage concessions from the union, the company decided to move some of its manufacturing to Mauldin, South Carolina, with the result that hundreds of workers lost their jobs. The company told the union about the impending move but did not bargain over it; hence the unfair labor practice charge. The company did bargain over the effects of the move on the workers, for it concedes that the word "negotiate" in the last part of section 1.1(b) means bargain. But it would not bargain over whether to relocate.

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* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

At the hearing before the administrative law judge on the union's unfair labor practice charge, oral testimony was taken on the background and purpose of section 1.1(b). The union's witnesses testified that it had been included in order to make sure that the union would have first crack at organizing the workers at the new plant; in a previous relocation by the company, the union had lost out to a rival union in the race to organize them. The union's witnesses denied there had been any discussion of waiving the union's statutory right to bargain over plant relocations. In contrast, Carter, who had negotiated the contract for the company and had drafted section 1.1(b), testified that in the negotiations he had told the union that the company would not agree to any restriction on its right to relocate work, and that the word "discuss" had been used advisedly, and meant "notify" rather than "negotiate" or "bargain." The company also pointed out that in previous cases of relocation the union had not asserted any right to bargain. But the union countered that those relocations had not resulted in a loss of jobs at the Rockford plant; the workers made surplus by the move had been given other jobs there.

The administrative law judge, saying he disbelieved Carter's testimony and believed that of the union's witnesses, concluded that the word "discuss" had not been intended as a waiver of the union's statutory right to bargain over a relocation motivated by wage concerns; hence the company had committed an unfair labor practice. The Board reversed. While upholding all of the findings on credibility that the administrative law judge had made, the Board held that the bargaining history (presumably the union's failure to have requested bargaining over the previous relocations), in conjunction with the "plain meaning" of the word "discuss" when juxtaposed with "negotiate" in section 1.1(b), demonstrated that the union had waived the right to bargain.

The administrative law judge's opinion contains a number of errors and omissions, and his credibility findings are suspect because based in part on the union's having produced several witnesses to the negotiation of section 1.1(b) and the company only one, Carter; no other significance can be attached to the administrative law judge's disparaging reference to the lack of "corroboration" for Carter's testimony. So this is not a case where a strong initial decision opposite to the Board's decision requires us to consider the evidentiary and analytical basis of the Board's decision with special care. See, e.g., *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496, 71 S.Ct. 456, 468–69, 95 L.Ed.2d 456 (1951); *Mattes v. United States,* 721 F.2d 1125, 1129 (7th Cir.1983). Nor is the conclusion that the Board reached an unreasonable one. A natural reading of section 1.1(b) is that the company agrees merely to discuss with the union in advance, but does not agree to bargain over—in the technical sense in which the word "bargain" is used in the National Labor Relations Act, see 29 U.S.C. § 158(a)(5); *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962)—any **972** contemplated relocation of operations. All that the company agrees to bargain over (the parties equate "negotiate" in section 1.1(b) to "bargain" in the technical sense) is what to do with the workers made redundant by the relocation. Although section 1.1(b) is found in the article of the collective bargaining agreement that deals with recognition of the union rather than with bargaining, the title of the article, "Recognition, Union Security, and Checkoff," is boilerplate. The article may just have been a convenient parking place for a section actually designed to regulate comprehensively and exhaustively the moving of operations from one plant to another.

The Board's opinion, however, is perfunctory, incomplete, and inconsistent. The Board has the unfortunate habit of writing opinions in the form of commentaries (usually in footnotes, though here there was text as well) on the administrative law judge's always much longer and more comprehensive opinion. Maybe the Board's workload is too heavy to allow anything better but that will not permit us to uphold a decision for which the Board has failed to provide a coherent rationale. See, e.g., *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 853–54, 85 L.Ed. 1271 (1941); Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 Duke L.J. 199, 206–09.

The basic flaws in the Board's analysis are three:

1. Its opinion leaps illogically from the proposition that the "plain meaning" of "discuss" is not "bargain" to the conclusion that the union waived its statutory right to bargain over plant relocations.

Overlooked is the possibility that the "discuss" clause has a different domain from the statutory right and can coexist with it. The Supreme Court has not yet decided whether and in what circumstances a company must bargain with a union over the decision to relocate operations. See *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 686 n. 22, 101 S.Ct. 2573, 2584–85 n. 22, 69 L.Ed.2d 318 (1981), and the interesting commentary on the decision in Alchian, *Decision Sharing and Expropriable Specific Quasi-Rents: A Theory of First National Maintenance Corporation v. NLRB,* 1 Sup.Ct.Econ.Rev. 235 (1982). But the lower, federal courts and the Labor Board hold, and we do not understand National Lock Corporation to contest, that a company must bargain if the decision to relocate is significantly motivated by concern over labor costs, though not (and this the union does not contest) if it is based mainly on factors other than labor, such as a desire to economize on shipping costs. See, e.g., *Otis Elevator Co.,* 269 N.L.R.B. 891 (1984). Even if the present case is of the second rather than first type, so that the union had no statutory right to demand that the company bargain over the decision to relocate, the union might be eager to know about the relocation in advance so that it could sign up the workers at the new plant ahead of any other union. It thus might want the company to agree to "discuss" (not bargain over) *all* relocations in advance, including those not covered by the statutory right to bargain. For presumably a contractual duty to discuss would entitle the union to obtain specific information—say about the work force at the new plant—that would give it an organizing edge over rival unions.

In exchange for this right of notice the union may or may not have given up its statutory right to bargain—a stronger right, but applicable to fewer relocations, and perhaps therefore on balance less valuable to the union. But one cannot just assume, as the Board did, that because section 1.1(b) is about relocations and does not create a duty to bargain (except over the effects of the relocation—and the difference between "decision" bargaining and "effects" bargaining is well recognized, see, e.g., *First Nat'l Maintenance Corp. v. NLRB, supra,* 452 U.S. at 677 n. 15, 681–82, 101 S.Ct. at 2580 n. 15, 2582), the section supplants the statutory right to bargain over a relocation decision based at least in part on labor costs. Someone who believed the testimony of the union's witnesses would probably conclude that the union had not waived its statutory right. That testimony indicates that the negotiations over the "discuss" clause were limited to the matter of giving the union advance notice in order to help it organize the new plant, that Carter drafted the clause as a gesture of good will toward the union, and that he demanded no concessions in return (for what was it to him which union got first crack at organizing the workers at the new plant?) and certainly did not demand a waiver of the union's statutory right to bargain. All this would matter little if one believed Carter instead, but that route is closed off by the Board's having upheld the administrative law judge's findings on credibility.

The Board itself said in its opinion, "It is undisputed that the clause was designed *solely* to accommodate the Union's desire to have the first opportunity to organize new employees at any new facilities created by National." 276 N.L.R.B. No. 14, at 6 (emphasis added; footnote omitted). If so, the statutory right to bargain was not affected; for to conclude that the clause also waived that right would be to assign a dual, not a single, purpose to the clause.

2. The Board's opinion omits mention of the traditionally stringent test for whether a party to a collective bargaining contract has waived a statutory right. The courts and the Board have held over and over again that evidence that the parties intended to waive a statutory right must, to be credited, be clear and unmistakable. See, e.g., *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 and n. 12 (1983) (and cases cited there); *International Brotherhood of Electrical Workers, Local 1466 v. NLRB,* 795 F.2d 150, 155–56 (D.C.Cir.1986); *Tocco Division of Park-Ohio Industries, Inc. v. NLRB,* 702 F.2d 624, 626–27 (6th Cir.1983); *Road Sprinkler Fitters Local Union No. 669 v. NLRB,* 600 F.2d 918, 921–23 (D.C.Cir.1979); *Teledyne Wisconsin Motor,* 275 N.L.R.B. No. 76 (May 24, 1985); *International Union of Operating Engineers, Local Union 18,* 238 N.L.R.B. 652 (1978); *Awrey Bakeries, Inc.,* 217 N.L.R.B. 730, 733 (1975), aff'd, 548 F.2d 138 (6th Cir.1976) (per curiam); *Weltronic Co.,* 173 N.L.R.B. 235, 237 (1968), aff'd, 419 F.2d 1120 (6th Cir.1969); *Unit Drop Forge Division,* 171 N.L.R.B. 600, 601 (1968), modified on other grounds, 412 F.2d 108

(7th Cir.1969); *Rockwell-Standard Corp.*, 166 N.L.R.B. 124, 132 (1967), aff'd, 410 F.2d 953 (6th Cir.1969); *C & C Plywood Corp.*, 148 N.L.R.B. 414, 416 (1964), enforcement denied on other grounds, 351 F.2d 224 (9th Cir.1965), rev'd, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967); but see *Consolidated Foods Corp.*, 183 N.L.R.B. 832 (1970). In light of this rule, it is hard to see how the Board's interpretation of the collective bargaining agreement could be thought supported by substantial evidence.

We grant that despite the strong judicial endorsement of the rule, the Board—which knows more about the dynamics of collective bargaining than the courts—might be able to dilute or abandon it, since the rule is a nonobvious gloss on the statute. Cf. 5 Davis, Administrative Law Treatise § 29 (2d ed. 1984). And there are two bits of evidence that a desire to abandon or dilute, rather than mere oversight, does indeed lie behind the Board's failure to mention the rule. The first is that the administrative law judge had relied heavily on the presumption against inferring the waiver of a statutory right and that the union had argued the presumption vigorously throughout the case. So the Board could not just have forgotten about the rule; and if it didn't mention the rule just because it did not want to weaken the force of its opinion, this would be the equivalent of wanting to dilute or abandon the rule. Second, in support of the conclusion that the union had waived its statutory right the Board cited only *Consolidated Foods Corp.*, *supra*, one of the few decisions that does not say that the waiver of a statutory right must be clear and unmistakable—though whether the omission to say this in *Consolidated* was deliberate or not is unclear.

All this is rather bootless conjecture, though. For it makes no difference 974 what the Board may have had in mind but failed to express; an administrative agency is not allowed to change direction without some explanation of what it is doing and why. This general principle of administrative law, see, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 57, 103 S.Ct. 2856, 2874, 77 L.Ed.2d 443 (1983); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 470–71 (7th Cir.1984); 4 Davis, Administrative Law § 20:11 (2d ed. 1983), has been applied to the Labor Board in such cases as *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093–94 (7th Cir.1984), and *International Ass'n of Bridge Workers, Local No. 111 v. NLRB*, 792 F.2d 241, 247–48 (D.C. Cir.1986). As the last two cases show, the principle is applicable to adjudication as well as to explicit "notice and comment" rulemaking. The fact that the Board has such broad discretion in deciding which route to follow, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290–95, 94 S.Ct. 1757, 1769–72, 40 L.Ed.2d 134 (1974), shows that the Board cannot be allowed to escape the obligation of justifying changes in its policies merely by following the common law route; the fact that common law rulemaking is retroactive buttresses this conclusion. So while not bound by *stare decisis*, the Board can jettison its precedents only if it has "adequately explicated the basis of its [new] interpretation." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267, 95 S.Ct. 959, 968–69, 43 L.Ed.2d 171 (1975). Admittedly there was doubt in *Weingarten* whether the Board had done that, see *id.* at 268–69, 95 S.Ct. at 969 (dissenting opinion); and we must follow what the Supreme Court does and not just what it says. But in *Weingarten* there had been some attempt at explication, and here there was none. The citation to a previous decision of the Board that may have departed (but without explanation) from the traditional standard does not satisfy the duty to explicate; a previous violation of the duty cannot validate the subsequent one.

Forcing an administrative agency to 'fess up to its changes of position may seem productive merely of paper shuffling, and also inconsistent with the genius of the common law, which allows new doctrines to be created implicitly and even surreptitiously by judges who deny all the while that they are changing the law. See *Rockford League of Women Voters v. NRC*, 679 F.2d 1218, 1222 (7th Cir.1982). Yet agencies often are forced to explicate decisions that judges and juries, not to mention legislative and executive branch officials, are allowed to make without explanation. See, e.g., *Hameetman v. City of Chicago*, 776 F.2d 636, 645 (7th Cir.1985). The reason may be that agencies unlike courts are not constrained to make policy by the common law route, but can use explicit rulemaking procedures. Indeed, agencies are often criticized (none more so than the Labor Board) for not making greater use of their rulemaking powers, see, e.g., *NLRB v. Majestic Weaving Co.,* 355 F.2d 854, 860 (2d Cir.1966) (Friendly, J.); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 779, 89 S.Ct. 1426, 1436–37, 22 L.Ed.2d 709 (1969) (dissenting opinion), although *NLRB v. Bell Aerospace Co., supra,* suggests that the criticism cuts little ice with the Supreme Court. Another consideration may be that independent agencies, such as the Labor Board, in combining legislative, executive, and judicial functions, seem somehow to elude the constitutional system of checks and balances. But these agencies are checked by other organs of government (as a legislature with executive and judicial functions, or an executive with legislative and judicial functions, would not be), even if they lack internal checks and balances—and the Administrative Procedure Act creates some. Moreover, the rule that the agency must explain its about-faces is not limited to the independent agencies; it extends to administrative agencies within the executive branch, as the *State Farm* decision shows. In any event, the Board violated the rule in this case.

3. The Board disregarded evidence that in the negotiations over section 1.1(b) the words "discuss" and "negotiate" were not distinguished. The union's witnesses so testified, the administrative law judge believed them, and the Board accepted the administrative law judge's view of their believability. The union and the company

agree that the word "negotiate" as used in the same sentence of section 1.1(b) is synonymous with the statutory term "bargain"; so if "discuss" equals "negotiate," then "discuss" must also equal "bargain." Taking this view, and construing section 1.1(b) against its draftsman, one might conclude that the company had (perhaps inadvertently) reaffirmed the union's statutory right to bargain and may even have amplified it to take in bargaining over relocations not within the scope of the right because not motivated by disputes over terms or conditions of work. Against this conclusion it can be argued that no one reading "the Company agrees to discuss such relocation in advance and to negotiate with the Union concerning the effect of such relocation on employees" would think that "discuss" and "negotiate" meant the same thing; it would have been so much simpler to use one word rather than two. In addition, the Board might have invoked some version of the parol evidence rule and refused to consider testimony about the meaning of section 1.1(b). The courts have applied the rule to collective bargaining contracts in cases brought under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, see *Mohr v. Metro East Mfg. Co.,* 711 F.2d 69, 72 (7th Cir.1983), and cases cited there; no doubt the Board could do the same thing in its interpretation of such contracts. But it did not do it in this case. The Board's opinion contains no hint that testimony about the negotiating history of "discuss"—testimony it had credited by affirming the administrative law judge's findings on credibility—was actually inadmissible. The Board did mention the bargaining history, by which we assume it meant the union's not having demanded bargaining over the previous relocations. But it did not mention the union's explanation, accepted by the administrative law judge, that it had not demanded to bargain over those relocations because they had not cost any jobs. The Board seems to have confined its attention to evidence that supported its conclusion and to have ignored any contrary evidence—an ostrich's approach which administrative agencies are not authorized to follow.

The Board even omitted to consider a bit of evidence that favored its interpretation. The union had not demanded that the company bargain with it till six months after the union first learned of the possibility of relocation. Even if the union did not waive in the contract its statutory right to bargain, it may have waived its contractual right to invoke its statutory right by delay in invoking the contractual right. See, e.g., *International Ladies' Garment Workers Union v. NLRB,* 463 F.2d 907, 918–19 (D.C. Cir.1972); *Mid-West Sanitary Service, Inc.,* 272 N.L.R.B. 624 (1984). But we cannot supply an alternative rationale for the Board's decision. See, e.g., *SEC v. Chenery Corp.,* 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943); *General Electric Co. v. NRC,* 750 F.2d 1394, 1403–04 (7th Cir.1984). Nor will we consider without a previous determination by the Board the company's defense of statute of limitations, which turns on a difficult question as to when the company refused to bargain.

The decision reversing the administrative law judge does not contain a reasoned analysis of the law and the evidence, and we therefore set aside the decision and return the case to the Board.

SO ORDERED.

Daniel Silverman, Reg. Dir. v. Imperia Foods, Inc.

646 F.Supp. 393 (S.D. N.Y.), October 10, 1986

On petition for preliminary injunction under Section 10(j)

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SWEET, District Judge: Daniel Silverman, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board (the "Board") by order to show cause seeks a preliminary injunction to require the respondent Imperia Foods, Inc. ("Imperia") to rehire fourteen employees and to take certain other action. For the reasons set forth below, a preliminary injunction will issue.

Prior Proceedings

On March 24, 1986, Local Union No. 277, International Brotherhood of Teamsters, Chauffeurs & Warehousemen of America (the "Union"), filed a charge against Imperia alleging unfair labor practices violating Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* The Union alleged that Imperia discharged fourteen of its sixteen unit employees on March 24, 1986 because the unit employees authorized the Union to commence a strike at Imperia's New York facility and accelerated the relocation of its business operations from its New York facility to New Jersey without notifying the Union and without affording the Union an adequate opportunity to negotiate and bargain amounting to a repudiation of its collective bargaining relationship with the Union.

On May 30 the Regional Office issued a complaint alleging violations of Section 8(a)(1), (3) and (5) of the Act. Imperia in its answer admitted the discharge and the accelerated relocation of its operations from New York to New Jersey but denied the charges numbered 12(b)–19, which allege various violations of the Act. Imperia also set forth various affirmative defenses alleging that the Union refused to meet and bargain, that the last collective bargaining agreement between Imperia and Local 277 expired on February 28, 1986, and that the Union encouraged its members to commit acts of sabotage, to refuse overtime work, and to coerce numerous of respondent's customers to cease doing business with Imperia.

Simultaneously with the filing of the charge with the Board, the Union filed a request for injunctive relief pursuant to Section 10(j) of the Act. On July 17, 1986, the Regional Office of the Board filed this order to show cause for a preliminary injunction with the court. Pursuant to a consent order of July 21, the parties agreed that the official transcript and exhibits of the unfair labor practice hearing held be-

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fore Administrative Law Judge Arthur Herman would be submitted in lieu of an evidentiary hearing. The hearing on the charges was completed on August 12 and the Board's brief was submitted on September 2. An informal request to extend the time for Imperia's brief to September 11 was granted without Board opposition, and a further extension was granted to September 17 over the objection of the Board and on that day the petition was fully submitted.

The Facts

Imperia is presently engaged in the processing and sale of grated cheese and bread crumbs. Ira Weissman ("Weissman") is the president and a 50% shareholder of the corporation. Sonny Ehrenworth ("Ehrenworth") is the vice president of Imperia and the other 50% shareholder of the corporation. The predecessor company to Imperia was a distributor known as A & M Dairy Products ("A & M") which prior to 1955 negotiated the initial labor agreement with the Union, at which time Imperia became the successor company.

More recently, an industry association known as the Butter & Egg Association (the "Association") has negotiated industry-wide collective bargaining contracts with the Union, which represented chauffeurs, helpers, dairy and food handlers, egg candlers, egg inspectors, butter packaging employees, cheese packing employees, egg breakers and office employees. Over time, the membership in the Association has shifted from being primarily food processors to food distributors, and, as a processor, Weissman has become less and less satisfied with the agreements the Association has reached with the Union. Imperia was a member of the Association and a signatory to the bargaining agreement with the Union, which expired on February 28, 1986.

Imperia was located at 168 Duane Street, a five-story building which consisted of approximately 17,000 square feet. It concluded it had to move out of this old, five-story building with unreliable elevators into a single-floor efficient, flowing manufacturing operation in the tri-state area. Imperia's net sales over the past three years have remained in the 5.0 to 5.2 million dollar area, while its costs were increasing significantly. According to his testimony, in March or April of 1985, Weissman entered into a transaction with Meile Rockefeller who wished to turn 168 Duane Street into coop apartments and agreed to trade the Duane Street building for a building that Weissman would designate in the ensuing 18 months. The advantage of this swap over a more traditional method of purchase and sale of real property is that the swap was tax free.

After Weissman signed the contract, rumors of a move began to circulate among the employees. To dispell uncertainty, Weissman held a company meeting at which he confirmed that the Duane Street Building would be sold and the business relocated to a yet unknown location. After weeks of investigation, Weissman located a suitable building in South Plainfield, New Jersey. In or about August, 1985, Weissman again met with his employees and reassured them that he wanted them to remain in his employ. He told them about the building in New Jersey. During the four months between the April and the August meetings, Imperia lost three to four employees who, according to Weissman, were unwilling to commute to the proposed New Jersey facility.

On November 22, 1985 the swap took place. Before and after the 22nd, Weissman met with architects, and projected the move into the new plant for late April, 1986, or, perhaps, earlier. In early December, 1985, the Union sent a 90-day notice to Imperia requesting negotiations for a new contract and in early January, 1986, Weissman received a telephone call from the chief negotiator for the Association. Weissman told the chief negotiator that he wanted to negotiate directly with the Union. No formal letter of withdrawal from the Association was made, nor was the Union notified directly of Imperia's position. Later in January, 1986, Weissman received a notice requesting the payment

of dues to rejoin the Association and authority to negotiate on Imperia's behalf. Weissman did not pay the dues nor did he sign the authorization form. After another call from the Association, Weissman requested the negotiator to advise Anthony Distini ("Distini"), president of the Union, that Imperia wanted to negotiate a separate contract with the Union.

Many of the unit employees lived in the Bronx, already far from the Duane Street plant, and the new plant was 35 miles further from Duane Street. Weissman was concerned that some of the employees might not undertake this additional commute to and from work every day. A number of Imperia employees visited the South Plainfield facility and one repaired and rehabilitated machinery there. Although some union members and perhaps its president were aware of some of the details of the intended relocation, no notice as such was given to the Union or the shop steward.

However, Jasper Brown, vice president of the Union ("Brown"), testified that on his bi-weekly visits to Imperia, the unit employees told him about the relocation, both in September, 1985 and again in December, 1985 and January, 1986 when he was told that machinery was being moved to the New Jersey plant which Imperia had purchased.

The collective bargaining agreement between the Union and the Association expired on February 28, 1986, negotiations were held and by March 14, a proposed new agreement had been reached, subject to Union ratification on March 15. On March 10, there was posted on the bulletin board of Imperia a notice of a meeting by the Union advising the employees that a meeting was to take place on March 15, 1986. On March 14, Weissman received a call from Distini after the negotiations with the Association had been completed. Distini stated that negotiations with the Association had been completed and that he understood that Weissman did not want to be a party of the Association and sought a separate contract. Distini told Weissman that he did not want to negotiate over the phone. Weissman agreed to set up a meeting with Distini. The same day Weissman spoke to an employee Carmen Mendez ("Mendez") who, in response to his inquiry, stated that morale was low because a contract has not been signed and that all employees would go to New Jersey. No prior contact had been sought by the Union or Imperia on the subject of a new collective bargaining agreement to replace the prior agreement other than the December 15 notice.

Weissman and his secretary and administrative assistant became concerned about the lack of productivity during the week of March 10 and conversations on the subject were held with individual employees but the issue was not addressed to the Union. On March 16 an employee observed a machine that required repair as a consequence of what he concluded was sabotage and he so advised Weissman. Imperia employees now working in New Jersey have testified that these acts resulted from the employees' effort to compel Imperia to reach a contract with the Union.

The Imperia records reveal the following overtime hours:

Week Ending	
Feb. 7, 1986	112 hours
Feb. 14, 1986	77¾ hours
Feb. 21, 1986	51¾ hours
Feb. 28, 1986	101¼ hours
March 7, 1986	38½ hours
March 14, 1986	15¾ hours
March 21, 1986	27 hours

In addition, the weekly sales dropped some $40,000.00 from the end of February to March, 1986.

No evidence was adduced that the Union instructed or encouraged employees to engage in any type of work misconduct such as slowing down or refusing to work overtime. Imperia never informed the Union or the shop steward of any of the alleged "problems" it had with employees during March, and employees were neither warned nor disciplined about their work or any of the alleged aforementioned work misconduct.

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On Monday, March 17, Weissman called the Union to tell Distini that he was ready to discuss a new contract. He was told that Distini was on vacation for two weeks. The call was returned shortly by Brown, who reported that the Union and the Association had reached an agreement which the Union had ratified and that a vote had been taken to authorize a strike against non-signatories. Weissman agreed to meet with Brown on Wednesday, March 19, 1986. During this period Weissman was told from employees that a strike might be very imminent. On March 18, 1986, Weissman asked his contractor if it would be possible for Imperia to move to the new premises over the weekend of March 22, 1986, and stated that if he were not able to move quickly, he would be struck. Weissman cancelled the March 19 meeting with Brown.

On March 21, Brown called Weissman, was told he was out of town, and Brown's call was not returned. Imperia moved to the New Jersey facility over the weekend of March 22, 1986.

On Monday morning, March 24, and without any direction from management, both the day and the night shift arrived at Duane Street around 7 a.m. Weissman gave the employees a past week's wages plus a week's vacation pay and a letter which read:

> Imperia Foods, Inc. has moved its operations to another state, namely New Jersey. Therefore, effective NOW, we are terminating your employment.
>
> We thank you for your efforts, unfortunately, they were not enough to overcome higher costs, no growth, and stiff lower competition. It is a matter of survival.
>
> * * * * *
>
> We wish you best of luck for the future.
>
> The Management

The fourteen of the sixteen union employees discharged were: Pedro Arroyo, Pedro Astudillo, Angel Erazo, Pablo Garcia, Ada Lucas, Carmen Mendez, Miguel Monge, Felipe Rivera, Ramon Ruiz, Elbyn Salazar, Jose Sanchez, Juan Santiago, Victor Santiago and Victor Torres. Angel Class and Ismael Rodriguez were not discharged.

All of the employees and Brown travelled to the South Plainfield plant, arriving around 12:30 p.m. After Brown and Weissman conferred briefly, the Union put a picket line outside with signs which read, "STRIKE" and "LOCKOUT." Weissman received the Association's contract and told Brown his attorney would have to review it. Later Weissman told Distini that a certain Herman Rosenman ("Rosenman") would negotiate for Imperia and gave Distini a telephone number. Rosenman said he would get back to the Union but did not, despite a subsequent request.

Conclusions

The National Labor Relations Act § 10(j), 29 U.S.C. § 160(j), empowers the Board to seek temporary relief when, in its discretion, the Board determines that unrelieved delay in remedying the unfair labor practices would frustrate the basic purpose of the Act. *See Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37–38 (2d Cir.1975); *Fuchs v. Hood Indus.*, 590 F.2d 395, 397 (1st Cir.1979); *Levine v. C. & W. Mining Co.*, 610 F.2d 432, 436–37 (6th Cir.1979); *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 741–43 (7th Cir.1976). Under this provision, the issues before a district court in a Section 10(j) proceeding are whether there is "reasonable cause to believe" that a violation of the Act, as charged, has been committed and whether injunctive relief is "just and proper." *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir.1980); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir.1980); *Trading Port*, 517 F.2d at 36–37.

As to the first of the two issues, a district court is not required to find that "an unfair labor practice occurred, or that the precedents governing the case are in perfect harmony, but only that there is 'reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals.'" *Mego Corp.*, 633 F.2d at 1030; *Danielson v. International Org. of Masters, Mates & Pilots*, 521 F.2d 747, 751 (2d Cir.1975) (discussing standards for § 10(*l*) injunction); *McLeod v. Compressed Air, etc., Workers, Local 147*, 292 F.2d 358, 359 (2d Cir.1961). The "reasonable cause" standard does not require the Board to adduce evidence to the extent required in a full hearing on the merits. The district court is not required to resolve disputed issues of fact or credibility. As the court explained in *Danielson v. Joint Board*, 494 F.2d 1230, 1245 (2nd Cir.1974):

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> When "reasonable cause to believe" turns on disputed issues of fact, the Regional Director may assume these in favor of the charge and the District Court should sustain him if his charge is within the range of rationality. If differing inferences may fairly be drawn from the facts he has found, he may choose the one more favorable to the charging party, and this too should be upheld.

In this regard, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Danielson v. Joint Board of Coat Workers Union*, 494 F.2d at 1245. In other words, unless "convinced that the [Regional Director's] legal position is wrong," *International Org. of Masters, Mates & Pilots*, 521 F.2d at 751, the district court "should defer to the statutory construction urged by the [Regional Director]," *id.* Altogether, in making the "reasonable cause" determination, the district court properly gives the Regional Director's position on both the facts and the law great weight. Of course, to give the Regional Director's position great weight is not to make it dispositive. For instance in *Silverman v. 40–41 Realty Assoc.*, 668 F.2d 678, 681 (2d Cir.1982), the Second Circuit vacated an injunction issued by a district court on the basis of a "novel and unprecedented" application of a statute.

As to the second of the issues before the court in considering a § 10(j) application, the NLRB has argued that once the district court makes a finding that there is reasonable cause that a violation has occurred, then "an injunction *must* issue." Petitioner's Brief at 28 (emphasis added). If this were so, it would gut the second prong of the § 10(j) test, the prong which requires that the district court find that the requested relief is "just and proper."

As is the case with so many equitable remedies, the issuance of a § 10(j) injunction is within the sound discretion of the district court. *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir.1980) (Friendly, J.); *Danielson v. Joint Board of Coat, Suit & Allied Garment Workers' Union, ILGWU*, 494 F.2d 1230, 1244 n. 22 (2d Cir.1974). In exercising that discretion, a court considering a § 10(j) application "must act in accordance with the general rules of equity." *Mego Corp.*, 633 F.2d at 1033. *See also Silverman v. 40–41 Realty Assoc.*, 668 F.2d 678, 680 (2d Cir.1982) ("general equitable principles apply in deciding the propriety of a temporary injunction issued under section 10(j)"); *McLeod v. General Electric Co.*, 366 F.2d 847, 849 (2d

Cir.1966) (§ 10(j) "in no way changed the extraordinary nature of injunctive remedy"), *vacated as moot,* 385 U.S. 533, 87 S.Ct. 637, 17 L.Ed.2d 588 (1967). This means that the court must engage in traditional equitable inquiries concerning irreparable harm, preservation of the status quo, and the balance of hardships. For instance, in *McLeod v. General Electric Co.,* 366 F.2d 847 (2d Cir.1966), *vacated as moot,* 385 U.S. 533, 87 S.Ct. 637, 17 L.Ed.2d 588 (1967) (per curiam), the Circuit Court vacated a district court's § 10(j) injunction on the general equitable grounds that the requisite "extraordinary grounds" were not present to justify the "extraordinary nature of the injunctive remedy." *Id.* at 849.

The Court of Appeals has, however, somewhat tempered the customary rules for injunctions by cautioning that general equitable principles must be "conditioned by the necessities of the public interest which Congress has sought to protect." *Seeler v. Trading Port,* 517 F.2d at 39–40, (quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329–30, 64 S.Ct. 587, 591–92, 88 L.Ed. 754

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(1944)). Thus, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Id.* at 40 (quoting *Hecht Co.* 321 U.S. at 331, 64 S.Ct. at 592). *Accord Morio v. North American Soccer League,* 632 F.2d 217, 218 (2d Cir.1980).

In this case the Regional Director's application of the statute does not appear to be at the absolute frontier of the law as was the case in *40–41 Realty.* Section 7 of the Act, 29 U.S.C. § 157, guarantees to employees the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of their mutual aid or protection. . . ." Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), implements this guarantee by making it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7." Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment . . ." in order "to discourage membership in any labor organization." Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), provides that it is an unfair labor practice "to refuse to bargain collectively with the representatives of his employees. . . ."

The facts and the reasonable inferences drawn from them to which the NLRB is entitled clearly provide a reasonable basis to conclude that a violation of the Act has been committed. Although its contract with the Union had expired, Imperia remained under a statutory duty to negotiate with the Union concerning a new one. In a letter dated September 18, 1985, the Union asked Imperia to "PLEASE GET IN TOUCH WITH US AT YOUR EARLIEST CONVENIENCE TO SET A MEETING DATE FOR SUCH NEGOTIATIONS." No action was taken by Imperia. Communications between the Union and Imperia after the Union reached an agreement with the Association, are set forth above. No meetings or even discussions were held, no drafts were exchanged, no bargaining took place. Even if it is assumed, as Imperia does, that the Union would insist on an unmodified Association contract, Imperia remains under a duty to bargain, a duty which it did not perform. Parenthetically, refusal of the Union to provide Weissman with a copy of the UnionAssociation agreement until they sat down with him may indicate that an agreement could have been reached if Imperia had bargained in good faith. The facts here establish reasonable cause to believe that a violation has been committed.[1] *See Ox-Wall Products Mfg. Co.,* 135 NLRB 840, 841 (1962) *enf'd* 310 F.2d 878 (2d Cir.1962) (employer accelerates move to new site because workers vote for union recognition and request bargaining). *See also Kaynard v. MMIC, Inc.,* 734 F.2d 950 (2d Cir.1984) (employer threatens to close shop if workers join union); *NLRB v. Winchester Electronics,* 295 F.2d 288 (2d Cir.1961) (pro-union employees laid off during negotiation of initial contract with management).

Imperia says that it moved to New Jersey the weekend of March 22 in advance of its intended relocation date because it feared a strike resulting from its refusal to bargain with the Union with respect to the Association contract or a modification of that contract. This fear resulted from what Imperia perceived as a slowdown and possible sabotage in the preceding week after the Union and the Association had reached an agreement, and, therefore, seeks to justify its discharge on *Wright Line* grounds, 251 NLRB 1083 (1980), arising out of the slowdown and sabotage. However, its position is undercut by its failure to negotiate with the Union on those issues, on the contract, or the discharge. Indeed, the letter of Imperia

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[1] Because Imperia refused to negotiate with the Union *at all,* the parties have not litigated before this court the question of the full extent of Imperia's obligations in negotiating issues in a new contract relating to employee transfers, and it is unnecessary in resolving this case to address what Imperia would have had to discuss if they had ever deigned to come to the table.

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which accompanied the discharge made no reference to any employee misconduct and the discharge was explained only in terms of the need to relocate as a consequence of economic factors. Had only those refusing to work overtime been disciplined or not transferred a different result might be in order. Instead, the mass discharge "without any warning, consultation, or negotiation" destroyed any possibility of responsible negotiation. *Johns-Manville Products*, 223 NLRB 1317, 1318 (1976).

Therefore, injunctive relief is "proper and just," and Imperia is directed to offer reinstatement of the discharged employees. Without such relief, the situation is subject to change to the point at which any final order of the Board would come "too late to prevent [the employer] from obtaining its objectives by unfair labor practices." *Reynolds v. Curley Printing*, 247 F.Supp. 317, 324 (M.D.Tenn.1965). With each passing day, the integrity of the bargaining unit erodes, and may result in the frustration of the Act even in the event that the Board finally rules in the Union's favor. In a similar situation, another district court characterized the irreparable harm this way:

> There is a significant possibility that, by [the time the Board rules in the Union's favor], the [employees] who will be entitled to reinstatement as a result of a Board-issued resumption order will have accepted employment with other employers, perhaps in other locations, and will be understandably reluctant to disrupt once more their own and their families' lives in order to return to their former jobs. For whatever harms those [employees] have suffered, a final Board order alone will provide no relief.

Wilson v. Liberty Homes, 500 F.Supp. 1120, 1128–29 (W.D.Wis.1980), *aff'd* 108 LRRM 2699, 2707–08 (7th Cir.1981), *vacated as moot and opinion withdrawn from publication*, 673 F.2d 1333, 109 LRRM 2492 (7th Cir.1982). *See also Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1053 (2d Cir.1980) (affirming reinstatement to avoid "serious adverse import on employee interest in unionization"); *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 907 (3d Cir.1981) (finding irreparable harm to bargaining unit by discharge of employees); *Balicer v. Helrose Bindery*, 82 LRRM 2891 (D.N.J.1972).

Further, in order to protect the collective bargaining process, Imperia is required to bargain with the Union. As the Second Circuit has said, "when a union loses its majority as the result of unfair labor practices, it is essential not to freeze the situation, but rather to re-establish the conditions as they existed before the employer's unlawful campaign." *Seeler v. Trading Port*, 517 F.2d 33, 38 (2d Cir.1975) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969)). It is "[t]hose previous conditions [which] constitute the status quo which courts should restore through the issuance of a bargaining order under § 10(j)." *Id.* at 38–39.

Submit order on notice.

IT IS SO ORDERED.

NLRB v. Southwire Company

801 F.2d 1252 (11th Cir.), October 14, 1986

On petition for adjudication in civil contempt

Before GODBOLD and VANCE, Circuit Judges, and THOMAS, * Senior District Judge

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GODBOLD, Circuit Judge: The National Labor Relations Board has petitioned this court for an adjudication that Southwire is in civil contempt of judgments entered by the Fifth Circuit in five previous unfair labor practice cases. [1] Southwire answered, and this court appointed a Special Master to hear evidence

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* Honorable Daniel H. Thomas, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

[1] *N.L.R.B. v. Southwire Co.*, 313 F.2d 638 (5th Cir.1963) *(Southwire I)*; *N.L.R.B. v. Southwire Co.*, 352 F.2d 346 (5th Cir.1965) *(Southwire II)*; *Southwire Co. v. N.L.R.B.*, 383 F.2d 235 (5th Cir.1967) *(Southwire III)*; *Southwire Co. v. N.L.R.B.*, 393 F.2d 106 (5th Cir.1968) *(Southwire IV)*; *N.L.R.B. v. Southwire Co., et al.*, 429 F.2d 1050 (5th Cir.1970), *cert. denied*, 401 U.S. 939, 91 S.Ct. 932, 27 L.Ed.2d 218 (1971) *(Southwire V)*.

Continued

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and make recommended findings of fact and conclusions of law. [2]

Following an evidentiary hearing the Master issued his report and recommended remedies. Southwire and the Board filed exceptions, and the matter is before us on briefs and oral argument.

The Board's petition is based upon events that occurred during an organizational campaign by the United Steel Workers of America, AFL-CIO, to organize employees at Southwire's plants and facilities in Carrolton, Georgia in 1983-84. The Board alleges 24 specific unfair labor practices, which can be grouped into five categories: distribution of union materials, posting union materials on company lockers, refusals to permit posting union literature on company bulletin boards, oral solicitation, and other company acts of interference, restraint or coercion.

I. Distribution of union materials

Southwire's rules and regulations, in effect during the period in question, prohibited the distribution of material tending to promote or publicize the activities of any individual, institution or organization in established work areas. Distribution was permitted in non-work areas, including break areas, parking lots and off company property.

The Master found that on three occasions, September 20, 21 and 30, 1983, union adherents distributing union material on parking lots were told by security guards that they could not pass out the material or loiter on the property and were ordered to leave, and the employees did so. The parking lots were non-work areas, and employees were on their own time. Except for one of the employees engaged in the distribution on September 30, management did not inform the employees involved in these incidents that they could distribute union materials during their non-work time on company property. Nevertheless some of the employees did distribute material on future occasions.

The Master found (p. 18-19) that the security guards were hired by a security firm that contracted with Southwire to provide various security services and were under the general supervision of Southwire. Their duties included policing areas outside the plant buildings and protecting Southwire property and personnel. They had the authority to restrict access to company property. They were charged with enforcing not only security rules but also work rules of the company, including solicitation and distribution rules. The Master did not find that the security guards had actual authority to halt the distribution in the parking lots but rather held that they acted within their apparent authority in stopping the parking lot distribution even if, in informing the employees that they were violating Southwire rules, they conveyed incorrect information. *Harrison Steel Castings Co.*, 262 N.L.R.B. 450, 455 n. 6 (1982). The Board held in *G.F. Business Equipment, Inc.*, 252 N.L.R.B. 866 (1980) that although one independent security guard had not acted as the employer's agent when the employer had not "ratified, condoned, or authorized" his acts, *id.* at 867, another guard had acted as the employer's agent when he informed employees, pursuant to his understanding of the employer's rules, that they could not distribute literature on company property. *Id.* at 872; *cf. Cabot Corp.*, 223 N.L.R.B. 1388, 1401 (1976) (adopting Administrative Law Judge's proposed order, which recognized that an independent security guard could act as an employer's agent but refused to so hold under the factual situation presented). Therefore, the fact that Southwire did not ratify or condone the conduct of the security guards does not diminish its responsibility for the action of the guards when acting within their apparent authority.

Southwire also says that the rights of the employees were not significantly curtailed and orga-

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In these prior proceedings the judgments of the court of appeals directed Southwire to cease and desist from

(a) discrimination in regard to hire or employment *(Southwire I-V)*;

(b) interrogating employees concerning membership in a labor organization *(Southwire I, IV, V)*;

(c) threatening employees with plant closure or loss of jobs and the threat to never sign a union contract *(Southwire I, III-V)*;

(d) maintaining a no solicitation rule for company property on non-work time in non-work areas *(Southwire II)*;

(e) soliciting employees to report to it union activities *(Southwire IV)*; and

(f) a general proscription against in any other manner interfering with employees in the exercise of rights to self organization, to form, join or assist labor organizations, to bargain collectively, to engage in concerted activity, or to refrain from any and all such activities *(Southwire I-V)*.

[2] The present case is properly brought in the Eleventh Circuit because it is an agency case arising within the geographical confines of the circuit.

nizing efforts were not chilled, citing *Graham Architectural Products Corp. v. N.L.R.B.*, 697 F.2d 534 (3d Cir.1983). Applying the "clearly erroneous" test, *N.L.R.B. v. J.P. Stevens & Co.*, 538 F.2d 1152, 1160 (5th Cir.1976), we hold that the findings of the Master that more than a "momentary inconvenience" or "slight interference" with the employees' rights was involved and that the employees were effectively precluded from engaging in lawful solicitation activity for the remainder of the day in question, are not clearly erroneous. As to these occurrences the conclusion of the Master that the Act was violated must stand.

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On October 3 employees were distributing literature inside the turnstile of a company gate. They did not block the entrance. A security guard told the employees that solicitation on company property was not permitted, and he wrote down the name and badge identification number of each employee. Dialogue ensued involving the security guard, supervisors, the employees, and a union agent who was not an employee. At least one of the union agents was told that employees could handbill but that non-employee union organizers could not. By that evening a supervisor had distributed written instructions to all security officers stating that they could not interfere with Southwire employees attempting to gain support for the union if the employees were not breaking any rules or regulations; he noted that employees could distribute union material on company property in any area except designated work areas.

The Master found that on the October 3 occasion the employees never ceased distributing literature and that both the security guard and plant superintendent told the employees they would check with their supervisors to determine whether their instructions to the employees were correct. Thus, despite the dialogue between the several people involved, the security guards' orders were not enforced, and the employees freely distributed union literature on company property on future occasions. Therefore, the Master concluded, the acts of the company on this occasion were not coercive and no violation of the Act or of the prior orders of the court was involved. These conclusions of law by the Master are not erroneous.

II. Prohibition against posting union materials on lockers

The Master found that in three incidents (involving employees Bass, Runels and Dowdy) employees posted union stickers or literature on or in storage lockers that were furnished them, and a supervisor either removed the material or ordered it removed. He found that the company permitted posting other types of materials on lockers.

Southwire does not question the findings on the Runels and Bass incidents. But it attempts to distinguish the Runels incident on the ground that his storage locker or compartment, allowed him for his tools, was part of a work table that was different in type and location from the lockers furnished other employees and was newly painted. The Master found that was no rational basis for enforcing different posting rules for one type of storage place supplied an employee and another type of storage place and that all lockers were routinely cleaned and painted, after which employees posted stickers on them without interference. These findings are not clearly erroneous.

A supervisor removed stickers from employee Bass' locker. The company contends there was no coercive effect because the supervisor attempted to return the stickers to Bass but he declined them since they were "crumbled up." We accept the findings of the Master that the supervisor's actions were prompted by anti-union animus, that the supervisor (after being told by her superior that her act was improper) did not apologize or tell Bass that he could post the stickers on his locker; and that Bass placed no more stickers on his locker after this incident. Moreover, the Master found that this was not an isolated incident.

Southwire's objections to the findings on the Dowdy incident are based on credibility grounds and we reject them.

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III. Refusal to permit posting of union materials on company bulletin board

Three types of bulletin boards are in use at Southwire's facilities. A general information bulletin board, maintained in each department, is for posting industrial relations notices, safety information, and other material of general information to employees. Chapel bulletin boards are for notices of a religious nature. Trading post bulletin boards are located in non-work areas of the plant, and, as the title suggests, are used by employees who wish to advertise items to buy, sell or trade. According to company rules, notices placed on the trading post board must be no larger than 3 × 5 inches and must be given to the Employees Services Department for posting. The bulletin boards have glass doors which are locked, so only Employees Services personnel have access to them. The rules provide that "Notices of outside activities such as school, church, clubs or any organizational, institutional, or social activity will not be permitted." On three occasions employees asked permission to post union handbills, each on legal size paper, on a trading post bulletin board. One employee was turned down because his handbill was said not to meet the qualifications or requirements for posting on the trading post board. A second was turned down because his handbill was deemed unsuitable for this bulletin board. The third employee was told by the person of whom he sought permission that "he would see what he could do," but the notice was never posted and no reason for the denial was ever given to the employee.

There is no statutory right for an employee or a union to use an employer's bulletin board. The prohibition of the Act comes into play when the employer otherwise assents to employee access to the bulletin board and discriminatorily refuses to allow the posting of union notices or messages. *Allied Stores of New York,* 262 N.L.R.B. 985, 985 n. 3 (1982) (citing *Container Corp. of America,* 244 N.L.R.B. 318 (1979), *enforced in pertinent part,* 649 F.2d 1213 (6th Cir.1981)). The Master concluded that once Southwire allowed non-work related announcements on the "buy, sell or trade" bulletin boards, it could not thereafter have a valid managerial reason to exclude union notices, and that the company's interest in limiting access to the bulletin boards for prescribed types of announcements was outweighed by the employees' § 7 rights of communication, citing *Union Carbide Corp. v. N.L.R.B.,* 714 F.2d 657, 660 (6th Cir.1983) and *N.L.R.B. v. Honeywell Inc.,* 722 F.2d 405, 406 (8th Cir.1983). He also concluded that the company might legitimately limit the size of notices and limit duration, but it could not exclude an item based upon content.

Employees testified to seeing notices for outside organizations posted on the trading post bulletin boards. Two employees described notices of sporting events, church meetings, and blood drives posted underneath the glass on the boards, areas to which only the Employees Services Department had access. The company contends that it exercised complete and consistent control over the use of the trading post boards and that they were used for their narrow specific purpose and no other. It contends that the Master did not make credibility findings as between employees who testified to notices of outside organizations and events as opposed to the testimony of management personnel.

We do not need to adopt the Board's argument that once a bulletin board is made available for any designated type of non-work related notice the employer may exercise no control over content and employees ipso facto have an unlimited right to post union materials. Board and company each introduced a photograph identified as a trading post bulletin board. They are different boards. But each contains notices of varying sizes and types, including sizeable photographs of automobiles and houses. While these exhibits do not visually show subject matter other than "buy, sell or trade" notices, they do refute the company's position that it consistently policed the boards and uniformly enforced its rules relating to them.

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Therefore, we affirm the Master's conclusion that the company violated the Act by refusing access to the trading boards, but for a different reason.

IV. Distribution of union materials in break rooms

Company rules permit distribution of printed materials in non-work areas, including break areas. Some two months before the open organizational efforts began a plant manager sent a superintendent to the manager of the machine shop informing him that his employees were leaving trash on break room tables and asking him to require employees to help keep the area clean. The supervisor warned the machine shop employees about leaving trash in the break room.

In late September an employee handed out union literature in a break room in another part of the plant. A supervisor present informed him, in front of the other employees, that by distributing union literature in the break room he was "pushing his

best copy available

luck" and violating company rules and that he could be fired if he did it again. The employee, Bowe, explained that he thought he had a right to distribute and asked the supervisor to check on his information. The supervisor asked his supervisor and was told that he was not correct in reprimanding Bowe. The next day the errant supervisor apologized to Bowe and told him that he could distribute union materials during non-work time in non-work areas. The supervisor did not inform the other employees who had been present during the incident of his error unless they specifically asked him.

In a separate incident an employee of the machine shop placed union literature on tables in a break room. He was told by another employee that members of management had threatened to fire employees who left trash in the break room. This prompted the employee, Ragsdale, to admit to his supervisors that he had placed union literature in the break room and caused him to ask whether he was permitted to do this. The labor relations manager told him that since the company had some little problems [about litter] in the machine shop break room a few months earlier, and employees had been put on notice about the problem, an employee could be notified that if he continued to litter the break room he could be subject to discipline. Ragsdale's supervisor told him that he could read union literature on break but that, like all other trash, it must be disposed of when the break was finished. Ragsdale testified he never left union materials in the break room again since he felt his job was threatened.

Other non-union literature, including information on the company, and on other industries, and on church organizations was left in various break rooms at different times, and in particular in the machine shop break room on the day Ragsdale left his union literature.

The Master found that the incident involving Bowe was not an unlawful interference with an employee's distribution rights because Bowe was not precluded from distributing union literature on that day or on future occasions. He found, however, that Wynn's statement to Bowe, made in front of the other employees present, that he could be fired if he attempted to distribute in the room again was both coercive and intimidating and was not effectively repudiated. *United States Postal Service*, 253 N.L.R.B. 1203 (1981). We reject the contention of the Board that the Master erred in concluding that Wynn's actions did not amount to unlawful interference with an employee's distribution rights since Bowe was not precluded from distributing literature on that day or in the future.

With respect to the Ragsdale incident concerning leaving union literature in the machine shop break room, the Master found that this did not involve an unlawful restriction on an employee's distribution rights but a disparate enforcement of the cleanliness policy developed about two months previously. He found that the evidence supported a finding that other literature was left in the same break room on the same day as Ragsdale left union literature, but only Ragsdale was warned about keeping the room clean. This is not clearly erroneous.

V. Other acts of interference, restraint or coercion

The Master found several incidents of interference, restraint or coercion

On August 18, 1983, a conversation between supervisor Terrell and employee Runnels (threat of cut in wages and plant closure).

In September 1983, a conversation between supervisor Robinson and employee Runels (threat of plant closure).

In September 1983, a conversation between superintendent Morris and employee Bell (threat of loss of benefits, loss of jobs or of full time employment).

In October 1983, supervisor Jones and employee Vance (threat of loss of job for supporting union).

In October 1983, supervisor Roberts and employee Warren (surveillance).

We accept the conclusion of the Master that all of these incidents were coercive.

The objections of Southwire, based largely on credibility grounds and sufficiency of evidence grounds, are rejected.

VI. Remedies

In recommending a remedy the Master considered several factors. He considered the character and magnitude of the harm threatened and the possible effectiveness of a suggested sanction in bringing about the desired result. He noted the duty of the Board in a litigated case to employ broader and more stringent remedies against a recidivist than those invoked against a first offender. *Containair Systems Corp. v. N.L.R.B.*, 521 F.2d 1166, 1171 (2d Cir.1975).

The Master set out several considerations that favored the company. None of the illegal acts by the company involved discharge or discipline, only verbal warnings. Attempts were made by the company to correct violative acts, including meetings by Southwire's labor relations manager with all company managers and supervisors, a written directive to all security guards on October 3 and several unsuccessful efforts by supervisors to retract illegal statements and apologize to affected employees. Only five percent of management was alleged to have been involved in any wrongdoing, and only 1.5 percent of the company's employees were alleged to have been the subject of or witness to any unlawful conduct. Further, no evidence was presented that any of the violations adversely influenced the organizing campaign. Employees freely distributed union literature in the parking lots on occasions after it was initially inhibited. Union literature was left in the break rooms at various times. Employees freely solicited for the union at work during non-work time.

Other mitigating circumstances found to exist were that there was no evidence that word of the company's unlawful conduct was prevalent among the employees. There was no showing of plant-wide coercion or anti-union animus that directly or measurably affected the union's organizing campaign.

On the other hand company officials, including members of upper management, were involved in some of the violations that occurred. Many violations were similar to those that led to prior orders of the Fifth Circuit. The Master found that a few Southwire supervisors, despite instructions to the contrary, continued to carry on an anti-union campaign that was contrary to the company's expressed wishes. He thus concluded that the remedy fashioned must contain sanctions stronger than those previously imposed and that it was not adequate for the company simply to request its supervisors to refrain from unfair labor practices.

Bearing these factors in mind, the Master recommended:

(a) That Southwire, and its officers and agents, conduct themselves in accordance with prior judgments and with the contempt adjudication of August 26, 1970; that they refrain from coercive interrogation, threats, prohibition of union solicitation or distribution of campaign materials in non-work areas and on non-work time and refrain from discriminatorily enforcing no solicitation and no distribution rules and no posting rules.

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(b) That Southwire remove from employees' records any adverse reports or notations concerning violations of the prior judgments.

(c) That Southwire post a notice that it has been adjudged in civil contempt and that it will immediately undertake the purging actions directed by the court, and mail copies of the notice to former employees found to have been the subject of or witness to violations, and that it convene during working hours all of its employees and read to them the contents of the notice.

(d) That Southwire issue written instructions to all supervisors to comply with the underlying judgments and prior adjudication as well as the new order.

(e) That the company file a statement with the clerk of this court and the regional director of the Board showing steps taken by it to comply with this court's directions.

(f) That Southwire grant to the Board access to its facilities or records to verify compliance.

(g) That Southwire pay to the Board costs and expenses, including attorneys' salaries, incurred by the Board in this matter, and pay a prospective fine of $10,000 for each and every future violation of the judgment and, if the violation is a continuing violation, an additional fine of $1,000 per day for each day that the violation continues.

(h) That this court reserve jurisdiction to issue attachment against the company for any future violation.

The Board had proposed a prospective fine of $20,000 per violation and $2,000 per day. The Special Master rejected these amounts as too severe under the circumstances. On its part Southwire notes that during a 13-year period between 1970 and 1984, although four different organizing campaigns were instituted, no violations of the Act by it were found. It noted the finding by the Master that none of the violations in the present proceedings was flagrant and that some occurred because members of management ignored orders of the company, and at times explicit instructions did not filter down to all supervisory levels.

This court may accept, reject or modify the Master's recommendations as to remedial relief, adapting them to the circumstances of the case, so long as they are remedial or coercive but not penal. *Florida Steel Corp. v. N.L.R.B.*, 648 F.2d 233, 239 (5th Cir.Unit B 1981).

We have considered that three of the violations involving security guards resulted in de minimis interference with distribution of union literature. The company promptly issued clarifying instructions and repudiated the guards' actions. Literature was freely distributed thereafter. One of the incidents of removal of pro-union stickers from storage lockers was retracted. The coercive conversations and interrogations involved statements by low-level supervisors to seven of Southwire's 2,900 employees in one-on-one conversations. The Master found that word of the company's unlawful conduct was not shown to be prevalent among the employees.

We accept the recommendations of the Master for a prospective fine of $10,000 per violation and for payment of attorneys' fees and costs. We do not accept the recommendation of a continuing fine of $1,000 per day. A continuing fine is a Draconian measure. In factually disputed situations, and even in factually undisputed borderline situations, months or even years may be required to determine whether a violation has occurred, during which the continuing fine may be accruing daily.

The Special Master declined the request of the Board that the union be granted reasonable access to plant bulletin boards and non-work areas for a period of two years; that names and addresses of current employees be supplied to the union on request for two years; that union representatives be given notice and opportunity to be present at any address made by the

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company to its employees on the question of union representation and that union representatives be given equal time and facilities to respond; that for a period of two years, prior to any Board election which may be scheduled, the union be entitled to deliver a 30-minute speech to employees on work time. We accept the Master's recommendations that these proposed remedies not be adopted.

Except as herein rejected the Master's recommendations as to remedial relief are accepted.

The report of the Special Master is ACCEPTED in part and REJECTED in part. The judgment of this court will issue accordingly.

NLRB v. Browning-Ferris Industries of Louisville, Inc. d/b/a Indiana Home Sanitation

803 F.2d 345 (7th Cir.), October 15, 1986—275 NLRB No. 199

On petition to enforce Board Order

Before WOOD, COFFEY, and FLAUM, Circuit Judges

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FLAUM, Circuit Judge: The National Labor Relations Board, pursuant to section 10(e) of the National Labor Relations Act, seeks enforcement of a bargaining order it issued against the respondent company. The Board issued the order after the company refused to bargain collectively with Teamsters Local 783, which had been certified by election as the employees' collective bargaining representative. The company contends that the union's certification was invalid because it allegedly engaged in improper conduct affecting the election. Our review of the Board's proceedings reveals that the Board's decision to overrule the company's objections to the election conduct was based on substantial evidence, and we therefore enforce the Board's order.

I.

Browning-Ferris Industries is engaged in the collection and disposal of solid wastes. The union sought to represent the company's drivers, and on August 10, 1984, the Board conducted an election among the drivers in response to the union's petition. The secret ballots revealed that of eighteen employees, ten voted in favor of the union's representation and eight voted against representation. The company filed objections to the following conduct that it claimed had improperly affected the results of the election:

1. Prior to the election and throughout the organizing campaign, the union improperly induced employees to vote for the union by threatening the physical well-being of employees and their families.

2. Prior to the election and throughout the organizing campaign, the union improperly induced employees to vote for the union by telling them that if they signed an authorization card prior to the election, all or part of the standard union initiation fee would be waived.

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3. Immediately prior to the election, the union improperly induced andor coerced employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act by engaging in misrepresentations of a material nature to which the company did not have an adequate opportunity to respond.

4. During the voting, employees were intimidated by the persistent presence in the voting area of a known union supporter who refused to leave the area.

5. By this and related conduct [participation of a supervisor in the election campaign], the union interfered with the election and the results of the election must be set aside.

The Board's Regional Director conducted an investigation of these objections and issued a report to the Board in September 1984. In his report, the Director concluded that the company's evidence was insufficient to warrant an evidentiary hearing or to invalidate the election, and he recommended to the Board that the company's objections be dismissed. The company then filed exceptions to the Director's report with regard to its first, fourth, and fifth objections, and made no exceptions to the Director's recommendation concerning the second and third objections. In November 1984 the Board adopted the findings and recommendations of the Director, dismissed the company's remaining three objections, and held that a certification of representative should issue. The company's continued refusal to bargain with the union resulted in a complaint in April 1985, and a three-member panel of the Board held that the refusal constituted a violation of sections 8(a)(5) and (1) of the NLRA. The Board then ordered the company to bargain with the union, and this enforcement proceeding followed.

II.

Our review of the Board's decision to certify a collective bargaining representative following an election is "extremely limited." *NLRB v. Tom Wood Datsun, Inc.*, 767 F.2d 350, 352 (7th Cir.1935); *see also, e.g., Mosey Manufacturing Co. v. NLRB,* 701 F.2d 610, 614 (7th Cir.1983) (en banc). We will defer to the Board's selection of rules and policies to govern a particular election so long as those rules are reasonable, *Tom Wood Datsun,* 767 F.2d at 352, and we will review the application of those rules according to the "substantial evidence" standard. *NLRB v. Affiliated Midwest Hospital, Inc.*, 789 F.2d 524, 527 (7th Cir.1986); *Mosey,* 701 F.2d at 615. Since we presume that the Board's decision was fair, the party challenging the decision bears the burden of demonstrating that the decision was not based on substantial evidence. *Tom Wood Datsun,* 767 F.2d at 352. In the context of a challenge to an election, the challenging party "must establish that there is not substantial evidence supporting the conclusion that any election irregularities or misconduct did not 'so impair the integrity of the ballot result that invalidation of the election is necessary.'" *Affiliated Midwest Hospital,* 789 F.2d at 528 (quoting *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1123 (5th Cir.1975)). We will review each of the company's three objections to the election in order to determine whether it has demonstrated that the Board's decision to overrule those objections was not based on substantial evidence.

A. *Threats.* The Regional Director accepted as true the company's charge that two employees had been threatened by pro-union employees, but he found that the two incidents "did not create the type of fearful climate which the Board or the courts have found to be grounds for setting aside an election." The Director based his conclusion on several factors. One concerned the timing of the first threat, in which one employee allegedly warned another that he would "bust [the second employee's] head" for not voting in favor of the union. This threat occurred more than two months before the election and a month even before the union's petition for representation was filed. The Director noted that the threat had not been made during the "critical period" between

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the filing of the petition and the election, *Ideal Electric and Manufacturing Co.*, 134 NLRB 1275 (1961), and therefore that it was unreasonable to assume that any atmosphere of coercion that may have arisen had carried forward to the election. The Director's conclusion in this regard was further buttressed by the fact that these same two employees continued to have a friendly relationship in the months leading up to the election, and that the threatening employee made no further coercive remarks.

The Director also relied on the fact that the second threat, uttered the day of the election, was "vague and subject to more than one interpretation." The incident involved two employees, one telling the other that he had "better vote for the union." The Director found that, while the statement could have been interpreted as a threat, it also could have meant that the employee would be benefited by union representation. The Director concluded therefore that the statement was "unlikely . . . to affect the results of the election."

Other factors that contributed to the Director's conclusion included the fact that neither of the remarks could be attributed to the union or its agents and so were accorded "less weight," *Tuf-Flex Glass v. NLRB,* 715 F.2d 291, 296 (7th Cir.1983), and the fact that the remarks were isolated from each other and did not indicate a pattern of intimidation or an atmosphere of coercion. Finally, the Director pointed out that these statements were "unaccompanied by other threats or acts of violence" and therefore that they did not "rise to the level found objectionable in the cases cited by the employer."

We find that, based on all of these factors, the Director's decision and the Board's affirmance of that decision were based on substantial evidence. Moreover, the company failed in the administrative proceedings to carry its burden of producing specific evidence of "coercive conduct [that] so influenced potential voters that free choice was impossible," *NLRB v. Chicago Marine Containers, Inc.,* 745 F.2d 493, 500 (7th Cir.1984), most particularly by failing to put into the record any evidence suggesting that other employees knew of the two threatening statements, or that a coercive atmosphere arose as a result of the statements. Since the evidence of threats that the company *did* put before the Director was accepted as true, we can only conclude that the company has not sufficiently demonstrated that the decision to overrule its first objection was unsupported by substantial evidence.

B. *Presence of Union Supporter in Voting Area.* NLRB policies prohibit electioneering, and the Board will set aside an election if a party demonstrates that there were "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." *Milchem Inc.,* 170 NLRB 326 (1968); *see also, e.g., L.C. Cassidy & Son, Inc. v. NLRB,* 745 F.2d 1059, 1062 (7th Cir.1984). Moreover, once the challenging party has met this burden of proof, the Board will not inquire into the nature of the voting area conversations. *L.C. Cassidy,* 745 F.2d at 1062. The company here proffered evidence to the Director indicating that after one of the pro-union employees had voted and left the voting area, he returned and stood by the voting booth where other employees were waiting to vote. The evidence demonstrated, however, that the employee was not a "representative of any party," that he did not speak to any of the other employees, and that after a few minutes he left, immediately after a Board representative asked him to do so. Moreover, other witnesses testified that the employee had returned to use a vending machine in the area. Based on this record, we agree that the company failed to provide evidence of electioneering sufficient to overturn the election, and we hold therefore that the decision to overrule the company's objection was based on substantial evidence.

C. *Participation of Alleged Supervisor in Campaign.* The NLRB may set aside an election because of pro-union conduct by supervisors, if the challenging

party demonstrates either that (1) "employees are led to believe, because of the supervisor's activities, that the employer favors the union," or (2) "employees may be coerced into supporting the union out of fear of future retaliation by the pro-union supervisor." *NLRB v. Howard Johnson Motor Lodge,* 705 F.2d 932, 934 (7th Cir.1983). The company's objection was based only on the second of these possibilities, and in support of its objection it presented evidence that one of its alleged supervisors, Eugene Guerin, commented to employees that if they were going to talk about the union, they had better keep it among themselves, and that since "they had started it, they had best finish it." On a second occasion Guerin supposedly remarked that he would support the union and that he hoped the union would win.

The Director accepted as true the company's claim that these statements had been made, but found that the company had not demonstrated that employees may have been coerced into supporting the union because of fear of reprisals. The Director's decision had several bases. First, the Director noted that although Guerin had been invested with the title of "route supervisor," he had been stripped of some of his "supervisory indicia" and eventually laid off before the election. Immediately before his layoff, the Director found, Guerin "was performing the duties of a bargaining unit driver during most of his working hours." Thus, Guerin was at most a low-level supervisor (there were at least two levels higher than his), if he could be deemed a supervisor at all for these purposes. The Director declined to decide whether Guerin technically was a supervisor, however, and treated the low level of his supervisory status as but one factor in the decision to overrule the company's objection. The other bases for the Director's decision were that the employees were unlikely to have been coerced into voting for the union by Guerin's statements, given his low level status and the absence of threats of retaliation, and the fact that Guerin's statements, if they had any impact, actually were more likely to make the employees vote *against* the union for fear of *employer* reprisals.

The record leads us to conclude that the decision to overrule the company's objection was based on substantial evidence. The company failed to introduce any evidence suggesting that the employees interpreted Guerin's remarks as threats, that they feared reprisals from him, or even that Guerin was an active union supporter. The evidence that it presented falls short of rising to the level that has supported overturning other elections and fails to establish an interference with employee free choice. The Board's decision therefore was based on substantial evidence.

III.

Our review of the company's above three objections revealed that it did not demonstrate that the Board lacked substantial evidence on which to overrule the objections. The company makes several other claims on appeal, however, to which we now turn.

A. *The Small Size of the Unit and the Cumulative Impact of the Conduct.* The company alleges that the Board erred in not giving sufficient weight to the cumulative impact of the election conduct, particularly in light of the small size of the bargaining unit and the closeness of the election results. While the size of the unit and the closeness of the vote may be relevant considerations in determining whether free choice was interfered with, *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1125 (7th Cir.1975), neither fact is sufficient to raise a presumption that the conduct had an impact on the election results. *Id.* It has been held that the cumulative impact argument "may not be used to turn a number of insubstantial objections to an election into a serious challenge." *Amalgamated Clothing & Textile Workers v. NLRB,* 736 F.2d 1559, 1569 (D.C.Cir.1984). The challenging party must at the very least demonstrate conduct that is legally actionable in its component parts *or* "offer the Board detailed evidence of the pattern the activity formed and its influence on the election." *Melrose-Wakefield Hospital Association v. NLRB,* 615 F.2d 563, 570 (1st Cir.1980). The company here has done neither: the isolated instances of improper conduct were properly found to be insufficient to overturn the election, and the company offered nothing specific to establish a pattern of conduct that could have influenced the vote. In the absence of this kind of specific evidence, the Board had a substantial basis for concluding that the cumulative impact of the conduct was not sufficient to warrant overturning the election.

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B. *The Board's Refusal to Grant the Company a Hearing.* The Board's policy is to grant a challenging party an evidentiary hearing on its objections only where the party raises "substantial and material factual issues and proffers evidence that establishes a prima facie case for setting aside an election." *L.C. Cassidy & Son, Inc. v. NLRB,* 745 F.2d 1059, 1064 (7th Cir.1984). As we indicated in our discussion above, the company did not come forward with evidence that established a prima facie case for setting aside the election. Moreover, it failed to raise substantial and material factual issues since the Director accepted as true all of the evidence it offered, even the controverted evidence. The company's only assertion was that the hearing should have been held in order to determine whether the conduct it complained of had an impact on the election. Its failure was that it could not offer any evidence that indicated such an impact was likely. In the absence of this kind of evidence, we cannot conclude that the Board's decision to deny a hearing was unreasonable. While we are sympathetic to the company's difficulties in gathering evidence, we must also remain mindful of the desirability of "quick and conclusive election results." *Orleans Manufacturing Co.,* 120 NLRB 630, 639 (1958). For this reason, we have recognized that an *ex parte* investigation "is deemed sufficient, indeed preferable, in that it precludes the opportunity for protracted delay." *Louis-Allis Co. v. NLRB,* 463 F.2d 512, 520 (7th Cir.1972). Therefore, because the company failed to raise substantial and material factual issues, we hold that it was not entitled to a hearing.

C. *The Board's Review of Evidence.* The company contends that enforcement of the Board's order should be denied because of our "*per se* rule under which the Board can never adopt the findings and recommendations of a Regional Director without first reviewing the affidavits produced by the Regional Director's investigation on which he based his conclusions." *Prairie Tank Southern v. NLRB,* 710 F.2d 1262, 1266–67 (7th Cir.1983). The Board in this case had before it the affidavits that the company proffered to the Director, but not the affidavits that the Director himself obtained. Board regulations make clear, however, that all witness statements are not part of the record that is forwarded from the Director to the Board. 29 CFR § 102.69(g)(*l*)(ii). Thus, parties are "on notice that the affidavits received in the Regional Director's administrative investigation are not part of the record, and that it is the responsibility of the objecting party to file supporting affidavits with the Board." *L.C. Cassidy,* 745 F.2d at 1065. While we agree that the company may have been uncertain as to how it could file with the Board affidavits that it may not have been access to, it should have raised its concern before the Board at its first opportunity, in other words in the underlying certification proceeding, rather than waiting until a subsequent stage, i.e. the unfair labor practice proceeding. *See, e.g., NLRB v. Affiliated Midwest Hospital, Inc.,* 789 F.2d 524, 533 (7th Cir.1986). Because it declined to do so, we conclude that the issue has been waived. *Id.*

For the above reasons, the Board's application for enforcement is GRANTED.

Washington Materials, Inc. t/a Buffalo Concrete; District Concrete Company, Inc.; Howat Concrete Company, Inc.; Maloney Concrete Company; Silver Hill Concrete Corporation and Super Concrete Corporation v. NLRB

Drivers, Chauffeurs and Helpers Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB

803 F.2d 1333 (4th Cir.), October 23, 1986

On petition to review Board Order

Before WIDENER, HALL, and MURNAGHAN, Circuit Judges

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K.K. HALL, Circuit Judge: Washington Materials, Inc. is a corporation comprised of six ready-mix concrete suppliers in Washington, D.C. and its surrounding suburbs, including parts of Maryland and Virginia. The six companies, which trade as Washington Materials, Inc., are Buffalo Concrete, District Concrete Company, Inc., Howat Concrete Company, Inc., Maloney Concrete Company, Silver Hill Concrete Corporation, and Super Concrete Corporation ("Buffalo," "District," "Howat," "Maloney," "Silver Hill," "Super," or, collectively, the "Companies"). The Drivers, Chauffeurs, and Helpers Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("the Union") represents the Companies' drivers and yardmen.

In these consolidated appeals, the Companies petition for review of an order of the NLRB (the "Board"), in which the Board found violations of Sections 8(a)(5), (3) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(5), (3), and (1). The Union petitions for review of other portions of the same order. The Board has filed a cross-application for enforcement of its order. We enforce in part and deny in part the Board's order.

I.

The Companies consist of all of the unionized ready-mix concrete suppliers in the Washington, D.C. area. The six Companies are in competition both with each other and with non-union concrete suppliers, which have been able to obtain a progressively larger share of the market in recent years. The Companies' most recent collective bargaining contract with the Union expired on May 15, 1982.

Contract Negotiations

Late in 1981, the Companies contacted Daniel George, the Union's president, and suggested the possibility of early contract negotiations. On January 7, 1982, George met for the first time with William Wilcox, the Companies' attorney and designated bargaining agent. Willcox took the position that the Companies had to narrow the cost gap between union and non-union wages, overtime, and fringe benefits in order to obtain more concrete supply jobs. George responded that he understood the problem, but that "take-backs" or concessions were a serious matter. George also stated that members of the Union believed that some of the Companies were conducting double-breasted operations, i.e. non-union businesses in addition to their unionized operations.

The next bargaining session, which took place on February 2, 1982, was attended by most of the Companies' chief executive officers. At that meeting, George specifically alleged that four of the companies owned or controlled non-union businesses. When Wilcox replied that the Companies were not there to discuss double-breasted operations, George responded that the Union was going to have "one hell of a problem" trying to convince its membership to accept concessions to combat non-union competition when the employees reported working on the same job with non-union employees whom they believed to be under the control of the Companies.

Two days later, at the next formal bargaining session, the Companies presented written contract proposals, which included a number of reductions in wages and benefits. After the parties discussed the proposals, the Union stated that it would make the Companies "an offer that [they] couldn't refuse" if the Companies would discuss their relationships with non-union businesses. Specifically, the Union offered to accept a 30 percent reduction in wages if the Companies would "put their non-Union companies on the [bargaining] table." Wilcox responded that the Companies could not talk about double-breasting and curtailed further discussion of the Union's cut-back offer.

At a bargaining session on April 19, 1982, the Companies proposed several specific wage and benefit reductions. George replied that he needed to look at the Companies' books. The Companies refused, and the bargaining session ended.

During subsequent bargaining sessions, George reiterated that the Union wanted to look at the Companies' books. He explained to Willcox that he thought that the books would show, among other things, that Super Concrete and some of the other Companies were subsidizing non-union operations.

At some point during the bargaining session on May 10, 1982, Willcox asserted that the Companies were losing job bids to non-union competitors because of the Companies' higher labor costs. In response, George asked the Companies to name the competitors to whom they had lost specific bids, but the Companies refused to provide the Union with that information.

On May 12, 1982, the Union sent letters to Willcox and to each of the six Companies, stating, in pertinent part, as follows:

> In order for the Union to fashion, realistically, a response to your latest proposal, the local union *must* have the following information:
>
> (1) *Certified* year end financial statement for the year ending December 31, 1981. . . .
>
> (2) A list of *all* bids submitted by you or an agent of your company on your behalf relative to performing *any* work covered by your collective bargaining agreement with Local Union No. 639.

(emphasis in original).

The parties discussed the Union's information requests at the next bargaining session, which took place on May 13. Wilcox took the position that the requested information would not be helpful to the Union. On May 15, the collective bargaining agreement expired and the Union filed unfair labor practice charges with the Board based upon the Companies' refusal to provide financial information.

On May 21, Willcox sent George a letter, again denying the Union's information requests and stating that:

> As we have said very often, to know the reason for our position and the facts that must be dealt with on your side of the table, as on ours, you don't need our "financial statements". You have only to look about you. It is as evident to you as it is to us that the amount of work and the amount of jobs have been steadily eroding for years in the face of the non-union competition. . . . The labor costs of the non-union companies are, as you know, substantially below those of the unionized companies. . . . Therefore the reason we have made our proposals is to try to bring our labor costs and productivity and assurances of uninterrupted deliveries more in line with those of the non-unionized companies, although our labor costs would still be very substantially above, and our productivity below, those of the non-unionized companies even if you agreed to all our proposals. . . .

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At the next bargaining session, which took place on May 24, Willcox asked the Union to make a proposal. George responded that the Companies had still not honored the Union's requests for information from the Companies' books, which he suspected would show whether Buffalo, Maloney, Super, and Howat had double-breasted relationships with certain non-union companies. The Companies thereafter modified some of their take-back proposals.

At a subsequent Union membership meeting, George went through the Companies' contract proposals item by item. George explained the foreseeable impact of the information requested by the Union on the direction of the contract negotiations. As an example, he stated that if the job-bid information indicated that the Companies were legitimately losing bids, the Union would have to recommend that the employees accept reductions. George further stated, however, that if the job-bid information showed that some Companies were deliberately bidding high on jobs in order to channel work to non-union affiliates, the Union would oppose any take-backs. The employees then voted to strike against the Companies in the event that no bargaining agreement would be reached by midnight on May 27.

At subsequent bargaining sessions, the Companies withdrew or modified most, but not all, of their remaining take-back proposals. When the Companies refused the Union's renewed request for additional information, George announced that the Union would have no choice but to recommend a strike to the employees.

On the evening of May 26, the Union held a membership meeting to address the Companies' latest contract proposals. George concluded his presentation of the proposals by stating that in view of the Companies' steadfast refusal to provide information, the Union had no choice but to honor the employees' May 25 strike vote. Some of the employees asked George whether the information requested by the Union would show whether or not the Companies had a financial interest in double-breasted operations. George replied affirmatively. In response, some of the employees commented that it was grossly unfair for the Companies to complain about non-union competition when they were actually competing with themselves.

The Strike and its Aftermath

The strike began on May 27, 1982. During May and June, each of the Companies wrote to George and provided some of the information which he had earlier requested, including lists of jobs for which they had submitted bids. Between June 18 and June 22, George sent letters to the Companies informing them that the material which they had submitted did not satisfy the Union's oral or written information requests. George stated that the Companies' job-bid information was insufficient to enable the Union to assess the Companies' claim of competitive disadvantage, because the list of jobs did not disclose such relevant details as the amount bid by the Company and the names of the successful bidders. In his letters to the six Companies George further stated that "[t]he Union wanted to know how it (the Union) could, in good faith, explain to its members that [the employer association's] proposals were realistic when [Union] member[s] viewed the companies as competing with themselves. . . ."

On July 15, 1982, the Union sent a telegram to Willcox and to each of the Companies making an unconditional offer to return to work on behalf of all of the striking employees. After the telegram was sent, strikers began returning to work. Although some were not immediately reinstated, most of the strikers were eventually reemployed.

On July 20, Willcox wrote to the Union and emphasized that the Companies needed wage and benefit reductions because their higher labor costs put them at a competitive disadvantage with respect to the non-union sector of the business. Willcox also stated that the "majority" of the Companies' non-union competitors had no connection with any members of the employer association. In his letter, Willcox specifi-

cally disavowed the idea that the Companies were unable to pay higher wages, asserting that they had only maintained a desire to narrow the labor cost gap between the unionized Companies and their non-union competitors.

The parties held several bargaining sessions during August and September, but were unable to reach any bargaining agreement. The Companies continued to operate under substantially the same economic terms and conditions established in the collective bargaining contract that had expired the preceding May.

Super's Refusal to Reinstate Johnson

On June 2, 1982, Wesley Northington and Charles Johnson, along with one other striking Super employee, attempted to attend a court hearing on Super's request for a temporary restraining order against violence associated with the strike. There was uncontradicted testimony that the three men "disturbed the proceedings" and were not allowed in the courtroom.

After leaving the courthouse together, they appeared about thirty minutes later at a construction site where two non-striking Super drivers, Ecton and Brown, were driving Super delivery trucks loaded with concrete. While the trucks were at the job site, the foreman, McDonald Sparrow, saw Northington on top of Ecton, pounding Ecton in the head with his fist. After being told by Sparrow to stop, Northington hit Ecton in the arm and face with a shovel. Sparrow grabbed the shovel from Northington and hung on to it, forcing Northington to let go of it. Northington then left the scene. As Northington was leaving, Sparrow saw Johnson and heard him yell to Brown, who was in one of the Super delivery trucks, "Don't get on that radio." Johnson then departed in the same direction as Northington. According to one striking Super employee, Johnson later said "I did not want to bust [Ecton's] head up," a remark which the employee interpreted to mean Johnson claimed responsibility for the assault. As a result of this incident, Johnson was denied reinstatement at the conclusion of the strike.

Maloney's Refusal to Reinstate Winter

Edward A. Winter is a mixer driver who has worked for Maloney since 1965. During his employment, Winter was the subject of numerous customer complaints and disciplinary warnings, involving poor attitude and behavior. Between January, 1976, and April, 1982, he received sixteen reprimands for violating various company rules. Two of these incidents were described as major offenses. He was also suspended from his job on two occasions.

Other drivers complained repeatedly about Winter's belligerent and uncooperative behavior and he had to be transferred among Company facilities a number of times because of problems, including fights, with other employees. Moreover, there was testimony that in early 1982 two Union shop stewards informed Maloney's president that they would work with management to get rid of Winter. Following the strike, thirteen employees also signed a petition, urging Maloney not to reinstate Winter in order to prevent him from causing further friction among customers, management, and employees.

Early in March, 1982, Winter failed to report back to work from a seasonal layoff in a timely fashion and was denied reemployment for the 1982 construction season on that account. Winter filed a grievance and, after George's intervention, was reemployed.

When the strike began, Winter joined it and picketed the Maloney plant from time to time. He assumed no leadership role in the strike and did nothing to otherwise distinguish himself from the rest of the striking employees. After the strike was over, Winter reported to the plant but was never reemployed. On October 19, 1982, after George contacted Maloney about the situation, the employer terminated Winter, citing his "terrible" job performance.

The ALJ's Decision

The Board filed a complaint against the Companies and the matter was heard by an ALJ. The ALJ found that the six Companies had violated the Act by refusing to

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provide the Union with their 1981 financial statements. The ALJ concluded that the Union was entitled to this information because the Companies had made their financial ability to pay an issue during the collective bargaining negotiations and the refusal to provide the financial statements caused the strike. The ALJ further found that four of the Companies (Buffalo, Maloney, Howat, and Super) committed a further unfair labor practice by failing to provide the "double-breasting" information requested by the Union.

In addition, the ALJ concluded that Maloney had violated the Act by discharging Winter because of his union membership. Finally, the ALJ found that Super's refusal to reinstate Johnson was not a violation of the Act.

The Board's Decision

The Board affirmed in part and reversed in part the ALJ's decision. The Board agreed with the ALJ that Buffalo, Maloney, Howat, and Super had violated the Act by refusing to furnish the Union with information concerning their relationships with certain non-union operations. The Board further found that this refusal to furnish information concerning alleged double-breasted operations was a contributing cause of the employees' strike against the four Companies and that the strike was, therefore, an unfair labor practice strike.

However, contrary to the conclusion reached by the ALJ, the Board found that the Companies had not raised a claim of inability to pay and, therefore, did not violate the Act by refusing to turn over their financial statements to the Union. Finally, the Board concluded that the refusal to reinstate both Winter and Johnson was a violation of the Act.

II.

In its appeal, the Union contends that the Board erred in finding that the Companies' refusal to furnish financial statements was not an unfair labor practice. In their appeal, the Companies contend that the Board's findings concerning the refusal by four of the Companies to furnish the Union with information about alleged double-breasted operations is not supported by substantial evidence. The Companies also contend that the Board erred in ordering the reinstatement of both Winter and Johnson. We uphold the Board's findings and conclusions with regard to the issues involving the financial statements and the double-breasting information as supported by substantial evidence. We conclude, however, that the Board erred in ordering the reinstatement of Winter and Johnson.

In *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956), the Supreme Court held that an employer's "refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." In the instant case, the Board, unlike the ALJ, refused to equate an employer's desire not to pay wages and benefits as an inability to make such payments. As the Board concluded:

> [A]t the first negotiating session Willcox stated that unionized contractors were not competitive due to the large inroads into the industry made by the non-union contractors. Willcox consistently repeated this theme throughout the entire bargaining process. At no time did the Respondents assert they were unable to pay what was required under the union contract proposals but rather consistently maintained they wanted to obtain a more competitive position in the industry. The Respondents thus had no *Truitt* obligation to provide the Union with all their financial records and therefore did not violate Section 8(a)(5) and (1) by refusing the Union's request for that information.

The Seventh Circuit recently came to the same conclusion in a similar case, observing that:

> the mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay. The relevant test, as articulated by this court, is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay
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>
> the employees' proposed demands. Only in the latter situation where the employer communicat-

> ed that it 'could not' pay the demands has it made a claim of inability to pay.

NLRB v. Harvstone Manufacturing Corp., 785 F.2d 570, 575–76 (7th Cir.1986) (citations and footnote omitted). *Cf. Empire Terminal Warehouse Company*, 151 NLRB 1359 (1965), *aff'd sub nom. Dallas General Drivers, Warehousemen and Helpers, Local No. 745 v. NLRB*, 355 F.2d 842 (D.C.Cir.1966) (employer's refusal to provide union with its financial books and records did not violate Section 8(a)(5) of the Act, where the employer's position was not based on inability to pay but on assertion that labor costs placed it in a disadvantageous position with respect to its competitors).

We find that the Board's analysis in the instant case is reasonable and that its finding in favor of the Companies on the financial disclosure issue is supported by substantial evidence. We, therefore, will not disturb that finding on appeal. [1]

III.

Likewise, we perceive no grounds for overturning the Board's conclusion that four of the Companies committed an unfair labor practice by failing to furnish the requested double-breasting data. Certainly, the Union's information concerning the alleged double-breasted operations was sufficient to trigger a duty to disclose relevant data. *See Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 536 (4th Cir.1985) (reports by union members that employer was interchanging work and employees with nonunion business was sufficient to require disclosure); *NLRB v. Leonard B. Hebert, Jr. & Co., Inc.*, 696 F.2d 1120, 1123–26 (5th Cir.) *cert. denied*, 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88 (1983) (union members' observations of work interchange at alleged double-breasting jobsite were among the reasons cited for finding a duty to disclose). Moreover, as the Board pointed out in its decision, the record establishes that the issue of double-breasted operations was discussed throughout the negotiations. The Union's letters of May 12, 1982, merely reduced to writing its previous requests for double-breasting information made during the discussions at the bargaining table. These requests, made well in advance of the strike, provided adequate notice to the Companies that such information was being sought. *See NLRB v. Rubatex Corp.*, 601 F.2d 147, 151 (4th Cir.), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979) (bargaining table exchange about which group of employees should have received a bonus gave rise to employer's duty to disclose information about the bonus); *NLRB v. Bagel Bakers Council of Greater New York*, 434 F.2d 884, 887–888 (2d Cir.1970), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 648 (1971) (bargaining table discussion constituted sufficient notice to employer that union was requesting financial information to substantiate a claim of inability to pay present level of wages). After considering the Companies' various arguments on this issue, we reject them as meritless and sustain the Board's findings as supported by substantial evidence.

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IV.

We find no support, however, for that portion of the Board's order which requires Super to reinstate Johnson. The Board overturned the ALJ's finding that Super was justified in denying reinstatement to Johnson because of his deliberate association with Northington's beating of Ecton. Unlike the ALJ, the Board refused to attach any significance to Johnson's remark, "Don't get on that radio," shouted to the other Super driver. Upon review of the record, however, we find no substantial evidence to support the Board's conclusion.

The uncontroverted facts [2] are that Johnson and Northington were at the courthouse on the day in question, "disturbing the proceedings;" they left together and appeared together thirty minutes later at a site where replacement drivers were working; Northington beat Ecton in the face and body with a shovel; Johnson rendered no assistance to Ecton and immediately after the beating threatened the replacement driver seeking medical andor police help by yelling at him "Don't get on that radio;" Johnson and Northington then left the scene almost simultaneously; later, Johnson made a statement that was interpreted to mean he claimed responsibility for the attack. The Board's conclusion ignores these facts. By ordering the driver not to seek medical help for Ecton and not to call the police to apprehend the perpetrator of the violence, Johnson fully associated himself with Northington's criminal acts. Accordingly, Super was amply justified in refusing to reinstate Johnson following the strike and the Board's order to the contrary cannot stand.

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[1] Nor do we find any merit to the Union's contention that a remand is required to address factual disputes on the financial disclosure issue. Our examination of the record confirms that throughout the negotiations, the Companies, through their designated bargaining agent, consistently maintained that they were not claiming inability to pay. Any isolated remarks suggesting that an individual entity had some financial problems is insufficient to undermine the Board's conclusion that the Companies' bargaining position did not raise a claim of inability to pay. *See NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 576 (7th Cir.1986) (isolated words and phrases indicating financial problems were insufficient to overcome employers' clear bargaining position that they were not claiming inability to pay); ACL Corp. dba Atlanta Hilton & Tower, 271 NLRB 1600, 1602 (1984) (employer's references to unfavorable economic conditions and refusal to deny or confirm that hotel was making profit did not amount to a claim of inability to pay); Empire Terminal Warehouse Co., 151 NLRB 1359, 1371 (1965), enf'd sub nom. *Dallas General Drivers, Warehousemen & Helpers, Local No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C.Cir.1966) (although making references to losing customers and "things . . . getting rough," employer did not claim inability to pay).

[2] Johnson, who was present during the hearing in this case, did not testify. The Union presented no evidence and the Board's General Counsel presented no evidence other than the discharge paper.

V.

We, likewise, refuse to enforce that portion of the Board's order requiring Maloney to reinstate Winter. Winter's "terrible" job performance, cited by his employer as the reason for his discharge, is undeniable. Nevertheless, the Board and the Union rely on the fact that the employer tolerated Winter's poor work performance in the past and waited to discharge him until after his participation in the strike.

In some circumstances, such conduct on the part of an employer can be sufficient to find an improper motive for the discharge. *See, e.g. NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 600–01 (4th Cir.1977) (discharge following employee's participation in concerted activity was unlawful regardless of his unsatisfactory work record, where there were no new complaints prior to his discharge and employee's poor work performance was not articulated as the reason for his discharge at the time he was fired). Where antiunion animus is a factor in the employer's decision to discharge an employee, an unfair labor practice is established. *McLean Trucking Co. v. NLRB*, 719 F.2d 1226, 1227 (4th Cir.1983). However, the mere exercise of protected rights does not immunize an employee from discharge and it is error to accord no weight to an employee's performance deficiencies. *Id.* at 1228, 1230–33.

In *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207 (7th Cir.1981), the Seventh Circuit refused to enforce the Board's reinstatement order, where the discharges were justified by previously tolerated employee misconduct. In that case the court criticized the "notion that blatant misconduct once tolerated at all must be tolerated forever." *Id.* at 1214. Citing its previous decision in *NLRB v. Truck Drivers, Oil Drivers, etc.*, 630 F.2d 505, 509 (7th Cir.1980), *cert. denied sub. nom. Gilmer v. Truck Drivers*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981), the Seventh Circuit observed:

> 'there must be room in the law for a right of an employer somewhere, some-
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> time, at some stage, to free itself of continuing, unproductive, internal, and improper harassment.' . . . . To ascribe any motive to these discharges other than a long overdue intolerance of [the discharged employees'] offensive and disruptive acts would be to indulge in unwarranted speculation.

Id.

In this case, we conclude that the record does not support a finding of improper motive. Dissatisfaction with Winter's poor job performance, attitude, and behavior was widespread among management, customers, and his fellow employees. Moreover, by his own admission, Winter did nothing during the strike to set him apart from other striking employees. Significantly, no other striking employee engaging in the same type of activity as Winter was discharged. Absent a showing that Winter was a more active union participant than the other striking employees, there is no basis for a finding that he was a potential or actual target of discriminatory treatment or that his discharge was retaliatory, *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 993–94 (4th Cir.1979); *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338 (4th Cir.1976); *Torrington Company v. NLRB*, 506 F.2d 1042, 1047 (4th Cir.1974).

In *Firestone Tire & Rubber Co. v. NLRB, supra* at 1337, we held that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive

reason why the employer rejected the good cause and chose a bad one.

Firestone Tire & Rubber Co. v. NLRB, supra at 1337. We conclude that in this case the Board failed to sustain its burden of showing improper motive. Accordingly, we deny enforcement as to the portion of the order which finds Maloney in violation of the Act for refusing to reinstate Winter.

VI.

For the reasons stated in Parts II and III of this opinion, we enforce the Board's order insofar as it (1) refused to find a violation of the Act for the Companies' failure to disclose its financial records to the Union and (2) found a violation of the Act for the failure of four of the Companies to disclose to the Union information pertaining to their involvement in non-union operations. For the reasons expressed in Parts IV and V, we deny enforcement as to those portions of the Board's order requiring the reinstatement of Johnson and Winter.

ENFORCED IN PART, DENIED IN PART.

NLRB v. Edward Cooper Painting, Inc. and Cooper & Cooper Painting, an alter ego

804 F.2d 934 (6th Cir.), November 6, 1986—273 NLRB 1870

On petition to enforce Board Order

Before ENGEL and RYAN, Circuit Judges and CONTIE *, Senior Circuit Judge

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RYAN, Circuit Judge: This case involves an NLRB petition to enforce a decision and order finding unfair labor practices against respondent Edward Cooper Painting, Inc. (the Corporation), and its alleged alter ego, Cooper & Cooper Painting (the Partnership). The NLRB [illegible]air labor practice proceeding was filed because the Corporation unilaterally terminated the collective bargaining agreement it had with the International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768 (the Union). After the NLRB proceeding was initiated, the Corporation filed for bankruptcy. The three primary issues presented are: (1) whether this court has jurisdiction to determine whether the automatic stay of judicial proceedings created by 11 U.S.C. § 362(a)(1) when the Corporation filed for bankruptcy applied to the NLRB proceeding; (2) whether the NLRB proceeding was stayed by operation of § 362(a)(1); and (3) whether the NLRB's order is enforceable against the corporation, or against the Partnership, its alleged alter ego.

For reasons discussed more fully below, we conclude: (1) we have jurisdiction to determine whether the automatic stay applied to the NLRB proceeding; (2) the proceeding was excepted from the stay by operation of 11 U.S.C. § 362(b)(4); and (3) the NLRB's order is enforceable against both the Cooper corporation and the Cooper & Cooper partnership. Therefore, the NLRB's decision is affirmed.

The findings of fact of the NLRB are conclusive if supported by substantial evidence. 29 U.S.C. § 160(e). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)). The following facts are adopted from the Board's decision, and are supported by substantial evidence.

Henry Edward Cooper was the only shareholder and sole manager of the Corporation, which did business in Lexington, Kentucky. In 1981, he employed as many as six people, including his son, David Cooper, who was working foreman of the Corporation's painting operations. Prior to 1981, the Corporation negotiated and signed two collective bargaining agreements with the Union. [1] Each agreement had a term of two years, and expired on March 31, 1980, and March 31, 1982, respectively. In 1981, when one of its major customers decided to accept non-union bids for painting jobs, the Corporation experienced financial difficulty. By July 23, 1981, business was declining and the firm **937** had only three employees, Henry Edward Cooper, David Cooper, and Walter Young, Jr.

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* Honorable Leroy J. Contie took senior status July 1, 1986.

[1] The Corporation was a member of the Blue Grass Chapter of the Painting and Decorating Contractors of America (PDCA), the organiza-

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On July 24, 1981, the Corporation unilaterally terminated both collective bargaining agreements effective August 1, 1981. This action violated the agreements and was an unfair labor practice in violation of the National Labor Relations Act. Henry Cooper informed Walter Young, Jr., that he could continue to work if he was willing to work under non-union conditions. Young declined the offer, and the Union filed an unfair labor practice complaint with the NLRB. On September 17, 1981, the NLRB filed unfair labor practice charges against the Corporation, seeking backpay on behalf of Walter Young, Jr., and other unnamed employees, as well as equitable relief.

After termination of its relationship with the Union, the Corporation continued in the painting business. The business was operated essentially the same as before the union agreement was terminated, except that non-union employees replaced union employees. The offices, secretary, and telephone number of the business remained the same. The same type of painting work was performed. David Cooper continued as foreman, and Henry Edward Cooper remained owner and operator.

In November of 1981, Henry Edward and David Cooper began operating their business as a partnership under the name Cooper & Cooper Painting. After this organizational change, David Cooper received a salary instead of an hourly wage, participated in partnership decisions, and shared in the Partnership's profits on a forty percent basis. The Partnership continued the painting business previously carried on by the Corporation.

On December 4, 1981, the Corporation filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Code. Although the Board had filed proof of claims with the bankruptcy court in the aggregate amount of $120,296, representing backpay due Walter Young, Jr., and other unnamed employees, the Corporation had been liquidated and the estate closed by order of the bankruptcy court by the time the Board rendered its decision and order on February 12, 1985.

On May 17, 1982, Henry Edward Cooper, an individual, filed for bankruptcy under Chapter 7 of the Bankruptcy Code and was discharged in bankruptcy on December 30, 1982, prior to the Board's decision and order. While the NLRB had notice of Henry Edward Cooper's personal bankruptcy, the Partnership did not raise his bankruptcy as a defense to enforcement of the NLRB's order.

The Cooper & Cooper partnership ended operations on November 4, 1982. Apparently, its business has been taken over by a new corporation.

The Board's order [2] requires the Corporation, and its alter ego, the Partnership, to: (1) cease and desist certain unfair labor practices, including abrogation of the terms of the collective bargaining agreement the Corporation had with the Union and termination of employees solely because they were members of the Union; (2) recognize and bargain with the Union as the designated bargaining representative in a bargaining unit defined in the Board's order; (3) abide by the terms of the abrogated collective bargaining agreement; (4) reimburse all employees and the Union for any losses suffered; (5) reinstate Walter Young, Jr., with backpay; and (6) post NLRB-drafted notice of the foregoing.

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I.

The first issue for consideration is whether this court, or the bankruptcy court, has jurisdiction to determine whether the automatic stay provision of 11 U.S.C. § 362(a)(1) applies to the NLRB proceeding. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, provides, in pertinent part:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
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> "(1) the commencement or continuation, including the issuance or employment of proc-

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tion which negotiated the collective bargaining agreements to which the Corporation was a signatory. Henry Edward Cooper participated in the negotiations.

[2] The Board modified the order issued by the ALJ to comply with the Supreme Court decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). The Board provided that the corporation would only be required to enforce the collective bargaining agreement through December 4, 1981, the date it filed its bankruptcy petition.

The *Bildisco* Court held that after filing the petition for reorganization in bankruptcy, the debtor-in-possession is not required to bargain with the union, and may unilaterally terminate its labor contract. In later reviewing the termination of the labor contract, the bankruptcy court would have to "weigh several equitable considerations to vindicate the prior labor contract abrogation." Gregory, *The Congressional Response to* NLRB v. Bildisco *and the Constitutional Subtleties of the Nondelegation Doctrine*, 62 U.Det.L.Rev. 245, 246 (1985).

> ess, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> "(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> * * * * * *
>
> "(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—
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> * * * * * *
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> "(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
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> "(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . ."

When the Corporation filed for bankruptcy, § 362(a)(1) automatically stayed "the commencement or continuation . . . of a judicial, administrative, or other proceeding against the debtor. . . ." In addition, § 362(a)(2) prohibited the enforcement of any judgment against the Corporation which was obtained prior to the filing of the petition in bankruptcy. However, § 362(b)(4) provides that the automatic stay does not affect "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . ." Finally, § 362(b)(5) allows governmental units to enforce any judgment obtained in the exercise of their police or regulatory power, with the exception of a money judgment.

Respondent contends that the bankruptcy court has exclusive jurisdiction to determine the coverage, modification, or termination of the automatic stay. Therefore, respondent argues, we should "remand" this case to the bankruptcy court for a determination of whether the NLRB proceeding was excepted from the stay. We disagree, because the applicability of the automatic stay to an unfair labor practice proceeding is an issue of law within the competence of this court. *See In re Baldwin-United Corp. Litigation,* 765 F.2d 343, 347 (2d Cir.1985).

Respondent cites our decision in *NLT Computer Services Corp. v. Capital Computer Systems, Inc.,* 755 F.2d 1253 (6th Cir.1985) for the proposition that only the bankruptcy court has jurisdiction to determine the applicability of the exceptions to the automatic stay. Respondent places particular reliance on our statement in *NLT Computer* that "[t]he stay provisions of section 362 are automatic and self-operating and those who have knowledge of the pendency of a bankruptcy action and stay are bound to honor the stay unless and until it is properly lifted." *Id.* at 1258.

Respondent's reliance on this passage is misplaced because the statement was grounded on the assumption that the stay *otherwise applied* to the non-bankruptcy judicial proceeding, and that the bankrupt-

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cy court therefore was the proper court to determine whether the stay should be lifted. In the course of providing the procedural posture of the case, we stated:

> "In an opinion filed on January 31, 1983, the district court held that it was not prohibited from proceeding upon the merits of the government's claim despite the automatic stay provisions of 11 U.S.C. § 362, because it possessed the power to withdraw the order of reference of the involuntary proceedings to the bankruptcy court and then *lift the automatic stay provisions which would otherwise apply.*"

Id. at 1256 (emphasis added). None of the litigants in *NLT Computer* asserted that the non-bankruptcy judicial proceeding was *excepted* from the automatic stay. The statement on which respondent relies was made in a non-bankruptcy judicial proceeding that was not even arguably excepted from the automatic stay.

Here, the NLRB contends that its proceeding against the Corporation is excepted from the § 362(a)(1) automatic stay because the NLRB proceeding is "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," and, as such, excepted from the automatic stay by § 362(b)(4).

The decision of the Second Circuit in *Baldwin-United Corp.* is the only case which has explicitly held that the district and circuit courts have jurisdiction to determine the applicability of the automatic stay. However, in the context of an NLRB petition for enforcement of an unfair labor practice decision and order, two other circuit courts have *assumed* they had jurisdiction to answer the question and proceeded directly to the merits. *See Ahrens Aircraft, Inc. v. NLRB,* 703 F.2d 23 (1st Cir.1983); *NLRB v. Evans Plumbing Co.,* 639 F.2d 291 (5th Cir.1981). *Evans Plumbing* was the first circuit court decision to hold that an NLRB unfair labor practice proceeding was excepted from the automatic stay under § 362(b)(4).

We agree with the statement by the court in *Baldwin* that:

> "The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay."

Baldwin-United Corp., 765 F.2d at 347 (footnote omitted). We hold that we have jurisdiction to determine whether the NLRB unfair labor practice proceeding was subject to the automatic stay.

II.

Respondent next argues that the NLRB's order is void because the NLRB failed to petition the bankruptcy court for relief from the automatic stay before it proceeded with the unfair labor practice hearing. It also argues that the NLRB was required to petition the bankruptcy court for relief from the stay even though it believed that its proceeding was excepted from the stay. This contention has no support in the case law, and we conclude that a governmental unit which determines that its police power or regulatory proceeding is excepted from the automatic stay under § 362(b)(4) is not required to petition the bankruptcy court for relief from the stay prior to continuing its proceeding.

Section 362(b)(4) provides that the filing of a petition in bankruptcy *"does not operate as a stay . . .* of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The statute provides that governmental actions to enforce police or regulatory powers are automatically excepted from the operation of the automatic stay. There is no occasion therefore to seek relief from a stay which has no application to the proceeding in question.

In addition, the legislative history of the Bankruptcy Act of 1978 evinces a congressional intent that "an action by a governmental unit seeking to enforce its regulatory power is not automatically stayed by reason of the provisions of subsection (b)(4) but might nonetheless be enjoined by the [bankruptcy] court in appropriate circumstances." 2 *Collier on Bankruptcy* ¶ 362.05 at 362–40 (15th ed. 1985).[3]

We hold that the NLRB, acting on the belief that its unfair labor practice proceeding was excepted from the operation of the automatic stay, permissibly proceeded with the hearing without obtaining relief from the stay in the bankruptcy court. However, the NLRB proceeded at its own risk. If it was later determined that the proceeding was *not* excepted from the automatic stay, the entire NLRB proceeding would be void *ab initio* as an act taken in violation of the stay.[4] Nonetheless, an action by a governmental unit in the exercise of its police or regulatory powers is not void merely because it was taken in the belief that it was excepted from the automatic stay.

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[3] The legislative history of the police power exception of the automatic stay provides:

> "Subsection (b) lists seven exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.
>
> "The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity, 28 U.S.C. §§ 151 and 164 as proposed in § 2266, § 201, and 28 U.S.C. § 1334, as proposed in § 2266, § 216. *Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay.* There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.
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> * * * * * *
>
> *"Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers.* Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.
>
> "Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors."

S.Rep. No. 989, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5837–38 (emphasis added).

Section 362(b)(4) explicitly provides that proceedings undertaken by a governmental unit in the exercise of its police power are unaffected by the automatic stay.[5] Only if we find the action did not fall within the ambit of the § 362(b)(4) exception to the automatic stay will we declare the governmental unit's action void.

Arguably, a more orderly procedure would require the NLRB to petition the bankruptcy court for permission to proceed. "[C]entralizing construction of the automatic stay in the Bankruptcy Court" would result in "uniformity on issues of law," and would assist that court's effort to "assure equality of treatment among creditors." *Baldwin-United Corp.*, 765 F.2d at 349. However, § 362 does not impose such a requirement, and the legislative history of that section provides that "[b]y excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay." S.Rep. No. 989, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News at 5837.

Our conclusion does not leave the trustee or debtor-in-possession unable to halt the unfair labor practice proceeding. The legislative history of the Bankruptcy Act of 1978 states:

> "The Court has ample other powers to stay actions not covered by the automatic stay. Section 105, of the proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11."

S.Rep. No. 989, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News at 5837. The bankruptcy courts have concluded that 11 U.S.C. § 105 gives them the power to stay NLRB proceedings that are excepted from the operation of the automatic stay by § 362(b)(4) if the assets of the debtor's estate are threatened. *See, e.g.*, *In re GHR Energy Corp.*, 33 B.R. 449, 450–51 (Bankr.D.Mass.1983). *Cf. In re Organized Maintenance, Inc.*, 47 B.R. 791, 797–98 (Bankr.E.D.N.Y.1985).

III.

Respondent also argues that the NLRB proceeding was "an attempt to enforce a money judgment" and was therefore subject to the automatic stay by operation of § 362(b)(5). We disagree, and hold, on the facts of this case, that the NLRB unfair labor practice proceeding was excepted from the operation of the automatic stay under § 362(b)(4) and was not an attempt to enforce a money judgment under § 362(b)(5). The NLRB proceeding was wholly 2unaffected by the automatic stay which went into effect when the Corporation filed for bankruptcy.

Not every action or proceeding by a governmental unit is excepted from the automatic stay. The legislative history to the Bankruptcy Act of 1978 provides that, under § 362(b)(4),

> "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."

H.R.Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5963, 6299. The courts which have considered this issue have generally concluded that NLRB unfair labor practice proceedings are excepted from the automatic stay by § 362(b)(4).[6] In *In re Nicholas, Inc.,* 55 B.R. 212, 214 (Bankr.D.N.J. 1985), the court summarized "the prevailing view among several other circuits":

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[4] *See, e.g., Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir.1982) ("Actions taken in violation of the automatic stay are void and without effect."); *In re Potts*, 142 F.2d 883, 888 (6th Cir.1944), *cert. denied*, 324 U.S. 868, 65 S.Ct. 910, 89 L.Ed. 1423 (1945) (state court judgment obtained after effective date of automatic stay is void).

[5] Our decision in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir.1981), is not to the contrary. There, the Ohio Bureau of Workers' Compensation sought permission to adjudicate worker's compensation claims filed by employees of the bankrupt debtor. The bureau petitioned the bankruptcy court to lift the automatic stay on the basis of the § 362(b)(4) and (5) exceptions. Whether Ohio could process the worker's compensation claims *without* petitioning for relief from the stay was not at issue. We reversed the judgment of the bankruptcy court and vacated the stay, but we did not hold that a governmental unit exercising its police or regulatory powers must always petition the bankruptcy court for relief from the stay. *See* D. Cowans, 2 *Bankruptcy Law & Practice* § 11.3 at 255 (1986).

> "[T]his Court necessarily reaches the conclusion that the automatic stay is inapplicable herein. The N.L.R.B. is a governmental unit exercising its police or regulatory powers. By the prevailing interpretations of the exceptions to the automatic stay, injunctive relief is unavailable against the Board on that ground. Moreover, the Court notes that the complained of proceedings have not yet reached the stage of enforcing a money judgment. Falling short of such prohibited activity, there is no basis to deny the exception to the stay."

The bankruptcy courts have not yet developed a consistent test for determining whether an action by a particular governmental unit falls within the automatic stay. However, even under the narrowest reading of § 362(b)(4), the NLRB unfair labor practice proceeding in this case is within the exception.

Generally, one of two tests has been applied to determine whether a particular governmental action was excepted from the automatic stay: the pecuniary purpose test or the public policy test. *See In re Herr,* 28 B.R. 465, 468–69 (Bankr.D.Me.1983). Under the pecuniary purpose test, the court asks whether the governmental proceeding relates *primarily* "to the protection of the [government's] pecuniary interest in the debtors' property and not to matters of public safety and health." *In re State of Missouri,* 647 F.2d 768, 776 (8th Cir.1981), *cert. denied,* 454 U.S. 1162, 102 S.Ct. 1035, 71 L.Ed.2d 318 (1982). The former purpose would subject the proceeding to the stay provision of § 362; the latter would not. In contrast, the public policy test "distinguishes between proceedings that effectuate public policy and those that adjudicate private rights: only the former are excepted from the automatic stay." *In re Herr,* 28 B.R. at 468.

The NLRB proceeding challenged herein passes muster under either test. First, an NLRB unfair labor practice proceeding is one which imposes sanctions on an employer for violations of the federal labor law. The Board's decision in this case is an adjudication that the Corporation violated federal labor law embodied in the National Labor Relations Act. It is not a proceeding for the primary purpose of protecting the government's claim of entitlement to a pecuniary interest in the debtor's estate. Second, the NLRB does not proceed on behalf of private persons:

> "[N]o private action arises under the Labor Act. Thus the NLRB is not functionally a forum where private parties may present labor disputes. Rather the NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws."

In re Adams Delivery Service, 24 B.R. 589, 592 (Bankr. 9th Cir.1982) (citation omitted). Congress has entrusted the NLRB with enforcement of the nation's labor laws, and has also committed "the matter of adjudicating unfair labor practices to the jurisdiction of the N.L.R.B." *In re Nicholas, Inc.,* 55 B.R. at 215. *See also, Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264–65, 60 S.Ct. 561, 563, 84 L.Ed. 738 (1940).

In *NLRB v. Evans Plumbing Co.,* the court stated:

> "The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers. It is clear that the NLRB is a governmental unit. This action was undertaken to enforce the federal law regulating the relationship between employer and employee. We can safely conclude therefore that this is an exercise of police or regulatory powers which places it within the § 362(b)(4) exemption to the automatic stay."

639 F.2d at 293 (footnote omitted). We agree with the *Evans Plumbing* court, and hold that the NLRB's unfair labor practice complaint against respondent was excepted from the automatic stay under § 362(b)(4).

Respondent argues that the NLRB proceeding against it was an attempt to reduce an unfair labor practice charge to a dollar amount for the benefit of private persons, namely the Union and those employees who lost wages. We reject this argument, primarily for the reason that "once proceedings are excepted from the stay by section 362(b)(4), courts have al-

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[6] *See, e.g., NLRB v. Evans Plumbing Co.,* 639 F.2d 291 (5th Cir.1981); *In re Nicholas, Inc.,* 55 B.R. 212 (Bankr.D.N.J.1985); *In re Rath Packing Co.,* 38 B.R. 552 (Bankr.N.D.Iowa 1984); *In re GHR Energy Corp.,* 33 B.R. 449, 450 n. 4 (Bankr.D.Mass.1983); *In re Powell,* 27 B.R. 146 (Bankr.W.D.Mo.1983); *In re D.M. Barber, Inc.,* 13 B.R. 962 (Bankr.N.D.Tex.1981). Only one case has concluded an NLRB unfair labor practice proceeding is *not* exempt. *See In re Theobald Industries,* 16 B.R. 537, 539–40 (Bankr.D.N.J. 1981).

The *Theobald* court found that the NLRB proceeding at issue related primarily to pecuniary, rather than governmental, interests, and therefore was not excepted from the automatic stay. The holding of the case, which enjoined the NLRB proceeding, was based on the injunctive power of 11 U.S.C. § 105, rather than § 362.

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lowed governmental units to fix the amount of penalties, up to and including *entry* of a money judgment." *In re Herr,* 28 B.R. at 469 (emphasis added). The legislative history of the statute states that § 362(b)(4) excepts a governmental unit from the automatic stay where it is "attempting to fix damages for violation" of a police or regulatory law.

At most, the NLRB unfair labor practice proceeding against respondent resulted in the entry of a money judgment. Section 362(b)(5) provides that only attempts to *enforce* money judgments are subject to the automatic stay. In *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 275 (3d Cir.1984), the court examined the meaning of the phrase "enforcement of a money judgment," as it is used in § 362(b)(5):

> "Quite separate from the entry of a money judgment, however, is a proceeding to *enforce* that money judgment. The paradigm for such a proceeding is when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment. It is this seizure of a defendant-debtor's property, to satisfy the judgment obtained by a plaintiff-creditor, which is proscribed by subsection 362(b)(5)."

We find the *Penn Terra* analysis of § 362(b)(5) persuasive, and hold that the Board's determination that the Corporation owed backpay to its former employees was excepted from the automatic stay by operation of § 362(b)(4). We thus affirm the *entry* of a money judgment, but do not *enforce* that judgment. *See In re D.M. Barber, Inc.,* 13 B.R. 962, 963–64 (Bankr.N.D.Tex.1981).

IV.

Respondent argues that Henry Edward Cooper's discharge in bankruptcy bars enforcement of the Board's order against the Cooper & Cooper partnership. The Board argues that we should not review this claim because respondent failed to present it to the Board as required by 29 U.S.C. § 160(e). [7] We conclude that this issue was presented to the Board, in effect, when respondent filed a "Plea in Abatement due to Bankruptcy." The Board was cognizant of Henry Edward Cooper's pending bankruptcy proceeding and determined that its proceeding was excepted from the automatic stay. It therefore disregarded respondent's plea in abatement. We hold that this is sufficient to meet the standard of § 160(e).

Nonetheless, we affirm the Board's conclusion that its order may be enforced against the Cooper & Cooper partnership. The Partnership was a party to the proceeding below, where it was found to be the alter ego of the Cooper corporation, a conclusion that is supported by substantial evidence.[8] The partnership entity,

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not Henry Edward Cooper, is the party to this proceeding, and the Board's order is fully enforceable against that entity. [9]

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[7] Section 10(e) of the Act provides, in pertinent part:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

29 U.S.C. § 160(e).

[8] The alter ego issue is "whether there was 'a true change of ownership * * * or merely a disguised continuance of the old employer.' " *NLRB v. Herman Bros. Pet Supply, Inc.,* 325 F.2d 68, 69 (6th Cir.1963) (quoting *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942)). This circuit later stated:

> "The criteria which guide the Board's exercise of its discretion to determine if one company is the 'alter ego' of another company are whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership."

Nelson Electric v. NLRB, 638 F.2d 965, 968 (6th Cir.1981). The Board found that there were only two differences between Edward Cooper Painting, Inc. and the Cooper & Cooper partnership: One, the partnership does not hire union employees. Two, David Cooper acquired an ownership interest in the Partnership, whereas Edward Cooper was the sole owner of the Corporation. Since all other aspects of Edward Cooper Painting, Inc. were carried over to Cooper & Cooper, and the Partnership began operations before the Corporation filed for bankruptcy, the Board's alter ego conclusion is supported by substantial evidence

[9] Under Kentucky law, a judgment against the partnership may be enforced against the property of each partner. Kentucky has adopted the Uniform Partnership Act, which provides, in pertinent part:

> "All partners are liable:
>
> "(1) Jointly and severally for everything chargeable to the partnership under KRS 362.210 and 362.215;
>
> "(2) Jointly for all other debts and obligations of the partnership. . . ."

Ky.Rev.Stat.Ann § 362.220 (Baldwin 1983). "It is . . . the general rule that the partnership creditor having obtained a judgment may at his option proceed against joint or separate property or both by way of levy and execution to enforce his judgment." Richardson, *Creditors' Rights and the Partnership,* 40 Ky.L.J. 243, 256 (1951) (footnote omitted).

For all the foregoing reasons, the Board's decision is AFFIRMED.

CONTIE, Senior Circuit Judge, concurring: While I agree with the majority's disposition of this case and its analysis in Parts I, II and III, I do not join in Part IV of the majority's opinion concluding that we have jurisdiction to consider the effect of Henry Edward Cooper's discharge in bankruptcy. [1]

Whereas the "Plea in Abatement Due to Bankruptcy" can be construed as drawing into question the issue of the automatic stay, it is clear that the effect of the discharge in bankruptcy was never raised below, probably in view of the fact that the discharges occurred in the course of the proceedings before the Board. The failure of respondent to raise particular issues before the Board deprives this court of jurisdiction to consider such contentions. *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665–66, 102 S.Ct. 2071, 2082–83, 72 L.Ed.2d 398 (1982). Pursuant to 29 U.S.C. § 160(e), "[e]xtraordinary circumstances for these purposes exist only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." *NLRB v. Allied Products Corp.,* 548 F.2d 644, 654 (6th Cir.1977). Since the respondent did not raise the discharge issue in the proceedings below, and there are no "extraordinary circumstances" for having failed to present this issue to the Board, I would conclude that we lack jurisdiction to consider this argument on appeal.

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[1] I do not, however, disagree with the majority's conclusion in Part IV that there is substantial evidence to support the Board's finding that Cooper & Cooper is an alter ego of the Cooper Corporation. *See NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576 (6th Cir.1986).

Hunter Douglas, Inc. v. NLRB

NLRB v. Hunter Douglas, Inc.

804 F.2d 808 (3d Cir.), November 6, 1986; rehearing denied December 2, 1986; cert. denied May 26, 1987—277 NLRB 1179

On petition to review and enforce Board Order

Before GIBBONS, WEIS and SLOVITER, Circuit Judges

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SLOVITER, Circuit Judge: Before us is a petition for review by Hunter Douglas, Inc. from a decision and order of the National Labor Relations Board and a cross-application by the Board for enforcement of its order. The portion of the order contested by Hunter Douglas involves the Board's determination that Hunter Douglas' discharge of most of the second-shift employees at its Maywood, New Jersey plant violated sections 8(a)(1) and (3) of the Labor Management Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1), (3), and that Hunter Douglas' questioning of employee Victor Nunez violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

I.

Facts

Hunter Douglas manufactures window coverings and distributes both components for window coverings and window covering manufacturing equipment to fabricators and assembles the coverings itself. In the **810** United States, it operates plants in Maywood, New Jersey; Dallas, Texas; Ontario, California; and Kent, Washington. The present case involves its actions at the Maywood plant.

During the summer of 1984 that plant operated on two shifts, with 63 employees on the first shift and 42 employees on the second. In August 1984, an employee informed Jose Lugo, the business agent of Local 404 of the United Electrical, Radio & Machine Workers of America, that Maywood employees were seeking to form a union. Subsequently, there were four meetings of plant employees at the union's offices. The first, on August 29, 1984, was attended by six employees. Later meetings on September 15 and 29 and October 20 were attended by small but increasing numbers of employees. During this period, employees were also distributing union leaflets at the plant. At the fourth meeting, union authorization cards were distributed, and, by October 24, 1984, 73 signed authorization cards had been obtained, 36 from first-shift employees and 37 from second-shift employees.

In late August or early September 1984, John Santalla, the Maywood plant manager, received an anonymous letter mentioning the names of several employees who were trying to organize a union. Santalla then created employee committees, which he met with on September 18, 20 and 27 and October 5 and 17 in the plant cafeteria on working time. At the meetings, employees complained of working conditions, such as problems with the heating system, air conditioning, bathrooms, and cafeteria. Santalla said he would try to resolve these problems. The employees also mentioned the possibility of receiving more pay. Santalla replied that the company was trying to initiate an incentive pay plan. Medical insurance was also discussed. At the third meeting, Santalla asked each of the employees whether their previous employer had had a union, to which some responded that it had and others that it had not. At the fourth meeting, Santalla distributed a list of proposed shop rules for the committee's consideration. One of the rules prohibited solicitation of employees if either the soliciting or the solicited employee was on working time. Another of the rules prohibited distribution of handbills and literature in plant working areas.

In October 1984, Santalla asked a machine operator, Victor Nunez, who went to Santalla's office to get a band-aid, whether it was true that Nunez wanted to join the union. Nunez replied "John, you know that I promised you that I do not want to know anything about unions, and I am not going to join any unions." App. at 683. Santalla then told Nunez no one else was to know about the conversation. A second conversation occurred in the area of the restrooms. Santalla said that he wanted to ask Nunez a confidential question and inquired whether it was true that the employees "were trying to get the Union back in place." App. at 684. Nunez replied, "I promised you that I wasn't going to get into a union, and I don't want to talk about it anymore." App. at 684.

On October 24, 1984, Hunter Douglas discharged 35 of the 42 second-shift employees and the second-shift supervisor. It is the General Counsel's position that the company's motive in discharging the second-shift employees was to inhibit union activity.

Hunter Douglas, on the other hand, argues that these firings resulted from legitimate business reasons stemming from its strategy to cease all work for retail customers. Even before the events at issue, Hunter Douglas had sold its products primarily through independent fabricators. For approximately 90 percent of its window coverings, Hunter Douglas would produce the components but then distribute them to its network of fifty to sixty fabricators who were responsible for assembly and retail sales. In the spring and summer of 1984, Hunter Douglas decided to direct all orders through its fabricator network. In August 1984, it advised retail customers that after August 31, 1984 all orders should be directed to its fabricators.

Hunter Douglas claims that it realized this strategy would give it excess production capacity, and that in spring 1984 it began to plan ways to reduce that capacity. Between March and July 1984, it reduced management personnel by 50%. It made similar cuts in space requirements and inventory during summer and fall 1984. Hunter Douglas claims that it would have had reduced manufacturing manpower needs at the Maywood plant in early September 1984, but that it was able to stave off a long-planned reduction in manufacturing workers at the Maywood plant because of orders from J.C. Penney, one of its largest fabricators. Penney had oversold its capacity and sought production assistance from Hunter Douglas the first week in September.

On October 18, 1984, O.B. Kelley, Hunter Douglas' Vice President of Sales and Marketing, learned that Penney would place no more orders with Hunter Douglas. Kelley informed George Shouldis, Vice President and General Manager of Hunter Douglas. On October 23, 1984, the loss of the Penney orders was confirmed. That same day Shouldis instructed John Brown, Director of Manufacturing, to develop a plan to reduce manpower. That same day, Brown, after consultation with Santalla, recommended to Shouldis that the second shift be eliminated. On the next day, October 24, 1984, with no notice, 35 of the Maywood plant's 42 second-shift employees and the second-shift supervisor, Jose Algarin, were informed of their discharge. Hunter Douglas explains that the dismissal without notice was effected to spare its employees from feelings of "unrest" and "discomfort". App. at 795. Local 404 formally demanded recognition from Hunter Douglas on October 29, 1984.

II.

Proceedings

Local 404 filed three unfair labor practice charges against Hunter Douglas, which were consolidated in a complaint issued by the Regional Director. Following a hearing, the Administrative Law Judge found, inter alia: that Hunter Douglas had violated sections 8(a)(1) and (2) of the Act by establishing committees, soliciting grievances, granting benefits and promulgating prohibitions on solicitation and distribution, all as a means of discouraging union organization; and that there was not sufficient evidence to show that Algarin, the second-shift supervisor, had been discharged for his refusal to commit unfair labor practices.

With respect to the activities at issue here, the ALJ dismissed the allegation that elimination of the second shift was an unfair labor practice. The ALJ found: "Respondent [Hunter Douglas] had knowledge of the Union's activities, Santalla displayed animus towards the Union and the timing of the discharges was such that they occurred during the Union campaign." App. at 40. He stated that although 90% of the second-shift employees had signed authorization cards, the discharges occurred before Hunter Douglas was aware of the signing of the cards and before Local 404 demanded recognition. The ALJ stated it was "questionable", but did not decide whether the General Counsel made a *prima facie* showing that protected conduct was a motivating factor in the decision to eliminate the second shift. App. at 40. He found no violation had occurred because he concluded that Hunter Douglas would have eliminated the second shift even in the absence of the protected conduct.

The ALJ also concluded that the questioning of Victor Nunez about union activities was not coercive under the totality of the circumstances and therefore was not an unfair labor practice. Noting that Nunez was not summoned to Santalla's office on the first occasion and that the two met casually near the restrooms on the second occasion, the ALJ found that Santalla's inquiries were the kind of "casual questioning concerning union sympathies" permitted by the Act. App. at 39 (quoting *Graham Architectural Products Corp. v. NLRB,* 697 F.2d 534, 541 (3d Cir.1983)).

Only the General Counsel filed exceptions to the ALJ's decision. The Board affirmed the ALJ's rulings, findings, and exclusions except with respect to the discharge of the second shift and the interrogation of Nunez. *Hunter Douglas,* 277 NLRB No. 123, slip op. at 7 (Dec. 23, 1985). The Board held that the ALJ's analysis of the discharge of the second shift was faulty because it failed "to consider record evidence that demonstrates that the second shift was selected for layoff in order to defeat the union campaign." *Id.* at 3. Drawing different inferences from the facts on record, the Board concluded that the General Counsel made a prima facie case that union animus was a motivating factor in the layoff of second-shift employees, and that Hunter Douglas failed to show by a preponderance of the evidence that those employees would have been laid off in the absence of union activity and animus. *Id.* at 7. It thus held that the discharge of its second-shift employees violated sections 8(a)(1) and (3) of the Act.

The Board also rejected the ALJ's conclusion that Santalla's questioning of Nunez was not coercive. The Board stressed that Santalla told Nunez the inquiries were confidential, that the questions had no legitimate purpose, and that Santalla was a plant manager who had conducted the interrogation in a calculated fashion. *Id.* at 6–7. The Board, therefore, held that Santalla's questioning of Victor Nunez on two occasions violated Section 8(a)(1) of the Act because it tended to interfere with the exercise of employees' protected rights. *Id.* at 7.

III.

Standard of Review

We must sustain the Board's findings of unfair labor practices if they are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487–91, 71 S.Ct. 456, 463–66, 95 L.Ed. 456 (1951); *Graham Architectural Products Corp. v. NLRB,* 697 F.2d 534, 537 (3d Cir.1983). Similar deference is granted the Board's inferences from facts which, if supported by substantial evidence, may not be displaced even though this court acting *de novo* might have reached a different conclusion. *Universal Camera,* 340 U.S. at 488, S.Ct. at 464; *Herman Brothers, Inc. v. NLRB,* 658 F.2d 201, 209 (3d Cir.1981); *NLRB v. Garry Manufacturing Co.,* 630 F.2d 934, 937 (3d Cir.1980).

Here, the Board disagreed with the ALJ. Hunter Douglas contends that this should subject the Board's findings to stricter scrutiny by this court. *See Eastern Engineering & Elevator Co. v. NLRB,* 637 F.2d 191, 197 (3d Cir.1980). *See also Albritton Communications Co. v. NLRB,* 766 F.2d 812, 817 (3d Cir.1985), *cert. denied,* —— U.S. ——, 106 S.Ct. 850, 88 L.Ed.2d 891 (1986) ("When, as here, the Board rejects certain findings made by an ALJ, this 'substantial evidence' standard is cast in a special light"). The Board, on the other hand, argues that when the differences between the Board and the ALJ stem solely from different inferences from the overall record evidence, we are to attach no special weight to the ALJ's contrary conclusions, since it is the Board's decision that is under review. *See Stein Seal Co. v. NLRB,* 605 F.2d 703, 706 (3d Cir.1979); *NLRB v. Duquesne Electric & Manufacturing Co.,* 518 F.2d 701, 704–05 (3d Cir.1975).

This issue was discussed in our in banc decision in *Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir.1980), *cert. denied,* 450 U.S. 996, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981), where we stated:

> [T]he Board is not in any way inhibited by inferences drawn by the ALJ. To the contrary, the authority to draw legitimate inferences from proven facts is exclusively the Board's not the ALJ's or the court on review of the Board's order. Indeed, we have consistently held that "the Board has the power to draw different conclusions from evidentiary facts" presented to the ALJ, including conclusions that directly contradict those reached by the ALJ. (citations omitted). If more than one inference may be drawn from a given set of facts, therefore, the conclusion of the Board will control unless it is unreasonable.

Id. at 316.

In this case, the Board did not make credibility findings that differed from the ALJ. Instead, the Board exercised its authority to draw "legitimate inferences from proven facts." We must therefore review its findings under the generally applicable substantial evidence standard. *See Garrett Railroad Car & Equipment, Inc. v. NLRB,* 683 F.2d 731, 739–40 (3d Cir.1982).

IV.

Discharge of the Second-Shift Employees

A. *Prima Facie Case*

In determining whether a discharge of employees constitutes an unfair labor practice under sections 8(a)(1) and (3) of the Act, the General Counsel bears the initial burden of making a *prima facie* showing by a preponderance of the evidence that protected conduct was a motivating factor in the employer's conduct. Once the General Counsel demonstrates a *prima facie* case, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct by the employees. *See NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983); *Hanlon & Wilson Co. v. NLRB,* 738 F.2d 606, 610 (3d Cir.1984); *Wright Line, a Division of Wright Line, Inc.,* 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982).

Although the ALJ made no specific finding whether a *prima facie* case had been made out, the Board explicitly stated as a conclusion of law that the General Counsel had established a *prima facie* case. Hunter Douglas argues that there is no substantial evidence to support this conclusion. In essence, its argument is that a *prima facie* case depends on a showing that the discharge of the second-shift employees was motivated by antiunion animus. It argues that such a showing was not made because there was no evidence that Shouldis or Brown, the two company officers responsible for the elimination decision, had any knowledge of union activity or harbored antiunion animus towards that activity. Hunter Douglas points to the fact that the first demand for recognition by Local 404 did not occur until October 29, 1984, five days after the second shift's elimination, and it claims that until that demand, union activity was so minimal as to be unnoticeable.

Concededly, attendance at union meetings held prior to the second shift's elimination was not large. The testimony was that six workers attended the first meeting, somewhat more attended the next two meetings, and 11 attended the fourth meeting. Meetings were not, however, the sole extent of union activity. Union literature in both English and Spanish, including 200 leaflets, was distributed in and around the plant in September and October. On October 20, the distribution of union authorization cards began. By October 24, approximately 50% of the workers on the first and second shifts had signed and returned authorization cards.

Hunter Douglas does not contend that plant manager Santalla was unaware of the union activity. His keen interest in that activity, as well as his antiunion animus, is fully substantiated on the record. In September, Santalla questioned second-shift supervisor Algarin about possible union activity by an employee. In September and October, Santalla organized and participated in the employee committee meetings at which the no-solicitation and no-distribution rules which would have precluded union literature were promulgated. After one meeting, Santalla questioned Algarin about an employee who had complained about low pay and Santalla told Algarin, "I don't care what you do, get rid of her. If anybody has anything to do with the Union, she's one of them," App. at 521; *see also* App. at 957–58. Santalla questioned employee Nunez about his union activity twice in October. Most significantly, in October, Santalla instructed Algarin to watch for union activists in the second shift as Santalla wanted to "get the teeth out of the union." App. at 528.

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Hunter Douglas points to direct testimony by Brown and Shouldis that they had no knowledge of union activity. However, Brown also testified that he was always "aware there was a potential for union activity. And from time to time I heard comments, but nothing that I could recall specifically." App. at 860. The ALJ did not find that Brown and Shouldis had no knowledge or union activity. He did find, without further elaboration, that "Respondent [Hunter Douglas] had knowledge of the Union's activities." App. at 40.

It is significant that when Shouldis asked Brown on October 23 to formulate a personnel reduction plan, Brown then consulted with Santalla, who was well aware of the increasing union activity. Santalla admitted in his testimony that he recommended to Brown that the second shift be eliminated. App. at 976. Brown in turn relied on Santalla's recommendation in suggesting the second shift's elimination to Shouldis. App. at 878. Where, as here, a supervisory employee has knowledge of union activity, an inference that he has communicated that knowledge to his superiors is permissible. *See Texas Aluminum Co. v. NLRB,* 435 F.2d 917, 919 (5th Cir.1970).

In some cases, the courts have upheld the Board's inferences of knowledge of union activity solely on the basis of the timing and nature of the discharge despite company claims that no management officials were aware of union activity. *See NLRB v. Wal-Mart Stores, Inc.,* 488 F.2d 114, 117 (8th Cir.1973); *NLRB v. Long Island Airport Limousine Service Corp.,* 468 F.2d 292, 295–96 (2d Cir.1972); *NLRB v. Sequoyah Mills, Inc.,* 409 F.2d 606, 609 (10th Cir.1969). In this case as well, a similar inference is permissible, not only from the plant manager's knowledge but from the timing and nature of the discharge.

The company's abruptness in implementing Brown's recommendation is significant. Employees were given no notice of their discharge and were simply informed when they arrived at work on October 24 that they no longer had jobs. This abrupt discharge coincided with the culmination of Local 404's drive to obtain union authorization cards. The only explanation offered for the lack of any notice prior to discharge, Shouldis' testimony that, "I think decisions as dramatic as this require immediate implementation. I think to drag along only causes unrest and discomfort for all concerned," App. at 795, is implausible.

Moreover, the manner of implementing the abrupt layoff departed from the company's past practice of reassigning employees to other shifts. When Hunter Douglas eliminated its third shift in 1983, it used the opportunity to "weed out some of the deficien[t]" employees, by reassigning others to the first two shifts. App. at 797. In 1984, a layoff was spread through the first and second shifts, using the same weeding out procedure. App. at 796–97. Although Hunter Douglas retained some second-shift employees with special skills, it has never suggested that it employed the same type of weeding out process that it had previously employed, and instead discharged almost all of the 42 second-shift employees in one fell move. The company cannot rationalize its action at the Maywood plant by its subsequent decisions to eliminate the second shift at the Kent, Washington plant in October 1984 and at the Ontario, California plant in January 1985.

Hunter Douglas contends that other evidence dispels any inference of discriminatory motive in the second-shift's elimination. It argues that because almost equal numbers of union cards were obtained from each shift, 36 from the first shift and 37 from the second shift, both shifts had relatively equal amounts of union activity. By looking only at the numbers, Hunter Douglas ignores the relevant percentages. Because the first shift had 63 employees while the second shift had only 42, only 56% of the first shift but over 90% of the second shift signed union cards. Moreover, the second-shift employees were more

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active in engaging in union activity. All six employees who attended the initial union meeting were from the second shift as were a majority of attendees at each of the subsequent meetings. Second-shift employees were primarily involved in the distribution of literature and union cards. Most important, Santalla's activities were concentrated on the second shift. Second-shift supervisor Algarin testified that Santalla said "that he was aware that some of the employees were trying to organize a union and that he believed that it was coming from [the second] shift." App. at 527.

Hunter Douglas also emphasizes that it retained ten union supporters from the second shift. Even if true, this does not change the fact that the majority of the second shift, which was the focus of union activity, *was* laid off. Moreover, courts have held that it is "irrelevant that some union sympathizers were not laid off, when the layoffs were meant to chill union activity," *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1355 (7th Cir.1984). *See also Birch Run Welding & Fabricating, Inc. v. NLRB,* 761 F.2d 1175 (6th Cir.1985).

We have previously stated that "because there often is no direct evidence of antiunion motivation, the Board may rely on circumstantial evidence to prove such intent." *NLRB v. Scott Printing Corp.*, 612 F.2d 783, 787 (3d Cir.1979). *See also NLRB v. Treasure Lake, Inc.*, 453 F.2d 202, 205 (3d Cir.1971). In this case, there was sufficient circumstantial evidence to support the reasonable inferences made by the Board. Even if Brown and Shouldis were not personally aware of the concentrated union activity that had taken place in the plant in the two months before elimination of the shift, since Santalla had both knowledge of that activity and antiunion animus and his recommendation played a part in the ultimate decision, Hunter Douglas may be held to have acted out of antiunion animus. Otherwise, companies will be able to accomplish impermissibly motivated discharges without penalty through the simple expediency of dividing their personnel functions and insulating top management from common knowledge. *See Allegheny Pepsi-Cola Bottling Co. v. NLRB,* 312 F.2d 529, 531 (3d Cir.1962). Accordingly, we hold that there was substantial evidence to support the Board's conclusion that the General Counsel had made out a *prima facie* case.[1]

B. *The Company's Articulated Business Reason*

Hunter Douglas also argues that even if the General Counsel established a *prima facie* case, the ALJ correctly found that Hunter Douglas proved that the discharge of the second shift would have occurred even in the absence of any union organizing conduct. The company bases this claim on evidence of its overall policy of work reduction and reorganization, the unexpected termination of orders by J.C. Penney, and its "sharply" reduced production needs after the layoff.

The Board did not reject Hunter Douglas' position that some form of work reduction would have occurred because of the change in its marketing strategy. It concluded, however, that Hunter Douglas failed to sustain its burden of proving that the timing and nature of the reduction that did occur resulted from business reasons, as it claimed, rather than from an attempt

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to discourage unionization. *See Transportation Management,* 462 U.S. at 400–03, 103 S.Ct. at 2473–75.

In reaching this conclusion, the Board relied on the "abruptness of the layoff, coming as it did at the time of the union drive," and the fact that "this layoff deviated from previous layoffs, in that it involved elimination of an entire shift rather than a reduction in the number of overall employees based on individual considerations." *Hunter Douglas,* 277 NLRB No. 123, slip op. at 5–6.

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[1] Hunter Douglas refers us to the findings of the district court of the District of New Jersey on the Regional Director's petition for injunctive relief under section 10(j) of the Act, 29 U.S.C. § 160(j), as support for its claim that no substantial evidence supports the Board's findings. The district court granted partial injunctive relief, but also held that there was not reasonable cause to believe that the elimination of the second shift violated the Act. The court did not believe that "all the discharges complained of were the product of [Hunter Douglas'] anti-union animus" and was "satisfied that [Hunter Douglas'] evidence on its defense of economic necessity overcomes the presumption in favor of injunction." App. at 101. The 10(j) proceeding is not under review, and hence cannot affect our determination. Because we do not rely on those materials, it is unnecessary to address the Board's motion to strike them from the appendix.

The mass of economic data that the company lays before us does not convince us that there is not substantial evidence to support the Board's decision. Hunter Douglas claims it had sharply reduced production needs, but in fact it took some time for production to decrease. The company's average incoming orders for the first three weeks of November were substantially equivalent to the company's average in October. Although the number of orders then declined for the two weeks near the Thanksgiving holiday, in December they returned to their approximate October level. App. at 290–91. The plant continued to be busy after the layoff, and the remaining first-shift workers were given the opportunity of working overtime "[j]ust about every day" until two to three weeks before Christmas. App. at 636–37. This tends to refute Hunter Douglas' argument that the loss of J.C. Penney orders required immediate reduction of the workforce. In fact, in its opinion the Board noted that Shouldis testified that Penney's termination of orders "was not a loss" because Hunter Douglas did not rely on Penney's unsolicited business, and that Brown testified that the layoff was not "precipitated by any one event." *Hunter Douglas,* 27 NLRB No. 123, slip op. at 4; *see also* App. at 821, 847–48.

The Board was not obliged to credit Hunter Douglas' contention that lower productivity on the second shift was the cause of its elimination, particularly in light of the layoff of workers who had been commended by Santalla for their productivity and one worker who had participated in training of third-shift employees. App. at 454, 501–02. Based on the record that had been adduced before the ALJ, and without overturning any of his credibility determinations, the Board concluded that "the layoff of second-shift employees would not have happened as it did were it not for the desire of the Respondent to impede union activity." *Hunter Douglas,* 27 NLRB No. 123, slip op. at 6. There was substantial evidence to support that determination.

V.

Interrogation of Nunez

Hunter Douglas also challenges the Board's determination that Santalla's interrogation of employee Victor Nunez tended to interfere with the exercise of employees' protected rights and therefore was in violation of Section 8(a)(1) of the Act. In *Graham Architectural Products, Corp. v. NLRB,* 697 F.2d 534, this court stated:

> An employer's questioning becomes coercive and runs afoul of section 8(a)(1) when it "suggests to the employees that the employer may take action against them because of their pro-Union sympathies. . . ." Although the Board need not show that the employer's interrogation actually had any coercive effect, the questioning must reasonably have tended to coerce under the circumstances.

Id. at 537 (quoting *Frito-Lay, Inc. v. NLRB,* 585 F.2d 62, 65 (3d Cir.1978)). *See also NLRB v. Keystone Pretzel Bakery, Inc.,* 696 F.2d 257, 259–260 (3d Cir.1982) (in banc); *Hedstrom Co. v. NLRB,* 629 F.2d 305, 314.

Here, Santalla questioned Nunez during the first week of October when Nunez had gone to Santalla's office to get a band-aid. Nunez testified that Santalla

> wanted to know if it was true that I wanted to get into the Union again. I said, "John, you know that I promised you that I do not want to know anything about unions, and I am not going to join any unions." He said . . . that matter was

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> something between he and I, and that no one else was to know about it.

App. at 683. Although Hunter Douglas argues that this was the kind of "casual questioning concerning union sympathies" which is permissible under the Act, *see Graham Architectural Products,* 697 F.2d at 541, the Board noted Santalla's direction that the conversation be kept confidential, which suggests to us that the questioning was more than "casual". Although Nunez' answer implies a promise made and no need to discuss the matter again, Santalla did question Nunez again, this time near the restrooms. Nunez testified that Santalla:

> told me that he wanted to [ask] a confidential question of me. That he wanted to know if it was true that we were trying to get the Union back in the place. I told him—I promised him—

> "I promised you that I wasn't going to get into a union, and I don't want to talk about it anymore."

App. at 684.

Such repeated confidential questioning was unlikely to be taken as "casual" by the employee. As the Board pointed out, Santalla had no legitimate purpose for the questions. We find substantial evidence to support the Board's findings regarding the interrogation in the nature of the questions, their repetition, their lack of any legitimate purpose, Santalla's high management position, and his emphasis on their confidentiality.

VI.

Conclusion

Hunter Douglas does not oppose the Board's request for enforcement of the portion of its order based on its findings that the company violated Sections 8(a)(1) and (2) of the Act by forming employee committees and convening meetings of the committees to solicit and resolve grievances, and that the company violated Section 8(a)(1) by granting benefits, remedying grievances, and promulgating a no-solicitation and no-distribution rule. Because we have found that substantial evidence supports the Board's other findings, we will enforce the entire order of the Board and deny Hunter Douglas' petition for review.

WEIS, Circuit Judge, dissenting: The decision of the Board in this case illustrates the importance of the burden of proof to the resolution of a controversy. The Board's opinion also demonstrates a curious ambivalence in assessing the evidence required of the parties to meet their respective burdens.

Review of the record here must be more searching than in the usual case where the Board and the ALJ agree on their findings. Although the "substantial evidence" test applies in both instances, that "standard is cast in a special light" when "the Board rejects certain findings made by an ALJ." *Allbritton Communications Co. v. NLRB,* 766 F.2d 812, 817 (3d Cir.1985). The evidence supporting a determination may be less substantial when an ALJ "who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496, 71 S.Ct. 456, 469, 95 L.Ed. 456 (1951). *See also Eastern Engineering & Elevator Co., Inc. v. NLRB,* 637 F.2d 191, 197 (3d Cir.1980).

This caution is particularly applicable when the narrative facts found by the ALJ are grounded on evaluations of oral testimony. As the Board explained in *Standard Dry Wall Products, Inc.,* 91 N.L.R.B. 544, 545 (1950), the ALJ's findings based on credibility will not be disturbed unless a "clear preponderance of all the relevant evidence" demonstrates error. In my judgment, it is unrealistic to assume that an ALJ's choice of inferences from narrative facts is not similarly affected to a substantial degree by credibility judgments made in the course of hearing testimony.

In this case, the Board concluded that General Counsel had met the burden of establishing a prima facie case, although the ALJ had been extremely dubious on that point. The ALJ did determine that

Hunter Douglas had met its burden of proving an economic reason for the layoff. The Board however found to the contrary despite largely undisputed evidence, significant portions of which were statistical and documentary.

In mixed motive discharge cases, General Counsel must establish by a preponderance of the evidence that the employee's protected conduct "was a substantial or a motivating factor in the discharge." *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 400, 103 S.Ct. 2469, 2474, 76 L.Ed.2d 667 (1983). Although the General Counsel's burden has been labeled a "prima facie" case, this use of the term should be distinguished from its application in other contexts.

In a jury trial, the plaintiff makes out a prima facie case if, assuming the truth of his evidence, a claim has been established. In a Board hearing, however, the assumption of truth criterion plays no part in the evaluation of General Counsel's "prima facie" case. Only if he meets the burden of presenting truthful evidence that supports his position by a preponderance has he made out his case. Thus, if the ALJ finds that the testimony produced by the General Counsel is not worthy of belief, a prima facie case has not been established, even if that evidence would have been committed to the fact finder in a jury case.

If General Counsel successfully meets his burden of persuasion, the employer nevertheless is not liable if it proves that the discharge would have occurred in any event. Rephrased, despite the fact that an employee's protected conduct was a substantial or motivating factor in his discharge, the employer is not subject to reinstatement or back pay orders if it can prove that the discharge would have occurred regardless of the forbidden motivation. The employer bears the burden of proving this affirmative defense. *NLRB v. Transportation Management Corp.*, 462 U.S. at 401, 103 S.Ct. at 2474.

In the case at hand, the Board found that General Counsel had met his burden based on inferences it drew from the testimony. These included the fact that Santalla, the plant manager, knew that union organizing efforts were underway on the second shift. Moreover, the company deviated from its previous practice of considering individual seniority or qualifications in spreading the layoffs between shifts. The Board also found it "not credible" that Shouldis and Brown, the company officers, would accept Santalla's recommendation and act "with such great haste."

The Board's emphasis on the abruptness of the layoff fails to consider that a reduction in force had been contemplated for some time and that other steps had already been taken to change the character of the operation at the Maywood Plant.

Substantial evidence indicates that the company was aware of the interest of some employees in joining a union. Although the employer did decide to lay off the second shift, it followed its previous practice to the extent of retaining ten employees because of their special skills. Significantly, these employees were union adherents, but the Board failed to mention this fact or to note that none of those on the first shift who signed union authorization cards were discharged.

Of the total who had signed union cards, thirty-six employees were from the first shift and thirty-seven were from the second. That a larger percentage of the second shift had signed cards is of no importance. Representation elections are determined by absolute numbers, not percentages.

In short, the Board strained mightily to find that General Counsel had met his burden. Yet, it was curiously reluctant to credit undisputed facts which the company offered to prove that the employees would have been discharged in any event.

The company relied on a number of factors:

1. Lower productivity of the second shift compared with the first was documented in statistical evidence showing that the gap was widening in the period from August through October 1984. In addition, Jose Algarin, the supervisor for the second shift who was also discharged, conceded that he had received complaints from Santalla about productivity. The ALJ observed that Algarin "appeared to me to be a credible witness."

2. Larger management representation was available during the first shift. The record reflects that the first shift hours were 7:00 a.m. to 3:30 p.m. (App. at 144), when management personnel would be expected to be present in greater numbers than in the later hours of the second shift.

3. Security considerations were expected to be less during the daylight hours of the first shift.

4. Indirect costs would be reduced, for example electricity used to light the work stations and run the equipment would not be required for the second shift hours.

The Board listed these factors but dismissed them, arguing that they failed to explain why the company had deviated from its previous practice of considering individual seniority and qualifications. As noted earlier, the Board overlooked the fact that some employees had been retained because of special qualifications. Furthermore, the Board ignored the evidence that since becoming director of manufacturing in May, 1984, Brown met the need for workforce reductions at three of the employer's plants by eliminating a shift.

By failing to answer these specific points, the Board seems to concede, implicitly at least, that the company had articulated adequate reasons for laying off some employees, if not particularly those on the second shift. The record compels that conclusion.

Undisputed evidence shows that early in 1984 the company had decided to expand its policy of using a network of independent fabricators to assemble blinds. Substantial reductions in management personnel, inventory, and amount of floor space had already taken place before August, when the company announced that further referrals of work to fabricators would be made. That decision made reductions in the number of employees inevitable.

The record demonstrates, again without contradiction, that in August, Shouldis and Brown discussed the necessity of reducing the work force. No employees were discharged then because the J.C. Penney business unexpectedly arrived at the point when the company otherwise would have implemented the cutback.

The records of Hunter Douglas's operations in the months following the October discharges amply demonstrate that economic pressures were the actual motivation for the reduction in manpower. Although J.C. Penney sent in a few more orders after October 24, the volume of other new orders continued to decline. The company has not recalled any of the employees who were discharged in October, nor has it hired new employees to replace those lost by normal attrition.

Furthermore, Hunter Douglas did not find an increase necessary in its overtime assignments after the October discharges. In August overtime expenses were $5,280. That sum increased in September to $11,521 when the J.C. Penney orders came in, and it fell to $5,550 in October. In the first month after the October discharges, the overtime dropped to $2,199, rose to $5,807 in December, and declined to $103 in January.

In the face of this uncontroverted data, it is difficult to understand how the same Board that piled inference on inference drawn from largely circumstantial evidence to find that General Counsel had met its burden, could then conclude that the company's factual data did not satisfy the burden of establishing an independent business justification for the reduction in force.

Like the ALJ, I am skeptical that General Counsel presented a prima facie case. Accepting *arguendo* the Board's determination that the burden had been met, however, I am persuaded that application of the same test to the employer's claim cannot **820** but result in a conclusion that it was the much stronger of the two.

The weakness of the Board's decision is perhaps most evident when an attempt is made to ferret out just what the Board thinks the employer should have done to meet its burden of proof. There is some indication, although not clearly stated, that the company should have followed its previous practice in laying off those with less qualifications and seniority. The Board, however, cites no authority for freezing a company's procedures when legitimate business conditions justify a change. To the contrary, in *Hardwick Co., Inc.*, 263 NLRB No. 47 (1982), the Board refused to find a violation of the Act where the employer, during an organizing campaign, changed its method of selecting employees for layoff from a subjective merit system to a purely seniority-based one.

Moreover, I suspect that if that previous practice had been followed, more union adherents would have been laid off than was the case here. In that event, the Board might well have complained that a more neutral method—perhaps laying off an entire shift without individual discrimination—would have been a permissible way of effecting the necessary reduction in force. One also wonders whether the Board would not be forced by its logic to say that choosing the first shift instead of the second likewise would have been a violation of the Act.

The Board also placed some significance on the timing, implying perhaps that even though a reduction in force was to be expected, it should not have come so soon. Even if the layoff could have been postponed for possibly a month, based on orders received, the Board did not limit its relief to that period of time. Reinstatement and back pay awards result in the employer being required to pay for two full shifts during a period in which, by no stretch of the imagination, would it have employed a work force of that size.

In short, I conclude that the record does not contain substantial evidence to support the Board's rejection of the employer's affirmative defense,[1] and accordingly I would deny enforcement of the reinstatement order.

Many of the same observations apply to the charge that Santalla's conversations coerced Nunez. We described the legal standards applicable to a claim of this nature in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 537 (3d

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[1] Based on the same record as that before the Board, the district court concluded that the employer had overcome the presumption in favor of a § 10(j) injunction by establishing the defense of economic necessity. The court rejected the Board's contention that there was "reasonable cause" to believe the discharges were caused by anti-union animus.

Cir.1983). We noted that, as here, the ALJ was in a better position than the Board to determine the character of the interrogation. Adopting a pragmatic view of the workplace, we observed that supervisors and employees often work closely together and that during the course of the day they may discuss many subjects including unionization efforts. "To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace." *Id.* at 541.

To make out a violation, General Counsel must establish the necessary element of a tendency to intimidate or coerce. When interrogation occurs under casual circumstances and conveys no direct or implied threat or warning to the employee, the employer's right "to communicate with their employees concerning an ongoing union organizing campaign" comes within the scope of the First Amendment. *Id.* at 541.

I recognize that the test is objective—whether the interrogation "tends" to restrain or coerce rather than actually produces that result, *Frito Lay, Inc. v. NLRB,* 585 F.2d 62, 65 (3d Cir.1978). Nevertheless, it is interesting that at the time Santalla questioned Nunez, he apparently had not joined the union effort. He, however, later signed an authorization card on October 23, 1984. (App. at 212).

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The ALJ had the opportunity to hear testimony from both Nunez and Santalla, and was thus in a far better position to appraise the effects of the interrogation than the Board. Judgments based on demeanor are particularly important in questions of this nature. The Board failed to provide any satisfactory reason for its refusal to accept the ALJ's findings that the questioning had not been coercive.

In sum, substantial evidence does not support the Board's decision on the coercion issue. The determination not only is contrary to our holding in *Graham Metals,* but also is inconsistent with the Board's own opinion in *Rossmore House and Hotel Employees and Restaurant Employees Union,* 269 NLRB No. 198 (1984). I would deny enforcement of this order as well.

Acme-Arsena Company, Inc. v. NLRB

804 F.2d 359 (6th Cir.), November 7, 1986—276 NLRB 1291

On petition to review Board Order

Before KRUPANSKY and RYAN, Circuit Judges, and EDWARDS, Senior Circuit Judge

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PER CURIAM: This case involves the discharge by petitioner Acme-Arsena of an active union steward, Celli, who was given to employing vulgar language in the conduct of his steward duties. Celli was fired when he threatened, in the course of one of these grievance discussions with management, to "drop-a-dime." Petitioner contends that by that phrase, Celli meant a threat to call the IRS and suggest that they take a look at the company's books.

The NLRB found that these facts did not mitigate against the finding of unfair labor practices in relation to Celli's discharge as found by the ALJ. Subsequent to an initial finding by the ALJ and an appeal by the company, the NLRB remanded for a supplemental decision as to whether or not the discharge would have taken place under the standards set forth in the *Wright Line* case:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, Inc., 251 NLRB 1083, 1089 (1980).

The ALJ made a careful review of the previous incidents and safety issues in which Celli had been involved in arguments with management and found them to be protected activity under the Act and that Celli's profane language was not egregious conduct which exceeded the bounds of pro-

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tected activity. By this finding, Celli met the first prong of the *Wright Line* test and thus the burden shifted to the company to demonstrate that the discharge would have taken place in the absence of protected conduct. This burden, the ALJ found, had not been met.

Our review of the record indicates that there is substantial evidence to support the findings and conclusions of the ALJ and the Board. The Board's order will be enforced.

K & I Transfer & Storage, Inc. and City Cartage and Moving, Inc. v. NLRB

805 F.2d 749 (7th Cir.), November 12, 1986; as corrected November 18, 1986—277 NLRB 1286

On petition to review Board Order

Before COFFEY, RIPPLE, Circuit Judges, and CAMPBELL, Senior District Judge *

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RIPPLE, Circuit Judge: This case is a petition for review of a National Labor Relations Board (NLRB or Board) order denying the application of K & I Transfer & Storage and City Cartage and Moving for fees and expenses under the Equal Access to Justice Act (EAJA). [1] The NLRB found that the position taken by its General Counsel in the proceedings underlying the fee application was substantially justified. For the reasons set forth below, we remand for further proceedings.

I

Respondents K & I Transfer and City Cartage transport freight in interstate commerce. They share a facility in Evansville, Indiana, "administer a common labor policy affecting the employees working at that locale[,] interchange personnel and utilize common supervision." R. 1 at 2. They were found to be joint employers of the employees at the Evansville facility. We shall refer to them collectively as "the Company."

On August 5, 1982, the Chauffeurs, Teamsters and Helpers Local Union No. 215 aw International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) filed a representation petition seeking certification as the exclusive bargaining representative of the employees of the Company. The NLRB held a hearing to determine the appropriate bargaining unit. The Regional Director of the NLRB issued a decision and direction of election. An election was held on October 7, 1982. Nine employees voted for Union representation; ten voted against. The Union challenged three of the ballots cast, a number great enough to affect the outcome of the election. The Union objected to Company conduct that it claimed affected the election results. The Union also raised unfair labor practice charges against the Company. The conduct that formed the basis of the unfair labor practice charges filed by the Union was essentially the same conduct that formed the basis of the Union's election objections.

The General Counsel of the NLRB issued a complaint against the Company alleging several violations of the National Labor

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Relations Act. First, the complaint alleged that the Company violated section 8(a)(1) of the Act, 29 U.S.C. section 158(a)(1), [2] by threatening to close down if the employees unionized and by interrogating employees regarding their pro-Union activities. The complaint also alleged that the Company violated section 8(a)(1) and (3), 29 U.S.C. section 158(a)(1), (3), [3] by laying off employee Darrel

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* The Honorable William J. Campbell of the Northern District of Illinois, sitting by designation.

[1] As stated in *Berman v. Schweiker*, 713 F.2d 1290, 1295 (7th Cir.1983):

> The EAJA is codified in two sections of the Code: 5 U.S.C. § 504 and 28 U.S.C. § 2412. Section 2412 sets forth the general rule regarding the liability of the federal government for fees and costs. Section 504 provides for an agency's liability for fees and costs arising from an adversary agency adjudication (citations omitted).

Only section 504 applies in this case. 5 U.S.C. § 504(a)(1) (Supp. III 1985) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

This is the current version of § 504(a)(1) which became effective on August 5, 1985. To the extent it is pertinent to the resolution of this case, the issue of the retroactivity of this statute is discussed in the text.

[2] 29 U.S.C. § 158(a)(1) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[3] 29 U.S.C. § 158(a)(3) provides, in pertinent part:

(a) It shall be an unfair labor practice for an employer—

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Healy for his pro-Union activity and by implementing a wage increase to discourage Union support. Finally, the complaint alleged that the Company violated section 8(a)(1) and (5), 29 U.S.C. section 158(a)(1), (5), [4] by refusing to recognize and bargain with the Union.

The Regional Director ordered tht the representation case be consolidated with the unfair labor practice case and scheduled a hearing for February 14, 1983. The hearing was rescheduled for April 18, 1983 because of inclement weather. At the beginning of the hearing on April 18, the General Counsel moved to amend the complaint by adding an allegation that the Company had unlawfully interrogated employees through its counsel. The administrative law judge granted this motion and allowed a continuance to the Company so that it could respond to this additional allegation. The Company then filed with the Board a request for special permission to appeal the granting of the General Counsel's motion to amend. While this request was pending, the General Counsel moved to withdraw the amendment. The administrative law judge granted this motion. The hearing was resumed on July 19 and continued through July 21.

The administrative law judge held in favor of the Company on every allegation of the complaint. The General Counsel presented testimony from two employees and one former employee of the Company. The administrative law judge explained that his findings and conclusions were based largely on the fact that he chose to credit the explanations offered by the Company's witnesses rather than those offered by the General Counsel's witnesses. The NLRB filed no exceptions to this decision, and on October 17, 1984, the NLRB issued an order adopting the administrative law judge's decision and dismissing the complaint.

On November 14, 1984, the Company filed an application for an award of fees and expenses under the EAJA and section 102.143 of the Board's Rules and Regulations. It claimed $20,569.72 in attorneys' fees and expenses which were incurred in defending the Company in these proceedings. The General Counsel moved to dismiss the application on the ground that the General Counsel's position in the unfair labor practice proceeding was substantially justified. On January 2, 1985, the Company requested further proceedings in the EAJA case so that it could discover additional evidence contained in the General Counsel's case files.

The administrative law judge then issued a supplemental decision. He recommended the denial of the Company's application for fees and expenses because he found that the General Counsel's position was substantially justified within the meaning of the EAJA. This conclusion was based on the fact that the findings in the underlying proceeding rested primarily upon credibility determinations. The administrative law

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judge denied the Company's request for further proceedings and rejected its application for fees and expenses incurred in the representation case. The Company filed exceptions to the supplemental decision. On December 11, 1985, the NLRB issued a supplemental decision and order. It adopted the recommendation of the administrative law judge and dismissed the Company's fee application.

II

A.

The parties agree that the question of whether attorneys' fees should be awarded to the Company turns on whether the position of the General Counsel in the underlying litigation was substantially justified. They are also in agreement that the inquiry as to whether the General Counsel was substantially justified must encompass not only an evaluation of the General Counsel's legal position in proceedings before the Board but also the actions that led to the litigation. At one time, there was considerable ambiguity as to whether the inquiry should include this latter factor—the actions which led to the litigation. *See Temp Tech Industries, Inc. v. NLRB,* 756 F.2d 586, 589–90 (7th Cir.1985). As the General Counsel notes in her brief, the 1985 amendments to the EAJA have made it clear that the inquiry must include this factor. Nor is there any question as to the retroactivity of these amendments. [5] As the Fifth Circuit

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[4] 29 U.S.C. § 158(a)(5) provides:

(a) It shall be an unfair labor practice for an employer—

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[5] The Equal Access to Justice Act (EAJA), as originally enacted, expired October 1, 1984. The new EAJA came into effect on August 5,

Continued

has already noted in *Russell v. National Mediation Board,* 775 F.2d 1284, 1286 (5th Cir.1985), the House Report makes it clear that the definition of "position of the United States" contained in the 1985 amendments is intended to clarify existing law and therefore applies to all matters pending on, or commenced on or after October 1, 1981. *Accord American Pacific Concrete Pipe Co. v. NLRB,* 788 F.2d 586 (9th Cir.1986); *see also Gotches v. Heckler,* 782 F.2d 765, 766–67 (7th Cir.1986); *United States v. Kemper Money Market Mutual Fund,* 781 F.2d 1268, 1270 n. 1 (7th Cir.1986).

B.

The Company alleges that the Board erred in denying its request for further proceedings to address specific evidence in support of its contention that the position of the General Counsel was not substantially justified. However, as the Third Circuit noted in *Dougherty v. Lehman,* 711 F.2d 555, 561 (3d Cir.1983), "[n]othing in the Act or its legislative history requires that independent or separate evidence—distinct from the record of proceedings on the merits—is required in order to satisfy the government's burden of proof." *Accord Lauritzen v. Lehman,* 736 F.2d 550, 559 n. 12 (9th Cir.1984). Indeed, section 504(a)(1) specifically directs that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." Moreover, in response to the express concerns of the President that clarifying the term "position of the United States" to include underlying agency action could lead to lengthy litigation on how the agency's position was formulated, [6] Congress amended 5 U.S.C. § 504(c)(2) to provide expressly that, when a party appeals a fee determination of an agency to the court of appeals, the court's

determination on the appeal "shall be based solely on the factual record made before the agency." Accordingly, we believe the NLRB correctly denied the petitioner's request.

III

The Company next argues that the NLRB's December 11, 1985 order adopting the findings and conclusions of the administrative law judge violated 5 U.S.C. § 557(c)(3)(A). [7] Specifically, the Company indicates that there is only a brief reference to its request for further proceedings, and no reference at all to its request for fees and expenses for its opposition to the General Counsel's motion to amend the complaint by adding an interrogation claim against K & I's counsel. Furthermore, the Company argues that the supplemental order and decision generally fails to meet the requirements of section 557(c)(3)(A) because of its conclusory nature. One of these procedural complaints is troublesome.

The Company's claim regarding the Board's failure to address its application for fees incurred in its opposition to the General Counsel's motion to amend the complaint presents a difficult problem. The NLRB order does not address this claim at all. Moreover, we do not agree with the NLRB that this was a collateral contention that did not require discussion in the NLRB's order. *See* Respondent's Br. at 28 (citing *Minneapolis & St. Louis R.R. v. United States,* 361 U.S. 173, 193–94, 80 S.Ct. 229, 241–42, 4 L.Ed.2d 223 (1961); *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission,* 736 F.2d 1147, 1150 (7th Cir.1984); *Trailways, Inc. v. I.C.C.,* 676 F.2d 1019, 1022 (5th Cir.1981)). We are also unwilling to hold that the order "implicitly rejected" this contention. Respondent's Br. at 28. While our scope of review under this statute is admittedly a limited one, we can hardly fulfill our responsibilities unless we have before us the determination of the Board. We therefore remand

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1985. The original EAJA had a provision that extended the coverage of the Act to those cases commenced but not finally resolved prior to October 1, 1984. *See Berman v. Schweiker,* 713 F.2d 1290, 1294 n. 13 (7th Cir.1983). Section 7 of the new EAJA provides: "Except as otherwise provided in this section the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act." Pub.L. No. 99-80, § 7, 99 Stat. 183, 186 (1985). The merits of the case underlying this fee petition were pending on October 1, 1984. However, on August 5, 1985, only the fee petition was pending.

[6] H.R.Rep. No. 99-120 pt. 1, 99th Cong., 1st Sess. 6–7, *reprinted in* 1985 U.S.Code Cong. & Admin.News 132, 134–35.

[7] Section 557(c)(3) provides, in pertinent part: The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . .

this case to the NLRB so that it may provide this court with its "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). Until this has been done, it would be inappropriate for this court to review the remainder of the order.

SO ORDERED.

ASARCO, Incorporated, Tennessee Mines Division v. NLRB

805 F.2d 194 (6th Cir.), November 14, 1986—276 NLRB 1367

On application to set aside Board Order

Before KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge

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JOHN W. PECK, Senior Circuit Judge: This case is before the court on the application of ASARCO, Inc., to set aside the decision and order of the National Labor Relations Board (the Board) which found that ASARCO violated §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5).[1] The violations were based on ASARCO's refusal to give an industrial hygienist employed by the International Chemical Workers Union (the Union) access to its mine for the purpose of investigating a fatal accident, ASARCO's denial of the Union's request for photographs taken of the accident site, and ASARCO's failure to give the Union copies of its internal investigative accident report. For reasons stated herein, we grant enforcement of the Board's order in part, and set aside the order in part.

On July 31, 1984, Wade Fields, an ASARCO employee and member of the Union's Local 700, with which ASARCO has a collective bargaining agreement, apparently drove a tractor off a bench of ore materials and over an abrupt 30-foot drop-off inside ASARCO's Young Mine, an underground **196** zinc mine. Co-workers found Fields after the accident to which there were no eye-witnesses. Fields died hours later on August 1, 1984.

ASARCO's safety director, Donald Ledbetter, immediately reported the accident to the Federal Mine Safety and Health Administration (MSHA). That same day an inspection team extensively investigated the accident site. The team included ASARCO representatives, the MSHA official, and Thales Miller, a member of Local 700 and its safety committee. After the on-site investigation, at which ASARCO took photographs, MSHA directed ASARCO to move the tractor to its shop area for inspection and gave ASARCO permission to clean up the accident site. The tractor was closely examined by the MSHA official, as well as by Ray Gann, the Local 700 president, and Dennis Gann, another member of the Local and its safety committee. Following this, MSHA, ASARCO, and Union representatives interviewed employees who had worked on Fields' shift.

On August 2, 1984, the Union requested permission for the Union's industrial hygienist, Thurman Wenzl, to visit the accident site. ASARCO denied this request. ASARCO did agree to the Union's subsequent request that ASARCO representatives meet with Wenzl and other Union officials to discuss the accident.

At this meeting, which followed MSHA's "closeout" conference attended by the Union, ASARCO representatives again denied the Union's request for access. The Union also requested copies of the photographs taken of the accident site. ASARCO advised the Union that the photographs would be given to the MSHA. Upon learning at the meeting that ASARCO planned to prepare its own internal investigative report of the accident, the Union requested a copy of the report. ASARCO never fulfilled the Union's request. The Union did receive a copy of the MSHA accident investigation report. The record reflects that ASARCO otherwise cooperated with the Union in answering questions about the accident.

The Union filed unfair labor practice charges alleging that ASARCO violated §§ 8(a)(1) and (5) of the Act by refusing the Union's requests for access and information. After an evidentiary hearing, the administrative law judge (ALJ) found that ASARCO had violated the Act. By decision and order dated March 14, 1985, the ALJ ordered ASARCO to grant access to the Union hygienist and to turn over its photographs and internal investigative report. A three-member panel of the Board affirmed the ALJ's decision and adopted the ALJ's order as its own. ASARCO's petition for review followed. The Board filed a cross-petition for enforcement of its order. The Union has intervened.

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[1] These sections provide:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

On review the Board's findings of fact will be upheld if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The Board's application of the law to particular facts is also reviewed under the substantial evidence standard. The Board's reasonable inferences may not be displaced on review even though the reviewing court might have reached a different conclusion had it considered the matter *de novo. NLRB v. United Insurance Co. of America,* 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968); *Universal Camera,* 340 U.S. at 488. Furthermore, the court must give deference to the Board's determinations regarding the employer's duty to provide requested information to the Union. *E.I. DuPont de Nemours & Co. v. NLRB,* 744 F.2d 536, 538 (6th Cir.1984); *Salt River Valley Water Users' Association v. NLRB,* 769 F.2d 639, 641–42 (9th Cir.1985); *Oil, Chemical and Atomic Workers Local Union No. 6–418 v. NLRB,* 711 F.2d 348, 360 (D.C.Cir.1983); *NLRB v. Jaggars-Chiles-Stovall, Inc.,* 639 F.2d 1344, 1347 (5th Cir.), *cert. denied,* 454 U.S. 826, 102 S.Ct. 116, 70 L.Ed.2d 100 (1981). With these standards of review in mind, we turn to the merits of the case.

The Union's Request for Access

The Board applied the balancing test set forth in *Holyoke Water Power Co.,* 273 NLRB 1369, *enforced sub nom. NLRB v. Holyoke Water Power Co.,* 778 F.2d 49 (1st Cir.1985), *cert. denied,* — U.S. —, 106 S.Ct. 3274, 91 L.Ed.2d 565 (1986), in determining that ASARCO should have granted the Union's industrial hygienist access to the accident site. Under *Holyoke* the Board:

> balance[s] the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

273 NLRB at 1370. The *Holyoke* standard is drawn from *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956), which balances the § 7 rights of self-organization [2] that are implicated by access requests of non-employee union organizers against the employer's interest in preventing invasion of its private property rights. In *Holyoke* the Board also expressly overruled an earlier line of cases, including *Winona Industries, Inc.,* 257 NLRB 695 (1981), in which the Board treated requests for access as simple information requests. 273 NLRB at 1370. It is well settled that "[t]he duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the National Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979) (citations and footnote omitted). In evaluating an employer's obligation to fulfill the union's information requests, the Board and courts apply a "discovery type standard," under which the requested information need only be relevant and useful to the union in fulfilling its statutory obligations in order to be subject to disclosure. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967); *General Motors Corp. v. NLRB,* 700 F.2d 1083, 1088 (6th Cir.1983).

ASARCO argues that the Union could satisfy its representation duties and accompanying need for information relevant to Field's accident and the safety issues raised thereby through means other than mine access—notably, the MSHA report and interviews with Union representatives who participated in the on-site investigation. In light of these alternate sources of relevant information, ASARCO contends that the Union did not meet the *Holyoke* test for access to employer property.[3]

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[2] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. § 157.

On the other hand, the intervenor Union asks this court to enforce the Board's order, but under the more liberal standard set forth in *Winona*, 257 NLRB

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at 697–98. The Union argues that *Holyoke* is flawed and should be overruled because it is premised upon *Babcock & Wilcox, supra,* which deals with § 7 rights of self-organization and the employer's duty under § 8(a)(1) to refrain from interfering with those rights and does not involve the employer's affirmative duty under § 8(a)(5) to bargain with the employer's representative. Because the outcome in this case is the same under either test, we decline to decide whether *Winona* or *Holyoke* is the proper test to be applied in situations involving the bargaining representative's request for access to employer property in order to gather information relevant to its representative responsibilities. As noted by the First Circuit in *Holyoke,* "[i]f the union's interest in obtaining information is substantial, and the employer's interest in keeping union representatives off its property is insignificant, both *Winona* and a balancing test point to the same result." 778 F.2d at 53. Employee safety, as a condition of employment, is a mandatory subject of collective bargaining. *Oil, Chemical & Atomic Workers Local Union,* 711 F.2d at 360. In addition, the collective bargaining agreement between ASARCO and the Union stated that the Union agreed "to cooperate and help management in the promotion of safety and the enforcement of safety rules and regulations;" the agreement also established a safety committee composed of union and management representatives whose function was "to make recommendations to management on accident prevention." The information regarding the fatal accident sought by the Union in this case was therefore clearly relevant and necessary to its duties as bargaining representative. ASARCO gave no reason for its flat refusal to permit the Union's industrial hygienist into the mine, nor did it attempt to strike a mutually acceptable compromise that would answer ASARCO's concerns later articulated before the ALJ regarding disruption of work and productivity. Finally, ASARCO's safety director Ledbetter conceded on cross-examination that without actually going through the mine one could not conduct a fair and complete investigation of the accident. On these facts, we agree with the Board's findings that absent access to the accident site the Union could not fulfill its obligation to represent the employees. We therefore enforce the portion of the Board's order which grants access to the Union's industrial hygienist to the mine and accident site for a reasonable period and at a reasonable time.

The Request for Photographs

The Union's request for photographs must also be upheld. On appeal ASARCO does not contest the Board's finding that the photographs constituted information that was relevant and necessary to the Union's understanding of the accident and its duty to represent the employees with regard to safety conditions. ASARCO contends that it had no legal obligation to take the photographs in the first instance and therefore should be under no compulsion to give the "fruits of its investigation" to the Union now. This position is patently unsupportable, as perhaps is indicated by ASARCO's failure to cite any cases in support of its argument. Indeed, the case law is replete with instances in which employers have had the duty under § 8(a)(5) to give bargaining representatives data compiled voluntarily and for the employers' own purposes. ASARCO's other argument is that the Union could have obtained the photographs from the MSHA, so that it had no legal duty to supply them. However, the availability of the requested information from another source does not alter the employer's duty to provide readily available relevant information to the bargaining representative. *Holyoke,* 778 F.2d at 52 n. 2; *Colgate-Palmolive Co.,* 261 NLRB 90, 92 n. 13 (1982), *enforced sub nom. Oil, Chemical &*

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[3] ASARCO also asserts on appeal that the Federal Mine Safety & Health Act, 30 U.S.C. § 801 *et seq.*, which provides for safety inspections and accident investigations, preempts any right to inspection the Union might otherwise have. ASARCO did not raise this issue before the Board. Under § 10(e) of the Act, 29 U.S.C. § 160(e), "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We, therefore, decline to consider this argument.

Atomic Workers Local Union No. 6–418 v. NLRB, supra; Kelly-Springfield Tire Co., 266 NLRB 587, 593–94 (1983). Accordingly, we enforce the portion of the Board's order which requires ASARCO to give the Union the requested photographs of the accident site.

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The Request for ASARCO's Internal Investigative Report

The appeal regarding the portion of the Board's order requiring disclosure of ASARCO's internal self-critical report presents a more difficult question. The Board was unable to cite, and we are unable to find, any prior case in which such a report was ordered to be disclosed. The Board argues that since the report would be subject to disclosure under federal discovery rules, ASARCO's report should also be disclosed pursuant to the "discovery-type standard" for disclosure in § 8(a)(5) cases. *See Acme,* 385 U.S. at 437, 87 S.Ct. at 568; *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 958 (6th Cir.1969). Although a liberal discovery-type standard is used in information request cases to determine relevance, this does not mean that anything that would be discoverable in litigation is automatically subject to disclosure in the collective bargaining context. Rather, relevance and any resulting duty to disclose must be evaluated in light of the rights and obligations created by the National Labor Relations Act.[4]

The uncontradicted testimony of ASARCO's safety director Ledbetter established that ASARCO prepares extensive self-critical reports after serious accidents in order to improve safety and prevent future similar mishaps. The reports contain speculative material and opinions, criticisms of persons, events, and equipment, and recommendations for future practices. Ledbetter stated that if ASARCO were required to divulge these reports to the Union, much of their contents would have been omitted, adversely affecting, if not nullifying, the report's value. Ledbetter testified that ASARCO also prepares these reports in anticipation of litigation which frequently arises after serious accidents.

The ALJ, as affirmed by the Board, concluded that ASARCO's internal report was not prepared in anticipation of litigation and should be disclosed because no lawsuit was pending at the time of the Union's request and because, in the ALJ's view, the record failed to establish that the report would not have been prepared in the complete absence of the possibility of some liability for the accident. The ALJ gave no weight to ASARCO's other argument that disclosure of the self-critical analysis would seriously affect the candor of future critiques and have a chilling effect that would defeat the critique's primary purpose. Although the ALJ gave lip service to the settled principle that the Union's need for information must be balanced against legitimate confidentiality interests of the employer, *see Detroit Edison,* 440 U.S. at 314–15, 99 S.Ct. at 1130–31; *Oil, Chemical & Atomic Workers Local Union,* 711 F.2d at 360, in actuality he summarily concluded that, because the report was not prepared in anticipation of litigation, the Union's right to the information was thereby established. We cannot sustain this conclusion.

As stated above, the employer's duty to bargain collectively in good faith under § 8(a)(5) includes the obligation to supply information requested by the union that is relevant and necessary to the proper performance of its statutory duties as the bargaining representative. *Detroit Edison,* 440 U.S. at 303, 99 S.Ct. at 1125; *Oil, Chemical & Atomic Workers Local Union,* 711 F.2d at 358–60; *General Motors,* 700 F.2d at 1088. However, "[a] union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested." *Detroit Edison,* 440 U.S. at 314, 99 S.Ct. at 1131. The union's interest in arguably relevant information does not always predominate over other legitimate interests. *Id.* at 318, 99 S.Ct. at 1132.

The ability of an employer to engage in self-critical analysis and speculation unhindered by concern that such material will be disclosed to the Union is a substantial, legitimate interest. In this connection we find persuasive the reasoning of the District of Columbia Circuit in

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International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC v. NLRB, 648 F.2d 18 (D.C.Cir.1981). In that case the court enforced the Board's order that

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[4] To the extent that *Rockwell-Standard,* which states "the standards of discovery procedures under the Federal Rules of Civil Procedure should be applicable to union requests for information," 410 F.2d at 958, can be read to imply otherwise, we accordingly modify it.

General Motors and Westinghouse need not give the union their affirmative action plans (AAPs). Emphasizing that "the employers' future plans, goals, or commitments [are] reflected in AAPs," it was stated that:

> The interest a union might have in an employer's AAPs must be balanced with the desirability of confidential, frank self-analysis on the part of the employer. An employer's self-analysis, often including admissions and desirably candid self-criticism, is necessarily chilled by a fore-knowledge that the results of that analysis must be disclosed to the union representing its employees and might then be disclosed to its competitors and others if the union sues the employer or otherwise elects to publicize the analysis.

Id. at 28.

The Board also appears to have accepted this principle that a chilling effect on a substantial interest is a legitimate concern which militates against disclosure. In determining that an employer has no duty under § 8(a)(5) to disclose witness statements taken as part of its investigation of employee altercations which resulted in disciplinary action, the Board stated that "[w]itness statements . . . are fundamentally different from the types of information contemplated in *Acme* [*supra*], and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information. . . . [W]itnesses may be reluctant to give statements absent assurances that their statements will not be disclosed. . . . [R]equiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the . . . process." *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978). *See Ohio Medical Products,* NLRB Gen. Counsel Advice Memo., Case No. 30–CA 7635, 113 LRRM 1087, 1088 (1983). In both *International Union of Electrical, Radio & Machine Workers,* 648 F.2d at 24–28, and *Anheuser-Busch,* 237 NLRB at 984 n. 4, the Union already possessed or was given access by the Board's order to the relevant factual data from which it could properly represent the employees' interests.

In this case the Board's position ignores the evidence that ASARCO's self-critical report is part of its effort to avoid future similar accidents. The practice of uninhibited self-critical analysis, which benefits both the union's and employer's substantial interest in increased worker safety and accident prevention, would undoubtedly be chilled by disclosure. As in *International Union of Electrical, Radio & Machine Workers, supra,* and *Anheuser-Busch, supra,* disclosure would seriously thwart the intended primary purpose of the document to the ultimate detriment of both parties' interests. The Board's position also ignores that the Union has available to it all relevant factual information regarding the accident by virtue of its extensive participation in the accident investigation with ASARCO officials and by virtue of the portions of the Board's order granting mine access and delivery of the photographs. Under these circumstances, access to ASARCO's internal report and self-critical thinking is not relevant or reasonably necessary to the Union's representative duties, and ASARCO's failure to disclose it was not a § 8(a)(5) violation. Because we deny enforcement of this portion of the Board's order on this basis, we need not consider ASARCO's other argument that the report should be shielded because it was prepared in anticipation of litigation.

In accordance with the foregoing, the portions of the Board's order granting mine access to the Union's hygienist at a reasonable time and in a reasonable manner and giving the Union the photographs are upheld. Enforcement of the portion of the Board's order giving the Union ASARCO's internal report is denied.

Iron Workers Local 118, International Association of Bridge and Structural Iron Workers, AFL–CIO v. NLRB

Waldo F. Kusterns v. NLRB

804 F.2d 1100 (9th Cir.), November 20, 1986; rehearing denied June 3, 1987—275 NLRB 1356 & 275 NLRB 1539

On petition to review and modify Board Order

Before SCHROEDER, CANBY, and THOMPSON, Circuit Judges

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SCHROEDER, Circuit Judge: We here review a pair of National Labor Relations Board decisions arising out of similar disputes between union members and their locals. The disputes concerned the locals' requirement that the members pay supplemental dues arrearages before being dispatched by the union for work. We previously held that the union committed an unfair labor practice when it insisted that the employees pay the arrearages before being dispatched to employers outside the bargaining unit in which the arrearages were incurred. *NLRB v. Iron Workers Local 118,* 720 F.2d 1031 (9th Cir.1983) (per curiam); *NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433,* 730 F.2d 768 (9th Cir.1984). We remanded to the Board for an award to make the employees whole. The Board awarded damages to Butler and denied them to Kusterns for failure to mitigate. We have consolidated the cases for purposes of this opinion because we have concluded that both cases are governed by similar principles and both individuals are entitled to back pay.

BACKGROUND

Waldo Kusterns and William Butler are both members of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Kusterns belongs to Iron Workers Local 433 and Butler to Iron Workers Local 118. Each local in 1977 was signatory to a multi-employer collective bargaining agreement which required employees working for signatory employers to pay supplemental dues, on the basis of each hour worked, as a condition of employment. Sometime in 1977, Kusterns and Butler, along with other iron workers, initiated court proceedings challenging the supplemental dues scheme under the Landrum-Griffin Act, 29 U.S.C. §§ 401 *et seq.* (1975). In accordance with their position in the lawsuit, both men refused to pay supplemental dues prior to job referrals.

In 1979, Kusterns and Butler registered for work at their respective locals' hiring hall in the "out-of-work book." At a time when Kusterns and Butler were near the top of the work list, the unions' dispatchers refused to refer the men because they were in arrears on their supplemental dues. Local 433 refused to refer Kusterns to a job at RPM Erectors, Inc. (RPM), and Local 118 refused to refer Butler to the Pittsburgh-Des Moines Steel Co. project at Valmy, Nevada (Valmy). RPM and Valmy were not members of the same employer bargaining units in which Kusterns and Butler had incurred dues arrearages.

In both cases, the NLRB found that the unions violated the National Labor Relations Act § 8(b)(1)(A) and (2), 29 U.S.C. § 158(b)(1)(A) and (2) (1982), by denying the dispatches to Kusterns and Butler. It reasoned that the men were under no obligation to pay the supplemental dues before dispatch to the RPM or Valmy sites, but had a seven-day statutory grace period after dispatch within which to pay the dues. *Id.* at § 158(f)(2). The Board ordered the locals to cease and desist from such unfair labor practices and to make the men whole for any loss of pay or benefits they may have suffered as a result of the discrimination. We enforced the Board's order as to Butler at 720 F.2d at 1032, and as to Kusterns in an unpublished decision entered January 26, 1984.

The lawsuit challenging the legality of the advance payment of supplemental dues was settled prior to the unfair labor practice hearing without impairing the unions' supplemental dues collection requirement. The net result was that, by virtue of the settlement, the union could insist upon payment of arrearages before dispatching members to employers in the unit where the dues were incurred. By virtue of the decisions in the unfair labor practice cases, however, the union could not so condition dispatch to an employer outside that bargaining unit.

Pursuant to this court's enforcement orders, the NLRB initiated back pay proceedings. The ALJ in each case determined that the respective locals owed Kusterns and Butler back pay for the period from the date of the locals' first unlawful dispatch refusal to the date the locals finally referred the men to comparable employment. The Board adopted the ALJ's back pay recommendation for Butler. It deter-

mined that Kusterns was not entitled to back pay, however, because he failed to mitigate his damages. The Board concluded that by refusing to pay his supplemental dues, Kusterns, although eligible for and wrongfully refused dispatch outside the unit, had rendered himself ineligible for dispatch to hundreds of jobs within the unit. According to the Board, he "essentially took himself out of the job market." Without citing any authority, the Board suggested that Kusterns could and should have met his mitigation obligations, without conceding his legal position in the pending litigation, by paying the supplemental dues under protest or into an escrow account.

Local 118 filed a motion for reconsideration of Butler's back pay award claiming that the Butler and Kusterns cases were factually and legally indistinguishable and arguing that the Board had enunciated two contrary rules. The Board then issued a "clarifying decision" stating that Butler had exercised reasonable diligence in his efforts to seek substantially equivalent interim employment by offering to pay his supplemental dues under protest. The Board, however, awarded back pay from the date of the local's wrongful refusal rather than from the date of the offer to pay under protest.

Because Kusterns was denied back pay on the ground that he had failed to mitigate damages, he petitions for review of the Board's decision in his case. Because Butler was awarded back pay from the union, the union petitions for review of the Board's order in that case.

DISCUSSION

The principal legal issue presented is whether the Board erred in concluding, in the peculiar circumstances of these cases, that the employees' duty to mitigate damages included a duty to offer to pay under protest the very dues they were challenging. We hold that there was no such duty and that the Board in effect imposed too high a mitigation standard. As we perceive the positions of the parties, all appear to agree that if there was no duty to offer to pay the dues under protest, then both Butler and Kusterns have satisfied any other mitigation obligations they may have had.

The general mitigation principles applicable to employees out of work as the result of an unfair labor practice are stated in *NLRB v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (9th Cir.1979). Although we there discussed the principles in the context of a back pay proceeding involving the liability of an employer rather than a union, the remedial powers of the Board flowing from section 10(c) of the Act, 29 U.S.C. § 160(c) (1982), are applicable to both employers and unions. Once the Board has established the unfair labor practice and the amount of back pay due the employee, the burden is upon the employer to produce evidence to mitigate its liability. *Mercy*, 589 F.2d at 1017. *See also NLRB v. United Brotherhood of Carpenters and Joiners*, 531 F.2d 424, 426 (9th Cir.1976) (imposing similar burden upon unions). The employer or union may satisfy that burden by establishing that the worker has actually received other earnings, or, by showing that the worker willfully incurred losses by, for example, taking himself out of the employment market. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941). The worker "is not held to the highest standard of diligence in his . . . efforts to secure comparable employment—'reasonable' exertions are sufficient." *Mercy*, 589 F.2d at 1018. *See also Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 624 (6th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984); *Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir.1980); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C.Cir.1972); *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 149 (2d Cir.1968); *NLRB v. Arduini Manufacturing Corp.*, 394 F.2d 420, 423 (1st Cir.1968).

In a typical case, like *Mercy*, the issue is whether the employer or the union has established that the employee failed to make reasonable efforts to look for comparable employment beyond the entity charged with unlawful discrimination. The cases before us, however, differ. In these cases, the union maintains that the employees should have done more to obtain employment through the discriminating entity itself. Conceding, as they now must, that the union could not insist upon prepayment of the arrearages before dispatching Kusterns and Butler to the RPM or Valmy jobs, which were outside the bargaining unit, they maintain that the employees should have paid the dues in order to make themselves eligible for jobs within the bargaining unit.

The problem is that the dues at issue are the same. In arguing that work within the unit constitutes comparable work which the employees should have sought in place of the work they were denied, the union and the Board are in effect contending that the employees should have made a distinction in 1979 between jobs within the unit and outside of the unit. That is a distinction, however, which this circuit did not recognize until 1983. It is settled wisdom that mitigation efforts must be judged in light of the situation at the time the problem is presented, and not with the benefit of hindsight. *See* C. McCormick, *Law of Damages* 134 (1935). At the time that the underlying arrearages dispute divided these employees from their union, neither side was making any distinction between jobs outside or inside of the unit. The employees consistently maintained that they did not have to pay the arrearages before being dispatched anywhere, and the union consistently refused to refer them to any job until the arrearages were paid.

We are here considering a question of the damages to which the employees are entitled in order to make them whole for unfair labor practices we have held the union committed. As we have seen, the dues which were necessary for dispatch to jobs within the unit were the same dues that the union was insisting, wrongfully, that the employees pay for dispatch to the jobs outside the bargaining unit. Thus, the thrust of the union and the Board's position is that as a prerequisite to recovering damages, the employees should have taken affirmative steps (by way of payment of the dues) to prevent the union from committing the unfair labor practice in the first place. We know of no authority for the proposition that, to mitigate damages, an employee must take affirmative steps which would eliminate all liability on the part of the union or the employer in the event that the employee eventually prevails. That would be the practical consequence of the Board's "mitigation" theory in these cases. It goes far beyond the reasonable diligence standard which we must follow. We hold that the exercise of reasonable diligence to secure comparable employment did not require the employees to pay, under protest or otherwise, the disputed amounts.

Two additional issues are raised. Kusterns argues that the ALJ improperly withheld state and federal taxes from his back pay specification. Because the Board denied Kusterns' back pay award and thereby bypassed the income tax issue, this question is not properly before us. The Board has not yet considered the issue.

Local 118 contests the Board's inclusion of subsistence pay in Butler's back pay award, claiming such payments constitute a form of reimbursement for work-related expenses that Butler did not incur. As the United States Court of Appeals for the Fifth Circuit and the NLRB have held, however, the "make whole" concept of section 10(c) includes payments, whether gratuitous or not, which the employee actually would have received absent the unlawful discrimination. *Nabors v. NLRB,* 323 F.2d 686, 690 (5th Cir.1963), *cert. denied,* 376 U.S. 911, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964); *International Brotherhood of Electrical Workers Local 401,* 266 N.L.R.B. 870, 873 (1983) (allowing "automatic" $16.65 per day subsistence payment to employees at Valmy for entire back pay period). Similarly, we find the subsistence pay award appropriate.

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The Board's decision in *Iron Workers Local 118* as to Butler is enforced; the petition for review in *Kusterns* is granted and the matter remanded to the Board for computation of back pay consistent with this opinion.

NLRB v. Certified Grocers of Illinois, Inc.

806 F.2d 744 (7th Cir.), November 21, 1986—276 NLRB 133

On petition to enforce Board Order

Before POSNER and RIPPLE, Circuit Judges, and CAMPBELL, Senior District Judge *

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POSNER, Circuit Judge: The Labor Board asks us to enforce its order finding that Certified Grocers, a cooperative buying organization, violated section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), which forbids interference with rights protected by section 7, 29 U.S.C. § 157, by promulgating an overboard rule against disclosure of employees' names, addresses, and wages. Certified argues that the Board's order is not supported by substantial evidence on the record considered as a whole.

At a time when the union was trying to organize the 100 to 200 clerical employees at three of Certified's facilities (all the rest of Certified's nonsupervisory employees were unionized), Certified's management conducted four essentially identical meetings with its clerical employees. Each employee was required to attend at least one meeting. The reasons for the multiple meetings were that there were too many employees to have a productive meeting attended by all of them and that the employees were split among different locations. At each meeting management discussed the state of the company and various company policies and closed with a request that the employees not sign union-authorization cards. After management spoke, employees were invited to ask questions. At the question-and-answer session in the first meeting (attended by about 100 employees), employee Beukema—who had already complained to Alessi, an officer of Certified, that the union had mailed campaign literature to her new address, which she hadn't wanted given out—asked how the union had gotten her address. Alessi answered that the company didn't know, that an employee's name and address are confidential, that the leak could only have come from the payroll, personnel, or data-processing departments, and that if the company discovered who was responsible for the leak it would take disciplinary action. At the three later meetings Alessi repeated Beukema's question and his answer. Finally, while testifying at a hearing (where several employees were present) on the union's petition for a representation election, Alessi answered "yes" to two questions by Certified's lawyer on whether it was the company's policy to keep information on wages confidential.

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* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

The union filed an unfair labor practice charge, complaining that Alessi's statements about confidentiality added up to the announcement of an overboard rule that interfered with the workers' statutory right to engage in concerted activities by exchanging nonconfidential information. Later a representation election was held which the union lost by a large margin. The Board's regional director has ordered a new election; his order is at present on appeal to the Board.

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The Board's practice, upheld in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), is to require the employer to disclose to the union, once a representation election is either ordered or agreed to, the names and addresses of the employees eligible to vote. The incidents giving rise to the unfair labor practice charge in this case occurred before the election was ordered, and neither party has suggested that the Board's requirement of disclosure after the election is ordered is material to our consideration. Cf. *Southern & Western Lumber Co.*, 212 N.L.R.B. 668, 669 n. 2 (1974).

The administrative law judge held that Alessi's statements "would have reasonably led the employees to believe that *any* disclosure of names, addresses, and/or wage rates, regardless of how they became aware of the information, could lead to discipline." (Emphasis in original.) Thus, even if the employee had not obtained the information from a confidential source—even if the information consisted of the employee's own name, address, or wages—the employee might (the administrative law judge thought) reasonably believe himself forbidden to disclose the information to anyone. Although the administrative law judge rejected the argument that Alessi's purpose in formulating and announcing such an overboard "rule" was to interfere with the union's organizing campaign, she concluded that this was the likely consequence; and since the exchange of nonconfidential information ancillary to protected concerted activities is itself protected by section 7 of the Act, the rule, regardless of its purpose, was, she thought, an interference with rights protected by section 7, and therefore violated section 8. The Board upheld the administrative law judge's decision without opinion.

The parties agree that a rule which merely forbids employees with access to confidential information not to disclose it without the company's authorization is valid even though an incidental effect may be to make it harder for the union to organize the company's workers. See, e.g., *Texas Instruments, Inc. v. NLRB*, 637 F.2d 822, 827–32 (1st Cir.1981); *NLRB v. Florida Steel Corp.*, 544 F.2d 896, 897 (5th Cir.1977); *International Business Machines Corp.*, 265 N.L.R.B. 638 (1982). The parties also agree that the company cannot go further and forbid the disclosure of nonconfidential information as well, to the detriment of the union's organizing efforts. See, e.g., *Bullock's*, 247 N.L.R.B. 257, 258 (1980). If Certified had announced that an employee cannot disclose his own name, address, or wages, or the name, address, or wages of any other employee however the information about the other employee was obtained—so that if Beukema had told the two employees who were conducting the union's organizing campaign, "My name is Beukema, and I live at such-and-such address," she would have violated the rule—section 8 would have been violated. See, e.g., *W.R. Grace Co.*, 240 N.L.R.B. 813, 815-16 (1979). Such a rule would impede the union's organizing efforts while serving no lawful interest of either the company or its employees. The issue is whether the "rule" supposedly announced, piecemeal, by Alessi could reasonably be understood to reach so far.

We find incomprehensible the characterization of Alessi's answer to Beukema's question (an answer repeated at the three other meetings), and to the questions put by Certified's lawyer in the representation hearing, as the announcement of a rule forbidding the disclosure of nonconfidential information. This is not because a company rule or policy, to run afoul of section 8, need always be in writing; plainly it need not be. It is because context and common sense make clear that Alessi's oral

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responses could not have been understood to be laying down a company policy against workers' disclosing information obtained without any breach of confidence, such as their own names. Beukema was not complaining to Alessi that the Union was using information it had obtained *from her;* she was complaining because she believed that only the company had her new address and that it should not have given it to the union. When against this background Alessi told the workers at the four meetings that the names and addresses of employees were indeed confidential, that the leak of which Beukema had complained could only have come from one of three departments in the company, and that whoever was responsible for the leak would (if caught) be disciplined, he could only have meant—and more important could only have been understood to mean—that it was against company policy for workers to disclose confidential information to which they had access by virtue of their employment in the payroll, personnel, or data-processing departments. To understand Alessi to have meant that one worker could not tell another worker his or her name would be fantastic. It is hardly surprising that no one testified to any such understanding.

The implicit premise of the Board's decision—that an answer to a question is a rule, and had better therefore dispel every possible ambiguity and incorporate every necessary qualification, lest it be considered overboard—would make it difficult, maybe impossible, for company officials to answer questions during organizing campaigns. Every time they uttered anything about company policy, even just a one-word answer to a question from the floor, they would be deemed to have promulgated a rule, and their utterance would be scrutinized for explicit qualifications necessary to save the rule from a charge of being too broad, even if the possibility of anyone's being misled was as remote as it was here. The qualification is important. If the scope of a rule is not obvious, a loose oral statement may convey to some listeners an exaggerated impression of its scope, as in *Lucky Stores, Inc.*, 271 N.L.R.B. 1190, 1197 (1984). But no reasonable person (and the standard used by the Board is one of reasonableness—the Board is not seeking to protect the least alert or intelligent worker) thinks that when a company inveighs against leaks of confidential information it is telling him to conceal his name.

The Board's analysis is especially unsatisfactory with regard to Alessi's testimony, for here the "rule" was inferred only by tacking the lawyer's questions to Alessi's essentially one-word answers. The lawyer asked, in a hearing at which two employees were present (the union's organizers), "Mr. Alessi, it is company policy that information with respect to pay rates is confidential?" Alessi answered "Yes." He also answered, "That is correct," to the lawyer's question, "Is my statement [correct] that an individual who reveals to an outside person the pay rates of the company, is subject to disciplinary action?" By these two exchanges a rule is deemed to have been created which forbids any worker to tell another worker, not what the company's pay rates are, but what his own pay is. The Board would require Alessi, before answering, to have rephrased the lawyer's question so that the combination of question and answer would have had the precision and completeness of a published rule. We don't understand how a legal proceeding could be conducted if such a threat of liability hung over, not a lie or a misstatement, but a failure to phrase every answer as a general law. We add that the Board's theory makes Certified's lawyer complicit in the alleged violation of section 8—an imputation for which the record provides no support.

We might still our doubts about the reasonableness of the inferences drawn by the Board—for we know that our role as a reviewing court is a distinctly limited one—if the Board, which is to say the administrative law judge, had some basis in reason or precedent for taking the unusual view that it did. But all the administrative law judge said to the point (and the Board, as we have said, added nothing to her opinion) was that the company's

> threats to discipline employees who disclosed names and addresses or wage rates included no qualification to indicate to employees that they were prohibited only from giving out information from company files, as opposed to information they had of their own knowledge. Indeed, the blanket nature of the threats [to discipline whoever disclosed confidential information], and the fact that Alessi's threats at the employee meetings as to disclosure of names and addresses were made to all the clerical employees, including those who would not have access in the normal course of their work to the information, would have reasonably led the employees to believe that *any* disclosure of names, addresses, and/or wage rates, regardless of how they became aware of the information, could lead to discipline. The cases cited above establish that such a pronouncement is unlawfully overly board. . . . [Emphasis in original.]

The "cases cited above," four in number, provide no support for this interpretation of Certified's "rule." Taking them in chronological order, *Ridgely Mfg. Co.*, 207 N.L.R.B. 193 (1973), enforced, 510 F.2d 185 (D.C.Cir.1975), held that the company had invoked a supposed company rule as a pretext for firing a worker because of his efforts on behalf of the union. *International Business Machines Corp., supra,* upheld a company's confidentiality rule against a challenge that it was overbroad. *Brigadier Industries Corp.*, 271 N.L.R.B. 656 (1984), aff'd, 776 F.2d 365 (D.C.Cir.1985), upheld a company's rule against solicitations during worktime. *Roadway Express, Inc.*, 271 N.L.R.B. 1238 (1984), held that a company could discipline a worker for taking the company's records for union purposes, even though the company had not announced a rule against such misconduct. Only in *Ridgely* and *Roadway* had the rules not been reduced to writing. But in *Ridgely* the rule was a phoney, used just to give the company an excuse for firing union activists. And in *Roadway* the rule was self-evident (as arguably it was in the present case too); it was understood that confidential information is confidential (just as it was understood here that confidential information is confidential and nonconfidential information is nonconfidential); there was no need to announce the "rule" orally, let alone write it down. In none of the cases was it suggested that an oral statement of policy, made in good faith, might violate section 8 because theoretically susceptible of being misinterpreted to forbid protected along with unprotected activity. The suggestion that Alessi's "threats" would be misunderstood because the audience included people who did not have access to confidential information overlooks the fact that what in one sense were "threats" were in another sense assurances to employees like Beukema, employees doubtless found in the audiences of all four meetings, that the company would protect the confidentiality of the information it had about them. This did not mean that the company would forbid them to tell anyone their own names.

What the Board has done here, perhaps by oversight (as suggested by its failure to write an opinion), is to take a perfectly good Board-made rule—the rule against company policies that while adopted in a good-faith effort to advance the company's lawful interests go too far and forbid conduct protected by section 7—and apply it in a fantastic fashion, never before contemplated. We are sure the Board does not want to paralyze the efforts of company officials to respond orally to questions about company policy raised by employees or in administrative hearings. But that would be the effect of our agreeing that an "overboard" answer is an "overboard" rule even when nobody who heard the answer in the context of the discussion or inquiry in which it was given would think it intended to control completely different questions. If you ask, does the company keep my medical records confidential, and the answer is "yes," you could not, as a reasonable person (the administrative law judge purported, as we have said, to be ruling on the basis of a *reasonable* understanding of Alessi's statements), infer that *you* are forbidden to disclose medical facts about yourself.

The usual purpose of confidentiality is not to maintain secrecy but to vest control over disclosure in one or a few persons—in the present case in the company, in the persons to whom the information pertains, and in those to whom these authorized disclosers voluntarily disclose it. Privacy is control, not secrecy, see, e.g., Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents and Informers*, 1976 Am.Bar Found.Research J. 1193, 1205–11, and the purpose of the company policy to which Alessi alluded, a policy the Board found had *not* been concocted to stave off unionization, was plainly to protect the privacy of its employees.

Although the substantial-evidence rule that governs our review of administrative action covers inferences, as well as elementary facts of the who-did-what-to-whom variety (or, in this case, who-said-what-to-whom), and thus gives the Board broad latitude to infer the probable reaction of employees to ambiguous language directed toward them, the Board does not have *carte blanche* to impute irrationality to workers, whether directly or by describing as "reasonable" an irrational interpretation. A worker would have to be irrational to think that when Alessi answered perfectly natural questions concerning the confidentiality of employee records he was laying down a "rule" forbidding employees to disclose their names, addresses, and wage rates. Nothing in the context of his statements suggested any such ambition on his part or understanding on theirs, nor is there any evidence of such an understanding.

The present case is unlike such cases as *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir.1976), where a worker was fired for violating "an amorphous, unwritten policy [prohibiting employees from discussing their wages with one another] apparently framed only in the minds of the company officials." See also *Bell Federal Savings & Loan Ass'n*, 214 N.L.R.B. 75, 77–78 (1974). For a company to have secret rules, which it trundles out as pretexts for firing union "troublemakers," is a form of misconduct unrelated to the issue whether a reasonable and publicly announced policy is invalid because it might unreasonably be misunderstood to go further than necessary. Compare *Southern & Western Lumber Co., supra*, 212 N.L.R.B. at 669; *Ridgely Mfg. Co., supra*, 207 N.L.R.B. at 196. In no previous case has the Board found, or a court upheld, a finding of an unfair labor practice in such a situation.

Enforcement of the Board's order is DENIED.

Medallion Kitchens, Inc. v. NLRB

806 F.2d 185 (8th Cir.), November 21, 1986—275 NLRB 58

On appeal from 8th Cir.

Before JOHN R. GIBSON, Circuit Judge, SWYGERT, * Senior Circuit Judge, and FAGG, Circuit Judge

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JOHN R. GIBSON, Circuit Judge: Medallion Kitchens, Inc. appeals from an order of the National Labor Relations Board holding that it violated section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1982), by failing to reinstate returning strikers in place of temporary replacements and that it violated section 8(a)(1) by making coercive statements to the employees before the strike. [1] Medallion argues that the

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Board erred as a matter of law in concluding that Medallion's workers were temporary rather than permanent. Medallion further argues that because its replacement workers were permanent, it was justified in recalling them from layoff status rather than recalling the strikers. In a related argument, Medallion asserts that it was not accorded due process in the proceedings because the General Counsel's theory of the case in the complaint misled Medallion into believing that the General Counsel was conceding the permanent status of the replacements when in fact the replacements' temporary status turned out to be the basis upon which the violation was found. Medallion argues finally that the finding concerning threats made before the strike is not supported by substantial evidence. After examining each of these arguments, we affirm the decision and order of the Board.

Background:

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* The HONORABLE LUTHER M. SWYGERT, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[1] The Board also determined that Medallion had violated section 8(a)(1) and (3) by withholding during the strike accrued and random day benefits, and Medallion appealed this decision. However, because Medallion has since paid these amounts with interest, the issue is moot.

Local 1267 of the United Auto Workers represented Medallion's production and maintenance employees for more than ten years. The bargaining unit contained about 279 employees of whom about 250 were at work on an average day. The most recent collective bargaining agreement had an expiration date of September 19, 1983. About ten days before the workers were to vote on whether to strike, foreman Bruce Roeder approached an employee that he supervised, Tony Arechigo, and asked how he thought the vote would go. When Arechigo replied that there would probably be a strike, Roeder said, "you guys go on strike, the union is not coming back." On September 15, the unit employees voted to reject Medallion's latest contract offer and authorized the Union to call a strike when the contract expired. On that day picketing began at the plant and most of the unit employees did not come to work. Medallion continued to operate using non-strikers and replacements. The applicants for employment were told that the workers were on strike and that they would receive the normal starting rate of $3.75 an hour. Medallion's Personnel Director told them that he did not know how long they would be working, "it might be a week, it might be less and it might be more * * * they would work up until the strike was over." ALJ Decision at 4.

On December 10, the plant's main building was destroyed by fire and production ceased. During the next few days Medallion contacted most of the post-strike employees through telephone calls and radio announcements to notify them of a meeting at the plant on December 15 and to tell them that the Christmas party would proceed as scheduled on December 17. At the December 15 meeting, Vice President Rone told the employees that Medallion was doing what it could to reopen as soon as possible. He told them to leave their current phone numbers with the company and to be ready to return to work. At the Christmas party on December 17, President Chalmers made a similar speech emphasizing that the company intended to get everyone back to work as soon as humanly possible.

On December 19, the Union informed Medallion that the strike would end as of December 25 and that all strikers would be unconditionally available for work the following day. On December 27 almost all of the strikers visited the company and left signed slips requesting reinstatement.

At the beginning of January 1984 Medallion began recalling employees to resume work. By the end of January fifty employees were at work and by late June, at the time of the hearing on the unfair labor practice charges, 114 had returned, but none of the former strikers had been recalled.

The Union then filed the unfair labor practice charges that led to the ultimate entry of the Board's order finding that Medallion had violated section 8(a)(1) and (3) of the Act.

I.

The Administrative Law Judge (ALJ) examined whether the replacement employ-

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ees had temporary or permanent status to determine whether Medallion violated the Act by failing to reinstate the economic strikers. A commitment to replacements that their positions are permanent may provide a substantial and legitimate business justification, which is a defense to a charge of unfair labor practices under section 8(a)(3). *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378–79, 88 S.Ct. 543, 545–46, 19 L.Ed.2d 614 (1967). Before we address Medallion's argument that substantial evidence does not support the finding that the replacements were temporary, we first address Medallion's assertion that it was denied due process because it was not fairly notified that the permanent status of the replacement employees was at issue.

In its complaint, the Board alleged the following:

> 5.(a) On or about December 19, 1983, the Union made an unconditional offer on behalf of all bargaining unit employees who had been engaged in an economic strike to return to work effective December 26, 1983.
>
> (b) On or about December 26, 1983, Respondent placed the employees described above in subparagraph (a) on layoff status.
>
> 6.(a) Since on or about January 4, 1984, and continuing to date, Respondent has recalled striker replacements from layoff status and has failed and refused, and is continuing to fail and refuse, to recall any of the strikers, notwithstanding the fact that said strikers have more seniority than the striker replacements who have been recalled.

> (b) Respondent engaged in the conduct described above in subparagraph (a) because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

At the hearing there was some testimony regarding the permanency of the replacement workers' positions, and in its posthearing brief, the General Counsel argued that the evidence did not establish that the replacements were permanent under the prevailing law, and that Medallion was not justified in refusing to reinstate the strikers.

Following the hearing and the filing of posthearing briefs, Medallion moved to strike portions of the General Counsel's brief or, in the alternative, to reopen the record to permit Medallion to present additional testimony. Medallion asserted that the Board's complaint did not give notice that the permanent status of the replacement employees was in dispute. Medallion argued that, in fact, the sole issue raised by the General Counsel's theory of the case was whether the replacements had seniority over the strikers, an issue that is relevant only if the permanent status of the replacements is conceded. Medallion argued that it had ample documentary evidence and testimony that it did not produce on the permanence issue because it was misled by the allegations of the complaint.

The ALJ denied Medallion's motion and found against Medallion on the basis that the replacement employees were not permanent replacements and, therefore, the strikers, upon their unconditional offer to return to work, were entitled to be recalled in lieu of the replacements. The Board affirmed the ALJ's decision. Medallion now asserts that because the issue of permanence was neither pleaded nor litigated, the Board violated its due process rights by basing its decision and order on those grounds. We reject this argument.

Medallion correctly argues that the Board's complaint must specifically plead the charges upon which it bases its allegation that there has been a violation of the Act, and that in the absence of specific pleading, there must have been the opportunity for Medallion to fully and fairly litigate the charges. *See Boyle's Famous Corned Beef Co. v. NLRB,* 400 F.2d 154, 163 (8th Cir.1968).

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Medallion cites a number of cases in which there were significant differences between the alleged violations and the violations ultimately found. In those cases, the courts held that due process had not been accorded the respondent in the agency action. *See Boyle's Famous Corned Beef Co.,* 400 F.2d at 160 (complaint alleged only that company dominated and assisted the independent union in violation of section 8(a)(1) and (2), but trial examiner went on to find refusal to bargain with the local union as a violation of section 8(a)(1) and (5)); *NLRB v. Homemaker Shops, Inc.,* 724 F.2d 535, 542–44 (6th Cir.1984) (complaint alleged charge of "unlawful assistance," but General Counsel raised charge of domination after hearing record was closed); *NLRB v. Complas Industries, Inc.,* 714 F.2d 729, 734 (7th Cir.1983) (original complaint alleged unlawful firing of one employee; the complaint was not amended until the date of the hearing to include charge of unlawful interrogation of another employee); *Presto Casting Co. v. NLRB,* 708 F.2d 495, 498 (9th Cir.), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983) (complaint charged unfair labor practices connected with the strike itself; company cannot be found guilty of different violation of failing to reinstate workers).

Medallion argues that such a discrepancy exists here between the complaint's allegations and the ultimate basis for the finding of a violation. It asserts that the Board's complaint alleged a violation solely on the basis of three facts: that replacements were laid off, that vacancies occurred, and that the strikers had more seniority than the replacements. Medallion contends that these facts do not conform to the General Counsel's unpleaded theory that the replacements were temporary; thus, the General Counsel was precluded from arguing the temporary status of the employees absent an amendment to the complaint.

We believe that Medallion mischaracterizes the General Counsel's argument on the temporary status of the replacements by labeling it a new and inconsistent "theory." The General Counsel's theory was that Medallion recalled replacements and unlawfully refused to recall any of the strikers. This theory did not change during the proceedings.

The burden was on Medallion to come forward with its own defense as to why the failure to reinstate did not amount to a violation of the Act. "[U]nless the employer can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of unfair labor practices." *Fleetwood Trailer Co.*, 389 U.S. at 378, 88 S.Ct. at 545 (1967). One such justification is that the replacements were given permanent status. *Id.* at 379, 88 S.Ct. at 456; *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–46, 58 S.Ct. 904, 910–11, 82 L.Ed.2d 1381 (1938). Medallion turns the case on its head by arguing that the issue of permanence was an unpleaded theory of the case; rather, it was an affirmative defense that Medallion, not the General Counsel, was obliged to raise. As the Board stated in its brief, the permanence issue was no more conceded by the General Counsel's silence than was any other possible defense Medallion might raise.

Having determined that Medallion's due process rights were not violated, we turn to the question of whether the Board erred in finding that the replacements were temporary. Medallion argues, first, that the Board erred in holding that the replacement employees were given permanent status only if Medallion made an express offer of permanence to the employees; Medallion contends that a manifestation of "a mutual understanding," "assurances," or "commitments" of permanence is sufficient to provide a justification for retaining the replacements. Second, Medallion argues that substantial evidence in the record as a whole supports its position that there was such a mutual understanding of permanence.

Certainly, the employer's manifestation of its intentions regarding the permanent or temporary status of the replacements is relevant in determining whether the employer had a legitimate reason for recalling replacements over economic strikers. *See Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964). Contrary to Medallion's claim, however, the ALJ's decision demonstrates that he adequately considered whether Medallion displayed such intentions.

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In support of its assertion that the ALJ and the Board used an inappropriate express permanence standard to determine the status of the replacements, Medallion quotes from a portion of the ALJ's findings:

> While the record shows that the Respondent has assured most of the employees (replacements) who had attended the Company's Christmas Party on December 17, that it would make an effort to get the Company operating as soon as possible and expected the employees to be back to work, it does not indicate that the employees were ever informed that their employment status had changed to one of permanence.

Medallion's Brief at 21 (quoting ALJ Decision at 5).

This statement by the ALJ does not indicate that he is requiring a formalistic expression of permanence. Earlier in his decision he determined that when the replacements were initially hired, they were expressly informed by Medallion that their employment was temporary—it depended on how long the strike lasted. In the portion of the ALJ's findings quoted by Medallion, the ALJ is simply responding to Medallion's argument that "all [replacements] were advised by Mr. McGrady that they were permanent employees." ALJ Decision at 5 (quoting Medallion's Brief at 7, 27). The ALJ concluded that, contrary to Medallion's argument, the record shows that Medallion did not advise the replacements of any change in their initial understanding. The ALJ decided that Medallion's "assurances" after the December 10 fire were not assurances of permanent positions but were assurances only that the company had no intention of shutting down and intended to reopen for production as soon as possible. He found that nothing in these assurances altered the status quo; the replacements were still to be employed only for the duration of the strike. We conclude that the ALJ adequately considered Medallion's intentions in determining the status of the replacements.

Next, we turn to the question of whether the evidence is sufficient to support the Board's findings. Since the determination of whether the replacement employees are temporary or permanent is essentially a question of fact, the Board's findings are conclusive "if supported by substantial evidence on the record considered as a whole." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564 (8th Cir.1984).

An employer who refuses to reinstate strikers violates section 8(a)(1) and (3) of the Act unless he shows that his action was based on legitimate and substantial business justifications; the burden of proof is on the employer. *See N.L.R.B. v. Great Dane Trailers,* 388 U.S. 26, 34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027; *see also N.L.R.B. v. Fleetwood Trailer Co.,* 389 U.S. at 378, 88 S.Ct. at 545. At the hearing Medallion's Personnel Director testified that the replacement workers were hired with the understanding that their employment would last only until the strike was over:

> Q. When you first began interviewing replacement employees, did you interview most of those people?
>
> A. Yes sir.
>
> * * * * * *
>
> Q. Did you tell Mr. Beckman [replacement employee] how long he would be working?
>
> A. No, sir. At that time we didn't know. I told him it might be a week, it might be less and it might be more.
>
> Q. Is that essentially what you told everybody who got hired?
>
> A. Yes, Sir.
>
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>
> Q. That it might be a week, it might be less, it might be a little more?
>
> A. They would work up until the strike was over.
>
> Q. Until the strike was over?
>
> A. Or the people came back.

Transcript at 69–70.

This evidence was essentially uncontroverted. Medallion attempted to counter this testimony by introducing evidence of later statements made to replacements. The ALJ determined, however, that these statements were not sufficient to support Medallion's contentions and, therefore, Medallion did not carry its burden of proof. Since Medallion points to no other evidence in the record that supports its position and was ignored by the Board, we conclude that the Board's findings were supported by substantial evidence in the record as a whole.

II.

Medallion argues that the Board erred in its determination that Medallion violated section 8(a)(1) of the Act by threatening its employees for their concerted, protected activities, and asserts that, as a matter of law, the statements made to several employees by Mr. Roeder before the strike that "you guys go on strike, the Union is not coming back," were not coercive. Viewing the evidence in the record as a whole, we find Medallion's argument to be without merit.

Section 7 of the Act guarantees employees "the right to self-organization to form or assist labor organizations" and "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. Section 8(a)(1) ensures that section 7 rights are protected by making it an unfair labor practice for an employer to interfere with, restrain or coerce employees' exercising these rights. The test for a violation of section 8(a)(1) "is not whether an attempt at coercion has succeeded or failed but whether 'the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of their rights under Section 7.'" *NLRB v. Intertherm, Inc.,* 596 F.2d 267, 271 (8th Cir.1979) (quoting *Russell Stover Candies, Inc. v. NLRB,* 551 F.2d 204, 208 (8th Cir.1977)). We must examine not only the statements, but also the surrounding circumstances to determine the coercive nature of the threats. *Id.* at 275. The issue of whether such statements are threats is generally one of fact for the Board's initial consideration. *Id.*

After examining the testimony in the record, the Board made the following conclusions:

> Only some of the above statements made by Respondent's supervisors to the employees were sufficiently coercive and threatening so as to interfere with their Section 7 rights. Roeder's remarks telling the employees that the Union would not come back if the employees went out on strike, was made to several employees, about one week before the strike vote by the Union, at the Company's premises and in an environment of coercion during which the employees were initially interrogated as to whether they favored a strike or not. These statements were clearly intended to dissuade the employees from their support for the Union and the strike. This conduct violated Section 8(a)(1) of the Act. His other remarks to the effect that he could give the employees pay raises if it were not for the Union

was vague and further qualified with the condition that the employee perform well. Under these circumstances, Respondent did not condition a promise of benefits in exchange for the employee's refusal to support the Union. Moreover, the statements made by supervisors Cappola and Rone were not sufficiently clear and, in any case, were not made with the intent to coerce or restrain the individuals. I find therefore that Respondent violated Section 8(a)(1) of the Act only in connection with

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Roder's repeated threats to the employees as detailed above.

ALJ Decision at 9.

Keeping in mind that it is the function of the Board, not the court, to pass upon the credibility of witnesses and the weight to be given to their testimony, *R.J. Lallier Trucking v. NLRB,* 558 F.2d 1322, 1325 (8th Cir.1977), we conclude that the inferences drawn by the Board as to the threatening nature of Roeder's statements are warranted by substantial evidence in the record.

The order of the Board is affirmed.

NLRB v. Wilder Construction Co., Inc.

804 F.2d 1122 (9th Cir.), November 21, 1986

On petition to enforcement and cross-application to review Board Order

Before FLETCHER, FERGUSON, and REINHARDT, Circuit Judges

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REINHARDT, Circuit Judge: Wilder Construction appeals the decision by the National Labor Relations Board (NLRB) holding that the company's unilateral withdrawal of recognition of the union representing its workers interfered with the employees' right to bargain through representatives of their own choosing and constituted a breach of the company's corollary duty to bargain, in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. 29 U.S.C. §§ 158(a)(1) & (a)(5) (1973). The NLRB also found that the company's subsequent refusal to provide the union with the information it requested regarding employees in the bargaining unit violated the Act. The NLRB's decision and order were based upon substantial evidence; the order is enforced.

Facts

In 1974, Wilder Construction recognized General Teamsters Local No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective bargaining representative of a unit that includes truck-drivers, mechanics, and warehousemen. The company entered into successive collective bargaining agreements after that time, the most recent being an agreement from June 1, 1980, through May 31, 1983. The union and company met on several occasions to discuss terms of a new contract but failed to reach agreement.

The union began a strike on August 29, 1983. On that date, the company employed 14 people in the bargaining unit. All were

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members of the union and all joined the strike. During the first three weeks of the strike, the company hired 12 permanent replacements. Sometime prior to October 11, 1983, 3 of the 14 union members crossed the picket line and returned to work.

On October 11, the company notified the union by letter that it was withdrawing recognition. The company asserted in its letter that it had a good faith doubt that the union commanded the support of a majority of the bargaining-unit employees. After that time, Wilder refused the union's requests to bargain.

On November 18, the union made an unconditional offer to return to work on behalf of the striking employees. The company answered that it had permanently replaced the employees, but offered to place any of them so desiring on a preferential hiring list. Five striking employees accepted the company's offer.

Almost six months later, on May 11, 1984, the union requested a list of the names, social security numbers, addresses, dates of hire and termination, if applicable, of the bargaining-unit employees. Wilder refused to furnish the requested information.

Based upon these facts, the National Labor Relations Board found that the company violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by withdrawing recognition from, and refusing to bargain with, the union. The NLRB also found that the refusal to provide the union with the requested information violated the Act.

Discussion

1. General Framework for Withdrawal of Recognition Claims

Once a union is certified by the NLRB or recognized by the employer, the union is conclusively presumed to command majority allegiance for a reasonable period; after such period, there is a rebuttable presumption of majority support. *See Mingtree Restaurant, Inc. v. NLRB,* 736 F.2d 1295, 1296–97 (9th Cir.1984). The presumption becomes rebuttable, for example, after a contract expires. *See, e.g., NLRB v. Vegas Vic, Inc.,* 546 F.2d 828, 829 (9th Cir.1976), *cert. denied,* 434 U.S. 818, 98 S.Ct. 57, 54 L.Ed.2d 74 (1977). A company's withdrawal of recognition establishes a prima facie case of an unlawful refusal to bargain. *See NLRB v. Mar-Len Cabinets, Inc.,* 659 F.2d 995, 998 (9th Cir.1981). There is a continuing duty on the employer to recognize and to bargain with the union until the presumption of majority support is rebutted. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d 293, 297 (9th Cir.1978), *cert. denied,* 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 290 (1979). Here, the employer seeks to rebut the presumption of union majority support by showing that it had a serious doubt as to the union's majority status at the time it refused to bargain. An employer may justify a refusal to bargain with the incumbent union by establishing a "good faith doubt" defense. *See id.* [1]

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The test for establishing a good faith doubt is an objective one. Evidence in support of that defense must "unequivocally indicate that union support had declined to a minority." *NLRB v. Silver Spur Casino,* 623 F.2d 571, 579 (9th Cir.1980), *cert. denied,* 451 U.S. 906, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981). An employer must have more than a subjective belief regarding the lack of majority support; it must prove that at the time it withdrew recognition, it had "knowledge of . . . facts which give a reasonable basis for doubting the union's majority." *Tahoe Nugget,* 584 F.2d at 299. The evidence presented by the employer must be "clear, cogent, and convincing." *See id.* at 297. This evidentiary standard applies to every element of the employer's defense. The NLRB's decision as to whether the test is met will be upheld if it is supported by substantial evidence. *Silver Spur,* 623 F.2d at 579.

2. The NLRB's Findings

a. The number of employees in the unit

The NLRB found that as of the date on which the company withdrew recognition the unit was comprised of 26 employees—the fourteen original workers and the twelve permanent replacements. Based upon its contention that four of the union members had permanently left the unit, the company asserts that by October 11 the unit was comprised of only 22 people. The employer's burden with respect to issues regarding the composition of the unit is the same as that which applies to all other aspects of its defense—its evidence must be "clear, cogent, and convincing."

1) Retired workers

Wilder contends that three of the union employees retired and were no longer part of the bargaining unit. The NLRB found, however, that the evidence presented was "far too equivocal" to establish Wilder's knowledge of the retirement of the three employees before it withdrew recognition from the union. Because the employer must have such knowledge *before* the withdrawal of recognition, any information acquired after withdrawal is not relevant. *See N.T. Enloe Memorial Hospital v. NLRB,* 682 F.2d 790, 794 (9th Cir.1982). The company's witness, its vice-president, did not establish when he found out about the retirements and admitted that the workers had not informed him of their plans. Moreover, the affidavit supplied by him to the NLRB three months after the withdrawal of recognition did not include the retirements as a reason for the company's good faith doubt. The NLRB reasonably found that the company's evidence was "insufficient to establish that [the] three employees either lost their status as employees or as strikers as of the date that the Company withdrew recognition." Thus the company failed to show by "clear, cogent and convincing" evidence that it had knowledge of facts that "unequivocally indicate[d]" that the three individuals no longer were part of the bargaining unit.

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[1] We note that even where the employer meets the presumption of union majority support by presenting evidence establishing a good faith reasonable doubt as to the union's majority status, the employer has not necessarily presented a complete defense on the merits. Technically, once the employer meets the presumption, the "burden then shift[s] to the Board to prove that the Union represented a majority on the day the [company] refused to bargain." *Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77, 80 (9th Cir.1977). The General Counsel may present evidence establishing the unfair labor practice even though the employer has succeeded in overcoming the presumption. However, because the General Counsel usually rests on the presumption alone, as he did in this case, the employer's rebuttal of the presumption is often enough to permit it to prevail on the merits. *See generally Atlantic Journal Company,* 82 NLRB 832 (1949) (establishing original principle governing good faith doubt defenses); *Celanese Corp. of America,* 95 NLRB 664 (1951) (cited with approval in *Brooks v. NLRB,* 348 U.S. 96, 104, 75 S.Ct. 176, 181, 99 L.Ed. 125 (1954)) (establishing the presumption of majority support and barring good faith doubt defense when employer engages in unfair labor practices serving to reduce the union's strength); *Stoner Rubber Company, Inc.,* 123 NLRB 1440, 1445 (1959) (justifying the evidentiary presumption and noting that if an employer would interrogate workers as to their support of the union directly that, in itself, could constitute an unfair labor practice).

2) Employee who found work elsewhere

The company also asserts that the NLRB erred by counting as a part of the bargaining unit one striker who allegedly found permanent employment elsewhere. The NLRB held, however, that Wilder had failed to demonstrate that the striker accepted the new employment before its withdrawal of recognition. The company's operations manager testified that the employee in question went to work for another company either during the strike or shortly thereafter. Because the strike continued for more than a month after the withdrawal of recognition, the NLRB found that the company failed to establish that the employee's alleged acceptance of permanent employment occurred on or before the date of withdrawal. Thus, facts introduced by the company fell far short of meeting the strict test applicable when a "good faith doubt" defense is asserted.

3) Conclusion

The NLRB's determination that on the relevant date the bargaining unit consisted of 26 employees, the 14 original strikers and the 12 permanent replacements, is supported by substantial evidence.

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b. The allegiance of the three returning strikers who crossed the picket lines

Because the unit consisted of 26 workers, in order to establish a good faith reasonable doubt as to the union's majority status Wilder was required to show by clear, cogent, and convincing evidence that it had knowledge of facts that would unequivocally demonstrate that more than 13 workers had rejected the union's representation. Thus, even were we to assume—contrary to authoritative precedent—that none of the permanent replacements supported the union, the company had the burden of showing its knowledge of facts that would prove that at least some of the original workers had disavowed the union as their bargaining representative. *Cf. Pennco, Inc.,* 250 NLRB 716 (1980) (holding that there is a presumption that permanent replacements support the union in the same proportion as the employees in the relevant unit), *enforced* 684 F.2d 340 (6th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982). Prior to the company's unilateral withdrawal of recognition, three striking employees crossed the picket line and returned to work. Whether these three maintained their allegiance to the union could, were we to disregard *Pennco,*[2] be critical in determining the majority status of the union. The NLRB ruled that the company "lacked a reasonable, objective basis for doubting the Union's majority status" because the company "ha[d] not shown that any of the original complement of 14 employees rejected continued representation by the Union." Its ruling is supported by substantial evidence. Indeed, any other conclusion, without evidence of an explicit repudiation of union membership and a rejection of the union as the exclusive bargaining agent, would be unwarranted and unreasonable.

The mere refusal to support a strike is not tantamount to a rejection of union representation. *See NLRB v. Top Manufacturing Co., Inc.,* 594 F.2d 223, 225 (9th Cir.1979). In *NLRB v. Mar-Len Cabinets, Inc.,* 659 F.2d 995 (9th Cir.1981), we evaluated a similar conclusion by the NLRB that employees who crossed a picket line did not reject the union's representation. In *Mar-Len,* we upheld the conclusion that these employees "crossed the picket line and returned to work as a means of preserving a continuity of income because of economic necessity, and not because they rejected union representation." 659 F.2d at 999. Moreover, we approved of the conclusion that some employees in *Mar-Len* resigned their union membership to avoid potential fines and "not to oust the union as a bargaining representative." *Id. See also Celanese Corp. of America,* 95 NLRB 664, 674 (1951) ("We are well aware of the fact that individual employees may abandon a strike and return to work for personal reasons wholly unrelated to any disavowal of their union as their collective bargaining representative."). No specific factual findings by the NLRB are necessary to support such conclusions; nor is it necessary that there be any evidence in the record that would justify such factual findings. In cases in which an employer asserts a good faith doubt defense, the presumption of allegiance to the union survives an employee's return to work through a picket line unless the employer offers "clear, cogent, and convincing" evidence that, in doing so, the individual intended to terminate the union's services as his bargaining representative and that the employer had reason to be aware that such was the individual's intent.

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[2] We do not intend to indicate any doubt as to the validity of the established rule of *Pennco.* Since the Board, however, chose not to rest its decision on *Pennco,* we do not think it appropriate—or necessary in this case—to rely on that decision.

Because workers may resign union membership during a strike in violation of a union's internal rules, *Pattern Makers' League v. NLRB,* —— U.S. ——, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985) (upholding the NLRB's interpretation of the Act), the

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most reasonable conclusion to draw if a worker does not exercise this option is that he has chosen to maintain his union affiliation. Moreover, even a formal resignation will not automatically be equated with a rejection of the union as the exclusive bargaining agent. *See Mar-Len,* 659 F.2d at 999. The burden still remains upon the employer to demonstrate clearly and convincingly that the resignations were motivated by a desire to oust the union as the exclusive bargaining agent and not solely by the reasons ordinarily underlying such action, such as economic necessity, concern over future employment, or a desire to avoid penalties or fines.

The NLRB's determination that the workers involved did not reject the union's representation by their mere crossing of the picket line is supported by substantial evidence.[3] Knowledge on the part of an employer of the crossing of picket lines by employees is insufficient to give rise to a good faith doubt as to the allegiance of those employees to the union for purposes of collective bargaining. Any other holding would endanger the section 7 rights of striking workers as well as workers who do cross the picket line.

CONCLUSION

The NLRB's finding that the union maintained majority support in the 26 member bargaining unit is supported by substantial evidence. The company failed to meet the good faith doubt test. Consequently, Wilder's refusal to bargain and its denial of the union's request for information each constitute unfair labor practices in violation of the Act.

ORDER ENFORCED.

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[3] The NLRB properly rejected Wilder's contention that the workers' crossing of the line sometime after the occurrence of picket line violence evidenced rejection of union representation.

The existence of picket line violence, standing alone, will not ordinarily be held to be the basis for inferring a rejection of union representation by those who work behind the line. *See IT Services,* 263 NLRB 1183 (1982). As the NLRB noted in *Pennco, Inc.,* 250 NLRB 716 (1980), "in view of the speculative nature of the employees' reasons for crossing the picket line, the occurrence of some violence on the picket line is, *at best,* one factor weakening the presumption of majority status but not alone rebutting it." *Id.* at 718 n. 16 (emphasis added). We cannot presume from the mere crossing of the line subsequent to incidents of violence that the workers intended to "oust the union as a bargaining representative." *Mar-Len,* 659 F.2d at 999.

State Bank of India v. NLRB

State Bank of India v. NLRB

NLRB v. State Bank of India

808 F.2d 526 (7th Cir.), December 11, 1986—273 NLRB 264

On petitions to review and cross-petition for enforcement of Board Orders

Before CUMMINGS, COFFEY, Circuit Judges, and WILL, Senior District Judge *

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COFFEY, Circuit Judge: The State Bank of India ("State Bank" or "Bank") petitions for review of two orders of the National Labor Relations Board ("Board" or "NLRB") finding that the Bank committed unfair labor practices in refusing to bargain with Local 6, International Federation of Health Professionals ("Union"), in violation of sections 8(a)(1) and (5) of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(1) and § 158(a)(5). The Board cross-petitions for enforcement of its orders.

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

The Bank contests the Board's orders on four grounds. Initially, the Bank argues that because it is "a direct instrumentality of the Indian Government," it is not considered as an "employer" within the parameters of § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2), even though it does business in this country. Next, the Bank argues that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330, § 1602 *et seq.* immunizes the Bank from the Board's jurisdiction. The Bank argues in the alternative that the NLRB exercise of jurisdiction over it conflicts with prior NLRB's decisions declining to exercise jurisdiction over commercial concerns owned by foreign governments and thus an abuse of discretion by the NLRB. Finally, the Bank insists that the NLRB should have granted the Bank a hearing on the Bank's objections to the representation election conducted on September 2, 1982 at the Bank's New York branch office. We enforce the orders of the NLRB.

On July 14, 1982 the Union petitioned the NLRB for a representation election at the State Bank's New York branch, seeking to represent full-time and regular part-time tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries and machine operators. Pursuant to a "stipulation for certification upon consent election," [1] and the Board conducted an election on September 2, 1982. The Union prevailed in the election with a majority of nine votes or forty-three to thirty-four.

The State Bank filed timely objections to the election, arguing that "the laboratory conditions necessary for a free and fair election were destroyed" because: (1) the Union or employees supporting the Union distributed to the eligible voters a forged letter dated August 30, 1982, signed by the Deputy Chief Manager of the State Bank, Mr. P.K. Bhattacharjee, that could have misled voters into believing that Bhattacharjee encouraged the employees to vote in favor of union representation; (2) the Union or its supporters on two occasions marked an "X" on the "yes" box of the sample ballot portion of an official NLRB notice of election posted in an employee lunchroom, suggesting to the voters that the NLRB favored unionization; and (3) the Union, in an effort to persuade employees to vote "Union," distributed a letter to employees that included an inflammatory racial statement that the State Bank, "tr(ied) to keep depressing conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups." [2]

On October 15, 1982, after investigating the State Bank's objections and receiving evidence from the parties, the NLRB Regional Director recommended that the objections of State Bank be "overruled" and that the Board issue a "certification of [bargaining] representative." The Regional Director declined to hold a hearing to resolve factual issues because, in his view, even if the evidence offered by the Bank to support its three objections were "deemed to be true . . . no substantial and material factual issues exist." With respect to the forged letter from the company (objection 1) and the twice-altered official NLRB notice of election (objection 2), the Regional Director concluded that the Bank's evidence was insufficient as a matter of law to hold the Union responsible. The Regional Director concluded that the State Bank's third objection, concerning the allegedly racially inflammatory statement, was meritless as a matter of law because the text of the letter, "although racially oriented, does not evince the prohibited motive of inflaming racial hatred merely to obtain votes. . . . Rather, [the] message to employees appears to be a permissible attempt to encourage racial pride and concerted action by minority group employees to better their wages and working conditions."

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[1] A "stipulation for certification upon consent election" is an agreement among labor, management and the NLRB that an election by specified voters to determine representation for a specified bargaining unit "shall be held" at a particular place and time. A stipulation of this nature replaces the hearing to determine whether a "question of representation affecting commerce exists" that is otherwise required by 29 U.S.C. § 159(c) in order to ascertain whether the Board should direct that an election be held. At the time the Bank entered into the stipulation, it pointed out that it was neither an employer within the meaning of the NLRA nor an employer over which the Board should exercise its discretionary jurisdiction.

[2] The record is not clear as to the precise number of American citizens employed by the State Bank. In the Chicago branch, it appears that nine out of eleven clerical employees were American citizens. In the New York branch, forty percent of the non-managerial employees were American citizens. Most of the employees who were not American citizens were of Indian origin but were awaiting naturalization proceedings in this country.

The Bank filed exceptions to the Regional Director's recommendation, arguing that the Regional Director erred in not holding a hearing and in overruling the Bank's

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objections. On February 23, 1983, the Board issued a decision adopting the Regional Director's recommendation and certifying the Union as the exclusive bargaining agent for the Bank's clerical employees.[3]

Subsequently, the State Bank refused the Union's request to bargain and on April 28, 1983, unilaterally awarded a retroactive wage increase to the State Bank non-managerial employees. Pursuant to the Union's charges filed with the NLRB, the NLRB's Regional Director issued two complaints alleging that the State Bank had violated sections 8(a)(5) and 8(a)(1) of the Act in refusing to bargain with the Union and in unilaterally granting a wage increase.[4] The State Bank admitted in its answer that it had refused to bargain but contested the NLRB's certification of the Union.[5] The NLRB issued two decisions and orders ruling that the State Bank had committed violations of sections 8(a)(5) and (1) of the Act in refusing to bargain with the Union, 273 NLRB No. 38, and in unilaterally conferring a wage increase on State Bank non-managerial employees. 273 NLRB No. 39. The Board ordered the State Bank to cease and desist from these practices, and to bargain with the Union. The Bank petitioned for review[6] requesting that we set aside the two NLRB orders arguing: (1)

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that the NLRB lacks statutory jurisdiction over the State Bank because the State Bank is a "direct instrumentality of the Indian Government" and therefore is not an "employer" within the meaning of the NLRA, § 2(2), 29 U.S.C. § 152(2); (2) that the State Bank is immune from NLRB jurisdiction as an instrumentality of the government of India under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.;* (3) or, in the alternative, that the NLRB abused its discretion in exercising jurisdiction over the State Bank because the Board overruled its prior decisions declining to exercise jurisdiction over instrumentalities of foreign governments doing business in this country; and (4) that the Regional Director must hold an evidentiary hearing on the State Bank's objections to the election and "certification of representative."

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[3] The February 23, 1983, decision reaffirmed a prior decision of the Board dated May 20, 1977, wherein the NLRB, noting the large and ever-increasing participation by foreign and foreign-controlled banks in the United States, "reexamine[d] its past policy of refusing to exercise jurisdiction over commercial activities of foreign governments or their agents occurring within the United States." *State Bank of India and Chicago Int. Bd. Amalgamated Clothing and Textile Workers Union, AFL–CIO,* 229 NLRB 838.

In *State Bank of India and Chicago Int.,* the NLRB reversed the Regional Director's decision not to assert jurisdiction, overruled its prior decisions, and directed that an election be held at the Chicago branch of the State Bank. Alluding to the structure of § 2(2), (quoted at n. 7, *infra*) that grants jurisdiction over "any" person acting as an employer and excludes only very specifically limited exceptions, the Board wrote:

> "On this point, it seems enough to observe that (the Bank) is not within the terms of the exclusions . . . (The Bank) asserts that (the Union) has failed to demonstrate an 'affirmative intention of the Congress' to confer jurisdiction over an employer that is virtually the alter ego of the Government of India . . .' Under our construction of the jurisdictional provisions of the Act, it is the (Bank) who has failed to demonstrate any congressional intent to exclude such employees from the coverage of the Act or to preclude the Board from exercising jurisdiction."

229 NLRB at 840.

The Board also rejected the Bank's argument that it would be an abuse of discretion for the Board to exercise jurisdiction over the Bank in light of the Board's earlier decisions concerning jurisdiction over foreign-owned concerns doing business in this country. We discuss this part of the Board's decision below, in § II.C.

[4] Section 8(a)(1) provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 7 of this Title."

29 U.S.C. § 158(a)(1).

Section 8(a)(5) provides:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a) of this title."

29 U.S.C. § 158(a)(5).

An employer's unilateral increase in wages constitutes an outright refusal to bargain and is therefore an unfair labor practice under § 8(a)(5). *N.L.R.B. v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

[5] Direct review of the Board's decision to certify a union is available only in "very limited circumstances," none of which are present. *Peerless of America, Inc. v. N.L.R.B.,* 576 F.2d 119, 121 n. 2 (7th Cir.1978); *Herald Co. v. Vincent,* 392 F.2d 354, 357 (2d Cir.1968). The Bank therefore obtained review of the union certification by petitioning this court for review of the Board's decision that the Bank had committed an unfair labor practice in refusing to bargain with the union. *See Peerless,* 576 F.2d at 121.

[6] Although the State Bank petitioned this court for review of both NLRB orders, it has briefed only the issues raised in the order reported at 273 NLRB No. 38 and rests its objection to the decision reported at 273 NLRB No. 39 on the arguments set forth in its brief. Both the Bank and the Board agree that if the court grants enforcement of the first order, reported at 273 NLRB No. 38, it also should enforce the order

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A. *The State Bank as an "employer" within § 2(2) of the NLRA.*

The State Bank asserts that as "a direct instrumentality of the Indian government" the NLRA impliedly excludes it from the jurisdiction of the NLRB. [7] The State Bank of India was nationalized and incorporated in India by the State Bank of India Act of 1955. The *Reserve* Bank of India, a wholly-owned and controlled agency of the Indian Government, owns more than 92% of the stock in the State Bank of India. The State Bank acts as an agent for the *Reserve* Bank of India in locations where the *Reserve* Bank is not established. Petitioner State Bank fails to explain how this agency relationship between itself and the *Reserve* Bank of India distinguishes it from American banks similarly obligated to the American Federal Reserve Bank, nor how this relationship sets the State Bank apart from any other foreign-owned commercial entity doing business in the United States. Although the American branches of the State Bank of India have assisted the *Reserve* Bank of India and the government of India in obtaining loans, making investments, buying and selling foreign currency, and financing food purchases, the State Bank performs the same services as the typical American bank and nothing in the record establishes that these operations serve to distinguish these American branches from any other bank operating in this country.

Nor do the regular operations of the State Bank or its internal organization distinguish the State Bank from American banks. The Bank maintains branch offices in New York and Chicago, as well as an agency in Los Angeles. The branch offices offer general banking services to the public, including checking and savings accounts, commercial loans, letters of credit and foreign currency exchange. In the United States, the Bank is subject to federal and state banking regulations and taxes, the Bank's deposits are insured by the Federal Deposit Insurance Corporation, and the Bank's foreign employees work in the United States subject to United States immigration law.

The upper level management of the United States branch offices of the State Bank (e.g., manager, assistant manager, accountant) are assigned to their employment positions in the United States from India on a temporary basis. The State Bank hires all other U.S. branch employees, including those represented by the union, locally. Although the International Division of the State Bank in Bombay, India, makes all policy decisions concerning the foreign operations of the Bank, the local branch managers are responsible for day-to-day operations and local personnel decisions including the hiring and firing of employees. He also makes recommendations to the State Bank's International Division in Bombay, India concerning the hours of operation of the American branches, the fringe benefits for employees, staffing levels, conditions of employment, and matters typically the subject of employment contracts. We are told that these recommendations of the local branch managers concerning the operation of the Bank's branches in America are given great weight by the State Bank's International Division.

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According to the State Bank, the import of *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957), and *McCulloch v. Sociedad Nacional de Marineros,* 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963), is that "the Board should not tread in the sensitive area of foreign relations . . . by exercising jurisdiction that would have extra-territorial effects without a clear Congressional mandate." The Bank further maintains that by creating an exception to the definition of the term "employer" in the Act for "the United States or any wholly-owned government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof. . . ." Congress "ex-

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reported at No. 39. Conversely, the parties agree that if the court denies enforcement of the order in No. 38, the court should also deny enforcement of the NLRB order reported at No. 39 (Pet.Br. at 2; Resp.Br. at 8).

Although the dispute arises out of events in New York City, 29 U.S.C. § 160(f) permits the State Bank to obtain review of the Board orders "wherein [the Bank] resides or transacts business." In this case, petitioner State Bank of India also maintains an office and transacts business in Chicago, Illinois.

[7] Section 2(2) of the NLRA provides:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2).

pressed its preference that the agencies with expertise in monetary policy be free from interference by the Board, which has no expertise in that critical area. This rationale applies even more forcefully to the Bank, which is an instrumentality of a foreign government, as well as an agent for the Reserve Bank of India."

The Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the National Labor Relations Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963) (emphasis in original); *N.L.R.B. v. Mars Sales and Equipt. Co.*, 626 F.2d 567, 575 (7th Cir.1980). The language of the NLRA § 2(2) on its face clearly vests jurisdiction in the Board over "any" employer doing business in this country save those Congress excepted with careful particularity.[8]

"As in all cases of statutory construction, our task is to interpret the words . . . in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979). These purposes are stated in relevant part in the "Findings and Declaration of Policy" in § 1 of the NLRA, 29 U.S.C. § 151:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Congress created the National Labor Relations Board to carry out these policies, and to implement them in a manner consistent with preserving interstate commerce and equality of bargaining power. Accordingly, "the Board has the duty of determining in the first instance (the jurisdiction) of the National Labor Relations Board and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law." *N.L.R.B. v. E.C. Atkins & Co.*, 331 U.S. 398, 403, 67 S.Ct. 1265, 1268, 91 L.Ed. 1563 (1947). As the Supreme Court stated in upholding the NLRB's jurisdiction over illegal aliens as "employees" under NLRA § 2(3), "[s]ince the task of defining the term . . . is one that 'has been assigned primarily to the agency created by Congress to administer the Act' . . . the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 2808–09, 81 L.Ed.2d 732 (1984).

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In this case, the Board held that because the State Bank failed to establish that it fell within one of the exceptions specifically articulated in § 2(2), *expressio unius est exclusio alterius* placed the State Bank squarely within the NLRB jurisdiction. The Board's position is that the NLRA has granted it plenary jurisdiction with specific, narrow exceptions, and thus its position that Congress intended all employers to be subject to the NLRA, has been repeatedly upheld in the courts.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499–504, 99 S.Ct. 1313, 1318–21, 59 L.Ed.2d 533 (1979), the Court excluded from the NLRA's jurisdiction under § 2(2) schools operated by the Catholic Church even though the religiously affiliated schools were not specifically excepted by the Act because "serious constitutional questions" would arise if the NLRA were construed to include church schools. Following the rule of statutory construction that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available," *Id.*, the Court found that "[t]he absence of an 'affirmative intention of Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to Unions as bargaining agents for their teachers." 440 U.S. at 506, 99 S.Ct. at 1322.

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[8] NLRA § 2(2) is quoted in full at n. 7 *supra*.

Far from supporting State Bank's arguments, *Catholic Bishop of Chicago*, 440 U.S. at 506, 99 S.Ct. at 1322, affirms the NLRB's position that NLRA jurisdiction extends to *"any"* employers doing business in this country *except* those specifically excluded *unless* such a construction would violate the Constitution. The majority in *Catholic Bishop* did not conclude that there were exceptions to the employers covered by the NLRA other than those expressly excepted by Congress. The majority merely determined that since it is a settled rule of statutory construction and reasonable that an unconstitutional intent or expression will not be inferred from congressional silence, the courts must construe the NLRA to exclude any employer whose inclusion within the NLRA would violate the constitution.

The State Bank does not argue that it is a constitutionally problematic employer within the meaning of *Catholic Bishop*. Instead, it relies on another line of cases in which the Supreme Court has required an affirmative expression by Congress that a class of employers falls under the jurisdiction of the NLRB before the Court will agree that the NLRB possesses jurisdiction over that class of employers. In *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957), American unions supported and participated in picketing that followed a labor dispute that erupted while the flag ship of a foreign employer was temporarily docked in a United States port. The foreign ship operated with a foreign crew employed under a labor agreement negotiated pursuant to the laws of another country. The Supreme Court explained that although Congress could have included foreign employers operating ships temporarily docked in United States waters within the jurisdiction of the NLRA:

> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case*, 120 U.S. 1 [7 S.Ct. 385, 30 L.Ed. 565] (1887). The exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 [43 S.Ct. 504, 67 L.Ed. 894] (1923). It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of the Congress as to the coverage of the Act.
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> The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. . . . Our study of the Act [NLRA] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships *under foreign laws.*"

353 U.S. at 142, 143, 77 S.Ct. at 701–02 (footnote omitted) (emphasis added).

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963), an American union petitioned for an election among the foreign crew members of a foreign-flag ship doing regular business with the United States. The foreign crewmen were previously certified and union-represented under foreign labor law. The Court followed its decision in *Benz*, holding that since there was no affirmative expression in the NLRA or its legislative history that Congress intended the NLRB to have jurisdiction over foreign crews on foreign ships temporarily docked in American ports, the NLRB was without authority to order a representation election for the foreign crew on a foreign ship. The Court explained that the Board's assertion of jurisdiction over "foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government." 372 U.S. at 16–17, 83 S.Ct. at 674–75. The Court noted that "the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government." *Id.*

In contrast to the foreign employers of foreign crewmen involved in *Benz* and *McCulloch,* the record establishes that State Bank is doing business in the United States and in fact has made it clear that they intend to expand their market share in this country. The Bank has plans to expand its operations in the United States. Further, unlike the foreign employees in *Benz* and *McCulloch* who were only temporarily located in the United States, most of State Bank's employees in its United States offices are American citizens or American residents awaiting naturalization.[9] Because these employees live and work in the United States and are subject to the obligations and responsibilities of American citizens, they are at the same time entitled to the protections and benefits our nation provides through its laws. For example, these resident employees of the State Bank would be eligible for Social Security benefits at age sixty-five under 42 U.S.C. § 1382c(a)(1).

State Bank's employees are more appropriately compared to the American employees involved in *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Co.,* 397 U.S. 195, 90 S.Ct. 872, 25 L.Ed.2d 218 (1970), where the Supreme Court held that American residents who were employed by a foreign flag ship to do longshoreman's work were covered by the NLRA. The Court distinguished *Benz* and *McCulloch,* writing:

> "The considerations that informed the Court's construction of the statute in the cases above are clearly inapplicable to the situation presented here. The participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels."

397 U.S. at 199-200, 90 S.Ct. at 874 (footnote omitted). In the present case as well, the labor dispute centers on the wages to be paid American residents, foreign or natural, who do non-managerial work for a foreign concern engaged in a commercial enterprise in this country. "The longstanding tradition of restraint in applying the laws of this country to ships of a foreign country—a tradition that lies at the heart of *Benz* and every subsequent decision—therefore is irrelevant to this case." *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.,* 456 U.S. 212, 221, 102 S.Ct. 1656, 1662, 72 L.Ed.2d 21 (1982).

The State Bank contends that because it is a "direct instrumentality of the Indian Government," exercise of jurisdiction by the NLRB "threatens to cause extraterritorial effects . . . completely disruptive of the international monetary policy carried out by the Bank as an instrumentality of the Indian Government (which) could provoke retaliatory action by the Indian Government." We do not believe that the Bank's speculative, and undocumented assertions of a disruption in our foreign relations with the government of India come close to demonstrating the kind of international conflict that would bar NLRB jurisdiction. The State Bank while doing business in this country is subject to our Federal and State banking laws directly dealing with its banking functions while acting as an agent of the Indian Government. The State Bank has offered no evidence to establish that allowing its American resident employees to unionize will interfere with its obligations to the *Reserve* Bank of India or disrupt the international monetary policy of the Indian government. While it is true that the NLRA exempts the United States federal reserve banks from its jurisdiction, the State Bank is not itself a reserve bank but rather a bank that acts on occasion as the agent of a foreign reserve bank.

Thus, the Bank's argument amounts to nothing more than a request that we allow it to compete in this country against United States banks that are subject to the NLRA at the expense of the nationally-mandated rights and privileges of American resident workers and reap the benefits of doing business in this country, merely because it occasionally acts as an agent of the *Reserve* Bank of India and is owned by the *Reserve* Bank. The

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[9] See note 2, *supra.*

NLRA and its legislative history clearly establish that Congress did not intend to exempt from NLRA jurisdiction a foreign enterprise with substantial commercial operations in this country and employing American residents merely because the enterprise is connected with a foreign government. Therefore, we agree with the NLRB's determination that the State Bank of India is an "employer" for purposes of the NLRA.

B. *Immunity Under the Foreign Sovereign Immunities Act.*

The Foreign Sovereign Immunities Act ("FSIA") [10] "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 1968, 76 L.Ed.2d 81 (1983). This restrictive theory of sovereign immunity is encapsulated in an oft-quoted statement of Chief Justice Marshall:

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> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."

The Schooner Exchange v. M'Faddon, 7 Cranch 116, 135, 3 L.Ed. 287 (1812).

The State Bank argues that the Foreign Sovereign Immunities Act precludes the NLRB from asserting jurisdiction over it. Thus, we must determine whether Congress intended that the FSIA immunize the State Bank of India from that portion of the United States' "necessarily exclusive and absolute" jurisdiction over employers doing business in this country that Congress vested in the NLRB.

On its face, the FSIA limits the jurisdiction of the state and federal courts, not that of the NLRB, over claims involving foreign sovereigns. The FSIA would appear to do no more than prevent the Board from seeking enforcement of its orders involving a foreign sovereign in a United States or state court. However, we need not decide the precise limits the FSIA places on NLRB jurisdiction because the commercial operations of the State Bank bring it outside the scope of the FSIA. Section 1605(a)(2) of the FSIA provides:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or any of the states in any case—
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> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

As defined in section 4(a) of the FSIA, "a 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or a particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Specifically, the term "commercial activity" includes "a broad spectrum of endeavor, from an individual commercial transaction to a regular course of commercial conduct. . . . Certainly if an activity is customarily carried on for profit, its commercial nature could readily be assumed." H.R. Rep. No. 94–1487, 2d Sess. 16 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6614–15. The House Report accompanying the FSIA clearly states that the employment of American citizens or third country nationals by the foreign state in the United States constitutes "commercial activity" and thus precludes immunity under the Act. *Id.*

In the present case, the State Bank operates branch offices in the United States furnishing the same full range of commercial banking services typically provided by American commercial banks, including checking and deposit accounts, commercial loans, letters of credit, foreign currency exchange, and time deposits. [11] The local branches of the State Bank of India employ American residents in furtherance of these commercial activities. If in fact the Bank engages in the commercial activities for the purpose of benefiting a governmental shareholder—the *Reserve* Bank of India—that fact is irrelevant under § 1603(d) since the commercial character of an operation is to be ascertained from the nature of the activity rather than its purpose. In this case our duty is clearly laid out by the text of the statute itself:

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[10] 28 U.S.C. §§ 1330, 1602–1611. The statute provides for jurisdiction in the federal courts to determine claims by foreign states to sovereign immunity from liability for their acts. § 1604 provides for immunity from jurisdiction of U.S. and state courts except as provided in §§ 1605 and 1607.

[11] *See supra,* at 530.

> "As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ."

28 U.S.C. § 1606.

C. *Abuse of Discretion*

The State Bank maintains that the Board's assertion of its jurisdiction over **536** the Bank is an abuse of the Board's discretion in that the Board has on two previous occasions, declined to exercise jurisdiction in allegedly similar factual situations. In *British Rail International, Inc.*, 163 NLRB 721 (1967), the Board declined to exercise jurisdiction over a corporation wholly-owned by an agency of the United Kingdom. The Board specifically refused to reach the question of whether the Board had statutory jurisdiction over British National Railways pursuant to the Act, but deemed it "inappropriate to assert jurisdiction in the instant proceeding." The Board cited the Supreme Court decision in *McCulloch* without discussion for support. In *AGIP, USA, Inc.*, 196 NLRB 1144 (1972), the Board declined to assert jurisdiction over a corporation wholly-owned by the Italian government, again without reaching the question of whether the Board had statutory jurisdiction. In support of its decision, the Board in *AGIP* merely cited the *British National Railways* case without any discussion much less setting forth its reasoning.

In the 1977 NLRB decision when the Board initially asserted jurisdiction over the State Bank, the Board overruled *BRI* and *AGIP*. 229 NLRB at 842. After reviewing *Benz* and *McCulloch*, the Board determined that the concerns voiced by the Supreme Court in those decisions did not apply to the State Bank as "neither [*Benz* nor *McCulloch*] dealt with the issue of foreign governments or their agents as employers doing business within the Territorial United States." *Id.* at 841. The Board also deemed significant the fact that foreign banks were increasingly involved in American markets, and that more American residents were being employed by those foreign banks and thus determined that circumstances had changed substantially since its earlier decisions. Reflecting on the changed circumstances and the increased employment of American residents by foreign entities, the Board wrote:

> "[W]e now conclude that there is no public policy or policy of the Act which, on the ground that the employer is discolsed [sic] to be an 'agency' or 'instrumentality' of a foreign state, justifies us to continue to decline jurisdiction in cases affecting employees in our own country whose employer engages in commercial activity which meets the Board's jurisdictional standards for such enterprises. . . . It will better effectuate the policies of the Act for the Board to assert, rather than in our discretion decline, jurisdiction. . . ."

Id. at 842.

The deference normally due the judgment of an administrative agency in the exercise of its discretion, *see Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2803, 2808–09, 81 L.Ed.2d 732 (1984), is all the more important when we are requested to intrude upon that agency's prosecutorial discretion. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), further restricted the scope of judicial review of agency prosecutorial decisions in articulating a presumption that the decision of an agency *not* to enforce and employ its regulatory authority in a particular case is unreviewable by a Court of Appeals. The Court concluded that in such cases, with narrow exceptions,[12] there is "no law to apply" for purposes of judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). Although the NLRA specifically provides for judicial review of Board orders in §§ 10(e) and 10(f), the statutory language does not specifically articulate the "law to apply" to the NLRB's decisions to assert or not assert jurisdiction. We therefore turn to case law in order that we might ascertain whether the NLRB abused its discretion in asserting jurisdiction over the State Bank.

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[12] As articulated by the concurrence in *Chaney*, there may be review where (1) an agency decides as a matter of law that it may not enforce a statute; (2) an agency engages in a pattern of non-enforcement of clear statutory language; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a non-enforcement violates constitutional rights. 105 S.Ct. at 1660.

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We held in *N.L.R.B. v. Austin Developmental Ctr., Inc.*, 606 F.2d 785, 790 (7th Cir.1979), that the Board's decision to assert jurisdiction "will not be reversed absent a showing that it acted unfairly and caused substantial prejudice to the affected employer." The Board's decision to assert jurisdiction over the State Bank in this factual situation meets this test since in deciding to assert jurisdiction over the Bank, the Board enunciated a policy equally applicable to similarly situated, foreign-government-owned employers.

Further, the Board must not announce new principles (e.g. a new assertion of jurisdiction) in an adjudicative proceeding, to the prejudice of those affected, where the failure of the agency to proceed by rulemaking would constitute an abuse of discretion. *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765–766, 89 S.Ct. 1426, 1429–30, 22 L.Ed.2d 709 (1969); *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771–72, 40 L.Ed.2d 134 (1974). However, as *Wyman-Gordon* and *Bell Aerospace* make clear, "the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rule-making and adjudication lies in the first instance within the Board's discretion." *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. at 1772. In *Bell Aerospace* the Supreme Court held that the NLRB could decide on a case-by-case basis whether buyers constituted "managerial employees" for purposes of the NLRA. In the present case, just as in *Bell Aerospace*, "[t]he Board . . . has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character" of the parties before it. 416 U.S. at 294, 94 S.Ct. at 1772. Specifically, the very arguments that the State Bank of India makes—that the NLRB should tread carefully when its decisions might affect the monetary policy of a foreign nation—support the Board's choice of overruling its prior policy in an adjudication rather than a rule-making proceeding.

Finally, the NLRB's decision to shift and reverse its former policy toward employers such as the State Bank of India must necessarily be grounded in a "reasoned analysis in support of the change." *Local 1384, UAW v. N.L.R.B.*, 756 F.2d 482, 493 (7th Cir.1985). As we wrote in *Austin*, the NLRB "may depart from previously established guidelines when to do so will, in the Board's judgment, effectuate the purposes of the Act." 606 F.2d at 790. "An administrative agency . . . must be allowed substantial flexibility to adapt its standards to changing conditions. . . ." *Id.*, n. 10.

The Board specifically found that asserting jurisdiction over the State Bank would effectuate the purposes of the NLRA given the expanded commercial activities of foreign-government-owned employers like the State Bank of India in our country, and the increasing number of American resident employees hired by them. We have no basis for disagreeing with that conclusion, or the reasoning the NLRB articulated in reaching it. Indeed, that conclusion is in harmony with Congress' declaration of policy in 29 U.S.C. § 151, set out above at page 531, and with the Supreme Court's opinion in *Ariadne Shipping Co., supra.* We therefore hold that the NLRB did not abuse its discretion in reversing prior policy and exercising jurisdiction over the State Bank.

III

We next consider whether the Board should have granted the State Bank a hearing on the Bank's objections to the representation election. In so doing, we note that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 328, 91 L.Ed. 322 (1946). This court has considered the Board's authority to regulate elections as "plenary," *Mosey Mfg. Co., Inc. v. N.L.R.B.*, 701 F.2d 610, 615 (7th Cir.1983) (en banc), and determined that "[t]he burden is on the challenger to show adequate reason for setting an election aside." *Advertisers Mfg. Co. v.*

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NLRB, 677 F.2d 544, 546 (7th Cir.1982). "That burden is 'heavy' requiring that the challenger produce 'specific evidence' of conduct so glaring as to impair employees' freedom of choice." *Id.* (citations omitted). Furthermore, "[t]he Board is entitled to rely on the Regional Director's report in the absence of specific exceptions supported by offers of proof of facts contrary to the Regional Director's findings." *NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, 496 (quoting *NLRB v.*

Advanced Systems, Inc., 681 F.2d 570, 572 (9th Cir.1982)). A party "is entitled to a hearing only when it raises substantial and material factual issues and proffers evidence that establishes a prima facie case for setting aside the election." *Chicago Marine Containers,* 745 F.2d at 496. We must determine whether the Board's conclusion that the Bank failed to present a prima facie case warranting an evidentiary hearing is supported by substantial evidence in the record. *Id.* at 496 n. 2. Accordingly, we examine the objections that State Bank raised against the election before the NLRB: (1) that the union (or union supporting employees) distributed an altered memo signed by the State Bank's president that misled the Bank's employees; (2) that union supporters defaced the official notice of election posted by the NLRB so as to mislead State Bank employees; and (3) that a letter the union distributed which alleged that State Bank discriminated against its employees on the basis of race prevented a fair election.

A. *The Altered Bank Memorandum*

The State Bank's initial objection to the election alleged that the Union or employees supporting the Union distributed an altered copy of a memorandum signed by the Bank's Chief Deputy Manager, Mr. Bhattacharjee, to employee voters that misled the voters to believe that Mr. Bhattacharjee favored the union in the election. The original memo was distributed three days before the election and contained a series of questions and answers about the procedures of the representation election. The last line of the memo stated, "I urge each of you to vote . . . and I sincerely hope you vote 'no'." The State Bank submitted evidence to the Regional Director revealing that shortly after the original Bank memo was distributed, at least three unit employees saw a copy of the memo that had been altered, to read ". . . I sincerely hope you vote *'yes',*" which was in the possession of a known union supporter.

The Regional Director decided that this evidence did not support the inference that the Union or its agent altered the memo. The Regional Director also observed that the memo was only one of more than ten memoranda distributed by the State Bank concerning the election, and except for the altered memo, all of the memoranda made perfectly clear that the State Bank opposed certification of the Union. In the judgment of the Regional Director, any voter who viewed the memorandum would realize that it was contrary to all other information the State Bank provided and thus was a hoax.

The State Bank argues that as a matter of law it is not required to fix responsibility for an alteration of a document to the union to set aside an election. It also contends that the evidence it presented permits an inference that the Union was responsible for the alteration and that a hearing would have uncovered additional facts to further support this inference. The State Bank also maintains that its evidence proves that at least one employee came forward and stated he was confused by the altered memo because the employee who brought the altered memo to the Bank's attention stated that he was in fact confused and wished to check the original.

In *Midland National Life Insurance Co.,* 263 NLRB 127, 131 (1982), the Board held that it would set aside an otherwise valid election on the basis of a *party's* alleged campaign misrepresentations only when the *manner* of deception made voters incapable of recognizing "mere propaganda of a particular party . . . for what it is."

> "In sum, . . . we will no longer probe into the truth or falsity of the parties'
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> campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. . . . [W]e will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."

263 NLRB 133.

The Bank established only that a Union supporter was in possession of the memo. The Bank has failed to establish that a *party* (here the Union) was responsible for the purported forgery. This court has traditionally upheld the NLRB's assertion that the improper acts of a third party are less damaging to the validity of an election than acts of the union or the employer. *Tuf-Flex Glass v. NLRB,* 715 F.2d 291, 296 (7th Cir.1983). *See also NLRB v. ARA Services, Inc.,* 717 F.2d 57, 66 (3d Cir.1983) (Board policy of giving lesser weight to third party misconduct bears a rational relationship to the policies of the Act). In *Tuf-Flex,* we held that in the absence of conduct "by the union sufficient to signal to the employees that [an individual] was anything more than an enthusiastic supporter," the actions of the "most active 'union man'" were not attributable to the union. 715 F.2d at 296. Moreover, "[t]he test of agency in the union election context is stringent, involving a demonstration that the *union* placed the employee in a position where he appears to act as its representative." *Id.* (emphasis in original). Accepting the Bank's evidence as true, and applying this standard, we do not agree with the State Bank's conclusion that the union was responsible for the forged letter. The mere speculative hope that some person might testify at a hearing and implicate the union is insufficient to constitute a prima facie case that would require the NLRB to hold a hearing. As we have repeatedly held in analyzing the burden a party must meet to raise an issue of fact in avoiding summary judgment, "a party may not rest on mere allegations or denials . . . [and] a bare contention that an issue of fact exists is insufficient to raise a factual issue." *Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir.1983). The *Tuf-Flex* standard is even stricter than the standard for avoiding summary judgment. A lesser standard would allow one who fears the outcome of the election to force the election to be set aside merely by creating a misrepresentation.

Furthermore, the Regional Director and the Board found that the State Bank's assertion that the forged letter "interfere[d] with employee free choice," *Midland, id.,* was not credible. We will not overturn a Board decision based on findings that call into play the very knowledge, experience and expertise in labor problems that the Board possesses. The State Bank's numerous memoranda to the employees discussing the election should have made the employees aware of the State Bank's adverse opinion of the union. The only evidence the Bank presented to demonstrate voter confusion was that an employee *checked with the Bank Supervisor once he realized that the forged letter was inconsistent with the Bank's stated policy against the union.* Therefore, the Bank's own evidence established that the allegedly confused employee was well aware of how the company wanted employees to vote at the election.

Since the Bank failed to make a prima facie case that the Union was responsible for the alleged forgery and since the Regional Director reasonably concluded that voters were unlikely to be deceived, we affirm the Board's holding that no hearing concerning the alleged forgery was required.

B. *The Defaced Notice of Election*

The State Bank's second objection to the election alleged that on two occasions an official notice of election containing a sample ballot posted in an employee lunchroom was defaced. On August 30 or 31, an unidentified person marked an "X" in the "yes" box (a vote for union representation) of the sample ballot. On September 1 another unknown person marked "X" on a piece of protective plastic directly over the "yes" box of the sample box. On the first occasion, the notice was replaced within twenty-four hours. On the second occasion, the "X" was wiped off the plastic covering on the morning of the election. The Regional Director accepted the Bank's allegations regarding the defaced sample ballots as true, and once more found that the State Bank had failed to establish that the Union was responsible for the alleged misconduct. The Regional Director "overruled" the State Bank's objection to the election, reasoning that it was "doubtful . . . that employees would gain the impression that the Board was encouraging them to vote for that party in the election, especially where, as here, the notices were covered in an obvious (although unsuccessful) attempt to prevent further alteration." The State Bank asserts that the NLRB's decision to dispense with a hearing prevented the State Bank from proving that the Union was responsible. The Bank also contends that the altered sample ballots were fatal to the validity of the election, under the Board's recent decision in *SDC Investments, Inc.,* 274 NLRB 78, 118 LRRM 1410 (1985).

In *SDC,* the Board held that distribution of copies of an official NLRB ballot handwritten in Spanish "Remember to Vote Yes . . ." justified setting aside a certification election. "The crucial question [is] whether the altered ballot in issue is likely to have given voters the misleading impression that the Board favored one of the parties to the election. . . . We reject the view that the mere existence of an altered ballot is a *per se* violation. . . ." 118 LRRM at 1412.

In *SDC*, the Spanish "Remember to Vote Yes. . . ." was integrated into what purported to be an exact Spanish translation of the entire text of the Board's English Ballot. It is probable that those employees reading the Spanish version would not recognize that the "Remember to Vote Yes" constituted an alteration of the English version that they could not read. Those employees would therefore presume the Spanish version was an authentic translation and thus infer that the Board favored the union.

In the present case, the defacement of the posted sample ballot was an obvious alteration of the Board's Notice of Election. The defaced sample ballot contained language that made it clear that the Board did not favor the Union. For example, to the right of the defacement, the Notice explicitly reads: "The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election." Directly above this, in large blue letters, is printed "The National Labor Relations Board protects your right to a free choice."

The evidence presented by the State Bank establishes that the defacements were corrected shortly after they were discovered. The Notice was defaced for only a short period of time and if employees were continually scrutinizing the notice of election with the scrupulous attention to the Board's views that the Bank suggests they were, they would have noticed the corrected ballot and the language accompanying it that made it clear that the Board did not favor the Union.

Furthermore, as with the forged letter, the State Bank has failed to meet the *Tuf-Flex* "strict standard" prohibiting the weak inference that the union is responsible for the actions of unidentified persons. *Accord N.L.R.B. v. Fuel Gas,* 674 F.2d 529, 531 (6th Cir.1982) ("To hold that a simple incident involving an anonymous pencil marking penciled on a sample ballot automatically indicates an unfair election would [be] beyond the limits of reason and common sense.")

The Bank failed to produce any evidence linking the Union, rather than an over-zealous union supporter with marking the sample ballots. Furthermore, the altered ballots displayed with the official notice of election were quickly replaced by unaltered ballots, and the Bank has offered no evidence to contradict the Regional Director's and the Board's expert judgment that employees were unlikely to be misled. Therefore, we uphold the decision of the Board and the Regional Director that the State Bank failed to make a *prima facie* case necessitating a hearing on this objection.

C. *The alleged "appeal to racial prejudice."*

A Union letter dated August 18 distributed to eligible employee voters stated in part:

> "The State Bank of India is trying to keep depressed conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups."

The State Bank filed its objections with the Regional Director that this letter's reference to racism so tainted the election atmosphere that a fair election could not be held. The Regional Director concluded that the letter "does not evince the prohibited motive of inflaming racial hatred merely to obtain votes. . . . Rather [the union's] message to employees appears to be a permissible attempt to encourage racial pride and concerted action by minority group employees to better their wages and working conditions."

The Board has held that there is no shelter or absolution for a party's attempt to force the election or defeat of a union by arousing vicious race-hatred. *Sewell Mfg. Co.,* 138 NLRB 66 (1962). The free choice and fairness in union elections that Congress intended will be swept aside by an undertow of inflamed racial prejudice. We have joined with other courts in upholding the Board's policy, that an otherwise valid election will be set aside when a party "deliberately seek[s] to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." *Sewell,* 138 NLRB at 72. *See, e.g., Peerless of America v. N.L.R.B.,* 576 F.2d 119, 125 (7th Cir.1978); *N.L.R.B. v. Utell Int'l,* 750 F.2d 177, 179 (2d Cir.1984); *N.L.R.B. v. Silverman's Men's Wear, Inc.,* 656 F.2d 53 (3d Cir.1981); *N.L.R.B. v. Baltimore Luggage Co.,* 387 F.2d 744 (4th Cir.1967); *N.L.R.B. v. Sumter Plywood Corp.,* 535 F.2d 917

(5th Cir.1976); *Arlington Hotel Co., Inc. v. N.L.R.B.*, 712 F.2d 333 (8th Cir.1983).

We must examine allegedly inflammatory racial appeals to determine if they are truly racially inflammatory and assess the relationship of an inflammatory racial appeal to the overall theme of the campaign. *Peerless, supra.* Much hangs on these two determinations, for "[i]f . . . racial or sexual remarks . . . do not form the core or theme of the campaign . . . and if the remarks are not inflammatory, they should be reviewed [only] under the standards applied to other types of misrepresentation." *Peerless,* 576 F.2d at 125. These "standards applied to other types of misrepresentation" are precisely those *Midland* standards we discussed above in analyzing the forged Bank letter: the NLRB will intervene in an election only if "voters are unable to recognize propaganda for what it is." *Midland National Life Insurance Co.,* 263 NLRB 127, 133 (1982).

A statement is racially inflammatory if on its face it is intended to produce or exploit strong racial prejudice, and is in fact likely to produce or exploit such racial prejudice. *Cf. Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969); *Collin v. Smith,* 578 F.2d 1197, 1203–1204 (7th Cir.), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). In the present case, the text of the disputed statement ("The State Bank of India is trying to keep depressed conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups") urges the employees to vote for the union *not* by appealing to and arousing their racial prejudice, but rather by contending that the Bank itself was taking advantage of their inability to protect their own interest because of their minority status. Unlike *Sewell,* where the employer urged the employees to vote **542** against the union because the union was involved with black people, here the union is urging the employees to vote for the union to *prevent* discrimination. This distinction between arousing race hatred and characterizing an employer's actions as discriminatory brings this case squarely within our holding in *Peerless,* 576 F.2d at 122, that a union's claim that management discriminated on the basis of race, sex and national origin was not an inflammatory racial appeal. *Accord N.L.R.B. v. Utell Intern, Inc.,* 750 F.2d 177, 179 (2d Cir.1984). As the Board concluded in *Sewell,* "a relevant campaign statement [should not] be condemned because it may have racial overtones." 138 N.L.R.B. at 71. Although the Union's statement here had "racial overtones," the statement was relevant to the working conditions and wages of the employees the union sought to represent.

Nor does the Union's alleged racial appeal satisfy the second prong of the analysis—that the alleged inflammatory racism be sufficiently close to the core theme of the campaign. The Union remark was a single sentence at the end of a long letter urging support for the union. This long letter in turn was one of many communications from the union to the employees presenting reasons for voting for the union. Thus this case is very different from previous cases in which racially inflammatory appeals were at the core of an election campaign. For example, in *NLRB v. Katz,* 701 F.2d 703 (7th Cir.1983), allies of the union discussed the movie "Holocaust' with the employees and also stated [Mr.] and Mrs. Katz are Jewish and they're getting rich while we're getting poor." On another occasion an employee told other employees that "Jews killed the Nazis— . . . the Jews marched in Skokie to keep the blacks out." The remarks in *Katz* were central to the union campaign while the remark before us in this case was isolated. While the comment in this case addresses the working conditions and wages of the employees, the comments in *Katz* discussing the Holocaust and Jews killing the Nazis were not relevant to any issues in the representation election. Furthermore, as in *NLRB v. Chicago Marine Containers, Inc.,* 745 F.2d 493 (7th Cir.1984), the union statement concerned a matter arguably within the knowledge of the employees, i.e., whether the State Bank had racist intentions. "Therefore, the employees . . . were entirely capable of evaluating the statements for what they were—mere opinions." *Id.* at 498. The record thus contains substantial evidence supporting the Board's decision that the Bank failed to establish a *prima facie* case of racially inflammatory conduct and therefore was not entitled to a hearing.

IV

The orders of the National Labor Relations Board are ordered ENFORCED.

Southwestern Steel & Supply, Inc. v. NLRB

806 F.2d 1111 (D.C. Cir.), December 12, 1986—
276 NLRB 1569

On petition for review and cross-application for enforcement of Board Order

Before Edwards and Williams, Circuit Judges, and Green,[*] District Judge

Opinion for the Court filed by Circuit Judge Williams

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Williams, Circuit Judge: Southwestern Steel & Supply, Inc. ("the Company") entered into a multiemployer collective-bargaining agreement recognizing Local Union 75, International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, AFL–CIO ("the Union") as the exclusive bargaining representative of a unit of field employees. The collective-bargaining agreement contained a "hiring-hall provision" obligating the Company to hire applicants exclusively by referral from the Union. The collective-bargaining agreement also provided that the Company "shall contribute" to the California Ironworkers Field Welfare Plan, and "will contribute" to the California Ironworkers Field Pension Trust, at prescribed rates. In a separate Contributing Employers Agreement ("CEA") between the Company and the trustees of the respective trusts, the Company agreed to contribute to the trusts "in accordance with the [collective-bargaining agreement) . . . for the period provided in such [collective-bargaining agreement] and from year to year thereafter unless written notice revoking

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this Agreement is given . . . at least sixty (60) days prior to any anniversary date."

Upon expiration of the collective-bargaining agreement the Company, without first bargaining to impasse with the Union, hired nonunit employees and ceased payments to the trusts. The National Labor Relations Board adopted an Administrative Law Judge's findings that the Company's unilateral conduct violated § 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5) (1982), and ordered the Company to make whole all employees, including those "who were denied an opportunity to work for [the Company] because of [its] unlawful refusal to continue using the hiring hall." 276 N.L.R.B. No. 174, at 1 n. 1 (1985). The Company petitions for review of that order and the Board cross-applies for enforcement.

An employer's unilateral change in terms or conditions of employment, so-called "mandatory subject of bargaining," made after expiration of the collective-bargaining agreement but before the employer has bargained to impasse with the union, circumvents the duty to bargain. *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C.Cir.1982); *see NLRB v. Katz,* 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). Thus, generally, provisions of the expired collective-bargaining agreement that relate to mandatory subjects are said to survive the agreement's expiration. *See Cauthorne,* 691 F.2d at 1025. The Company does not dispute, nor could it, that a hiring-hall provision of the type contained in the collective-bargaining agreement is a mandatory subject of bargaining. *See NLRB v. Southwest Security Equipment Corp.,* 736 F.2d 1332, 1337–38 (9th Cir.1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985); *NLRB v. Houston Chapter, Associated General Contractors, Inc.,* 349 F.2d 449, 452 (5th Cir.1965), *cert. denied,* 382 U.S. 1026, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966). Instead, the Company asserts that the hiring-hall provision fell into the narrow class of exceptional mandatory subjects—so far limited only to union-shop, dues-checkoff, and (to a limited degree) no-strike provisions[**]—that do not survive expiration of the collective-bargaining agreement. We join the only two courts of appeals that have addressed the issue in affirming the Board's decision not to except hiring-hall provisions from the general rule. *See*

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[*] District Judge Joyce Hens Green of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[**] While the Board may be reevaluating its position on the survivability of arbitration clauses, *cf. Southwest Security Equipment Corp.,* 262 N.L.R.B. 665, 665 n. 1 (1981), *enf'd,* 736 F.2d 1332 (9th Cir.1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985); *Indiana & Michigan Electric Co.,* No. 25–CA–10549 (NLRB argued Dec. 6, 1983), it has done nothing to disturb its current position that they survive. *See Digmor Equipment & Engineering Co.,* 261 N.L.R.B. 1175, 1175–76 (1982); *American Sink Top & Cabinet Co.,* 242 N.L.R.B. 408, 408 (1979). Under this view, the Company's invocation of the arbitration clause as another exception amounts, at best, to a complaint that the Board's order in this case is inconsistent with what the Board may do in the future.

NLRB v. Southwest Security Equipment Corp., 736 F.2d at 1337–38; *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 977 (6th Cir.1982).

Armed with no more than an ambiguous Board dictum, *see Rayner*, 251 N.L.R.B. 89, 90 (1980), *enf'd as modified on other grounds*, 665 F.2d 970 (9th Cir.1982), the Company asserts that a provision may not survive expiration of the collective-bargaining agreement if it " 'governs' the employer-union relationship" in addition to the employer-employee relationship. Reply Brief for Petitioner at 4. The Company's formulation of the "exception" eviscerates the "rule"; virtually all mandatory subjects implicate the institutional employer-union relationship. *See, e.g., Midstate Telephone Corp. v. NLRB*, 706 F.2d 401, 405 (2d Cir.1983) (provision for per diem compensation and travel and lodging expenses of employee negotiators survives); *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598–99 (4th Cir.1967) (superseniority provision survives despite fact that its "primary purpose . . . is to help the union further establish itself").

Contrary to the Company's assertion, the existing exceptions are not rooted in such rule-swallowing logic. The well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3); and § 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an *existing* collective-bargaining agreement. *See, e.g., Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), *enf'd in relevant part sub nom. Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619 (3d Cir.1963), *cert. denied*, 375 U.S. 984, 84 S.Ct. 516, 11 L.Ed.2d 472 (1964); *Hudson Chemical Co.*, 258 N.L.R.B. 152, 157 (1981). Similarly, that a no-strike provision does not survive except (in keeping with the strong national policy favoring arbitration, *see Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977)) if and to the extent that its correlative arbitration clause survives, *see Goya Foods, Inc.*, 238 N.L.R.B. 1465, 1467 (1978), is attributable to the union's statutory right to strike, *see* 29 U.S.C. §§ 158(d)(4), 163; *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293, 77 S.Ct. 330, 336, 1 L.Ed.2d 331 (1957). A waiver of that right during the life of the collective-bargaining agreement is not a "clear and unmistakable" waiver, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–10, 103 S.Ct. 1467, 1477–78, 75 L.Ed.2d 387 (1983), of the right to strike beyond the contract term, *see Goya Foods, Inc.*, 238 N.L.R.B. at 1468 (Fanning, concurring); *cf. NLRB v. Lion Oil Co.*, 352 U.S. at 293, 77 S.Ct. at 336. The hiring-hall provision, in contrast, is neither a statutorily guaranteed right nor statutorily dependent upon an existing collective-bargaining agreement.

We likewise uphold the Board's decision to remedy the hiring-hall breach by requiring compensation for unit members who would have been employed by the Company had it hired in conformity with the provision. We are unswayed by the Company's protest that the remedy is punitive because it "requires Southwestern to put two people in every job and pay each full wages and benefits." Brief for Petitioner at 16. The Company has suggested no alternative. Retroactive relief is a reasonable way (if not the only way) to compensate those who have been harmed by the Company's refusal to comply with the hiring-hall provision. *See, e.g., NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 433*, 600 F.2d 770, 777–79 (9th Cir.1979) (upholding backpay remedy for union discrimination in hiring-hall referral), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). And the remedy is consistent with past practice. *See Southwest Security Equipment Corp.*, 262 N.L.R.B. 665, 670–71 (1982) (adopted by Board pro forma); *Clarence R. Yeager Distributing, Inc.*, 261 N.L.R.B. 847, 849 n. 10 (1982), *enf'd without opinion*, 718 F.2d 1109 (9th Cir.1983), *cert. denied*, 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984); *Wayne Electric, Inc.*, 226 N.L.R.B. 409, 409 n. 3 (1976). Even when the Board does not expressly extend its make-whole order to would-be employees, as in *Watson-Rummell Electric Co.*, 277 N.L.R.B. No. 162, at 4, 6 (1985), the order is understood to encompass them, *Wayne Electric, Inc.*, 226 N.L.R.B. at 409 n. 3.

Finally, we reject the Company's assertion that its unilateral termination of payments to the welfare plan and pension trust did not violate any duty to bargain. Ordinarily, such payment obligations are mandatory bargaining subjects that, like the hiring-hall provision, survive expiration of the collective-bargaining agreement until the conclusion of good-faith bargaining. *American Distributing Co. v. NLRB,* 715 F.2d 446, 449 (9th Cir.1983), *cert. denied,* 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984). The Company argues, however, that the Union waived its right to bargain over the continuation of such payments (and, therefore, the corollary right to such payments until the parties bargained to impasse). The only evidence that the Company adduces is the provision in the CEA prescribing how and when revocation was permissible as between the Company and the respective trustees. This tidbit falls far short of the "clear and unmistakable" evidence by which the Company must demonstrate the Union's waiver of a statutory right. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708–10, 103 S.Ct. 1467, 1477–78, 75 L.Ed.2d 387 (1983); *Local Union 1395, IBEW v. NLRB,* 797 F.2d 1027, 1029 (D.C.Cir.1986). The provision amounts to no more than a right of the Company to terminate its agreement with the trustees, subject to an obligation to give timely notice. That qualified right to terminate can naturally be construed as coming into play only after the Company has complied with its statutory duty to bargain; thus, it is consistent with the survival of the unequivocally expressed duty to contribute. We decline to find a clear and unmistakable waiver in such circumstances, especially when the Union was not even a party to the document containing the alleged "waiver." *Compare Hennepin Broadcasting Associates, Inc.,* 272 N.L.R.B. 237, 237–38 (1984) (collective-bargaining agreement expressly provided that terms of trust agreement, giving employer right to terminate unilaterally, "control the Employer's obligation hereunder"); *Cauthorne Trucking,* 256 N.L.R.B. 721, 722 (1981) (not clear whether union was party to pension agreement that unambiguously provided for termination of benefits upon expiration of collective-bargaining agreement), *modified on other grounds,* 691 F.2d 1023 (D.C.Cir.1982).

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The Company's petition for review is denied and the Board's cross-application for enforcement is granted.

So ordered.

NLRB v. Malta Construction Company

806 F.2d 1009 (11th Cir.), December 22, 1986—276 NLRB 1494

On petition to enforce Board Order

Before VANCE and EDMONDSON, Circuit Judges, and ALLGOOD *, Senior District Judge

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ALLGOOD, Senior District Judge: The National Labor Relations Board (the Board) seeks enforcement of its order issued on October 22, 1985, against Malta Construction Company (the Company) for violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) (the Act). [1] The question presented is whether the order has an adequate evidentiary foundation. We hold that it does and that it will be enforced.

The International Operating Engineers Local 926 (the Union) filed charges of unfair labor practices against the Company following the discharge of two employees during a union campaign. Following a hearing, an administrative law judge (ALJ) recommended sustaining the allegations that Paul Hoback's discharge violated the Act, but dismissing the allegations concerning Johnny Lambert's discharge. Both the Company and the General Counsel filed exceptions to the findings.

After reviewing the findings of the ALJ, the Board agreed with the recommendation regarding Hoback's discharge and in a 2–1 decision concluded the Company violated Section 8(a)(3) also in discharging Lambert. The Board ordered the Company to cease and desist discharging employees for engaging in protected activities and interfering with, restraining, or coercing employees in the exercise of guaranteed rights. The Board ordered the Company to offer Hoback and Lambert their former or equivalent jobs, plus any lost earnings with interest. The Company was also ordered to expunge the personnel files of Hoback and Lambert of any information regarding the discharge. The Board is now petitioning this court for enforcement of that order. Malta opposes enforcement of the order and contends the decision is not supported by substantial evidence and is contrary to established law.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge, Northern District of Alabama, sitting by designation.

[1] 29 U.S.C. § 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C.S. § 157],

* * * * *

(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.

In reviewing an order of the Board, we are bound by the Board's factual findings if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *City Cab Co. of Orlando, Inc. v. NLRB,* 787 F.2d 1475 (11th Cir.1986); *Weather Tamer, Inc. v. NLRB,* 676 F.2d 483 (11th Cir.1982). The Board has been given the primary responsibility for striking a balance between asserted business justifications and the invasion of employee rights in light of the Act. *NLRB v. Fleetwood Trailer Co., Inc.,* 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967).

The Company is a contractor engaged in the construction of overpasses and bridges on Interstate 675 south of Atlanta, Georgia. Soon after the Company began work on the I-675 project, in June, 1983, the equipment operators and mechanics began a campaign to organize a union. On July 29, 1983 the Union filed a petition with the Board's Regional Office for an election. During the campaign the Company actively opposed the Union.

On August 8, 1983 Johnny Lambert placed a union sticker on the crane he operated and on both his personal hardhat and his company issued hardhat. Employees had been issued orange hardhats and instructed to wear them when they were not in the cabs of their machines. Dennis Fleeman, one of the superintendents on the job, told Lambert to remove the sticker from the crane and the company hardhat. Lambert removed the sticker from the crane but refused to remove the one on the hardhat. The next day Fleeman saw Lambert wearing his personal hardhat and reported both incidents to the project manager, Gene Root. Root and Fleeman then consulted the general manager, George Fleet, who told them that the company policy was for all employees to wear only the company issued hardhat and it was to be kept free of any kind of sticker except the company insignia. When Fleeman and Root told Lambert of the policy, Lambert agreed to wear the company hat, but refused to remove the union sticker. Root warned Lambert he would be fired if he refused to remove the sticker. Lambert told Root he thought he had a right to wear the sticker, refused to remove it and was fired.

Paul Hoback was also actively involved in the union campaign. Hoback wore union insignias, handed out union materials, talked to other employees about the union and testified for the union in a hearing before the Board on the Union's representation petition.

Hoback was discharged for "deliberate interference with production and refusing work assignmentfollow instructions." On Saturday, September 17, Hoback was given a work assignment by superintendent Burley Bonner. During the morning Hoback took a water break, during which he discussed the union campaign with Eric Bonner, a laborer on the crew and the son of the superintendent. Later he stopped his machine to help Ronnie Simmons who had gotten his front-end loader stuck. Bonner returned to the site several times during the morning and again shortly before noon. Bonner was generally dissatisfied with the job Hoback was doing and the amount of time it was taking. Bonner's son told his father that Hoback had stopped his machine to discuss the union. On Monday, Bonner told Fleet that Hoback had been slow on Saturday and had stopped his machine to talk to Simmons. Hoback was fired that day with no further investigation. Hoback had never been warned nor disciplined for extra long breaks or wasting time before the day he was fired.

The wearing of union insignia by employees, particularly during an organizational campaign, is fairly typical behavior and has been held to be protected under § 7.[2] "The right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1944), quoting the NLRB decision, 51 NLRB 1186.

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[2] 29 U.S.C. § 157. Rights of Employees.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) of the Act specifically makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of guaranteed rights. Based on this section, courts have repeatedly held that absent special circumstances to maintain production or discipline or insure safety, interfering with an employee's right to wear union insignia constitutes an unfair labor practice. *Davison-Paxon Co., Div. of R.H. Macy & Co. v. NLRB,* 462 F.2d 364 (5th Cir.1972); *NLRB v. Lone Star Textiles, Inc.,* 386 F.2d 535 (5th Cir.1967); *Brewton Fashions, Inc. v. NLRB,* 361 F.2d 8 (5th Cir.1966); *cert denied* 385 U.S. 842, 87 S.Ct. 95, 17 L.Ed.2d 75 (1966); *NLRB v. Floridan Hotel of Tampa, Inc.,* 318 F.2d 545 (5th Cir.1963). The burden of proving an unfair labor practice is always on the NLRB, but once the existence of presumptively invalid rules is shown, the employer has the duty of going forward with the proof and showing special circumstances to justify the rule.

The Company argues that the Board failed to fairly balance the competing interests of the employer and employees as required by *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). The Company points out that employees were allowed to display union insignia on their person and property without restriction, but that legitimate business concerns made the restrictions on the hardhats necessary. The special circumstances as put forth at the hearing were: (1) to make it easy for supervisors to distinguish Malta employees from other companies employees; (2) so operators and truck drivers could spot employees working around the equipment; and (3) because construction workers come in contact with the public and the Company wanted to protect its image. The Company argues that it was not motivated by an anti-union attitude in requiring the removal of the sticker, but by legitimate business concerns. The Board ruled that the Company failed to show that the complete ban of union insignia on hardhats was necessary for either identification or safety. As to the third justification for the ban, the Board found that employees have so little contact with the public that it does not justify a special circumstance.

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In its decision, the Board pointed out that there can be legitimate reasons for rules prohibiting union insignia on hardhats, but that Malta had not demonstrated such special concerns. *See, Andrews Wire Co.,* 189 NLRB 108 (1971); *Standard Oil Co. of California,* 168 NLRB 153 (1967); and *Brown Manufacturing Corporation,* 235 NLRB 1329 (1978).

Section 7 of the Act protects the rights of employees to engage in union activities and Section 8(a)(3) makes it unfair labor practice for an employer to discharge an employee because of his protected union activities. *NLRB v. United Sanitation Service,* 737 F.2d 936 (11th Cir.1984). In proving a case of unlawful discharge, if the General Counsel shows that an employer's opposition to union activity was a motivating factor in the employer's decision, an unfair labor practice is established unless the employer can prove as an affirmative defense, that it would have discharged the employee even in the absence of the protected activity. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), affirming *Wright Line, Inc.,* 251 NLRB 1083.

Paul Hoback was fired ostensibly because he failed to follow instructions and interfered with the production. Hoback had a history of taking long breaks and wasting time, but he had never been warned nor disciplined for it. He was not warned the day he was fired that his behavior could result in some form of discipline. In fact, there was nothing different about Hoback's behavior that day or the company's reaction to it, except that Hoback was talking about the Union. The question of motive is a factual matter for the Board's determination based on all the facts and circumstances. As in many cases there is evidence of both a lawful and an unlawful motive. While management has a lot of freedom in hiring and firing its employees, it cannot fire when the real motive is to discriminate against pro-union employees. Because direct proof of motive is often impossible to obtain, circumstantial evidence must be relied upon to prove a violation of Section 8(a)(3). Based on all of the circumstances the Board reasonably concluded that the asserted reasons for discharge were not the real ones and that the Company failed to show that they would have fired Hoback absent the Union conversation.

After a careful review of the entire record, the court is of the opinion that the decision of the Board is supported by substantial evidence and that the proper legal standards were applied. Accordingly, the petition for enforcement of the Board's order is GRANTED.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part: Because of the deference due to decisions of the NLRB, I concur in the court's judgment as it deals with Mr. Hoback. Notwithstanding the deference due to NLRB decisions, I conclude that Mr. Lambert was lawfully disciplined by his employer; and I dissent from the court's judgment as it deals with Mr. Lambert.

The issue in this case is not whether employees can wear union insignia at the jobsite; they can. Nor is the issue whether

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employers can always revent emoyees from using company property for union purposes; they cannot. The issue is whether the NLRB evaluates a case properly when it gives no weight to property rights in balancing the rights of employees and employers. In my view, the answer to that question is clearly "no."

In this case the question is not one of fact, but of a proper balance to be struck between conflicting interests. As the Supreme Court said in *NLRB v. Brown,* 380 U.S 278, 291–92, 85 S.Ct. 980 988, 13 L.Ed.2d 839 (1965):

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent wit a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts uld abdicate their responsibility if they did not fully review such administrative decisions.

Instead of balancing the employees' interest in organizing against the company's property interest, the NLRB and the majority here give no weight to the fact that the company owned the safety helmets. All the precedents cited by the NLRB involving union insignia [1] are distinguishable on this fact: none involve union insignia displayed on company-owned safety equipment where the union was not discriminated against and the wearing of union insignia was generally allowed. Moreover, the NLRB at oral argument bluntly contended that the company's property interest in the safety helmets makes no difference. This argument goes too far and is unjustified by judicial precedent or by Congressional intent. [2] Although company ownership of the helmets may not be, in and of itself, the determinative factor, surely it counts for something. It is a circumstance that must be given substantial weight.

As a general proposition, I believe that a company has a right to preserve and control its own property. [3] If a company adopts a rule in the exercise of its property rights without any intention of curtailing union activities, its employees face a significant burden of proving that that rule infringes on their rights. They might meet that burden, for example, by proving that the rule effectively closed all available forums by which employees could show their union allegiance. In the instant case, no one even contends such a thing.

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It is important that both parties agree that the underlying requirement that employees wear company-owned helmets was not motivated by anti-union sentiments. The rule requiring the wearing of company-owned helmets predates the union organizational efforts and is designed to assure OSHA[4] compliance—a fact not contested by the NLRB. The NLRB does not dispute that such a step to assure OSHA compliance reflects a legitimate business interest. Furthermore, employees were allowed to display union insignia on their person just as they pleased except on the company's helmet. It is also undisputed that the company treated union decals no differently, certainly no worse, than any other decal on company helmets. "With the Company permitting . . . various sizes and kinds of insignia to be worn, it cannot be maintained that the Company's rule prohibiting the wearing of decals [on hard hats] deprived the employees of the right to identify themselves with the Union for purposes of organizaing other employees. . . . Certainly the rule in this case did not restrain or interfere with any employee's right to show his allegiance to other employees. . . . *Standard Oil Co. of California* 168 N.L.R.B. No. 28 (1967). *Accord Andrews Wire Corp.*, 189 N.L.R.B. 108 (1971).

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[1] The NLRB appears to have a history of overreaching on this point. Actually, the NLRB has rarely, if ever, met with success in court concerning display of union insignia where the employer's rule was not a total ban. *See Burger King Corp. v. NLRB,* 725 F.2d 1053 (6th Cir.1984) (enforcement of NLRB order denied—union insignia on company-owned uniform); *Midstate Tel. Corp. v. NLRB,* 706 F.2d 401, 403 (2d Cir.1983), (enforcement of NLRB order denied—insignia on employees' own clothing); *Fabri-Tek, Inc. v. NLRB,* 352 F 2d 577 (8th Cir.1965) (enforcement of NLRB order denied—insignia worn on employee's clothing); *NLRB v. Harrah's Club,* 337 F.2d 177 (9th Cir.1964) (enforcement of NLRB order denied—union insignia on company owned uniforms); *Davison-Paxon Co. v. NLRB,* 462 F.2d 364 (5th Cir.1972) (enforcement of NLRB order denied); *cf. NLRB v. Floridan Hotel of Tampa, Inc.,* 318 F.2d 545 (5th Cir.1963) (total ban on wearing membership insignia not allowed). The present case seems stronger for the employer than any of these.

[2] In listening to the NLRB's lawyer orally argue this case and equate this case with one in which the employee owned the helmet, I could not help but note how far we have come. "*Liberty, property, and no stamps!* It had been the first slogan of the American Revolution." C. Bowen, *Miracle at Philadelphia, The Story of the Constitutional Convention May to September 1787* at 70 (1966). I know that our views about property rights have changed since the nation was founded, but it still concerns me to hear how little such rights seem to mean to some governmental agencies.

[3] Thee are, of course, a number of cases in which employees have been allowed to use the employer's real property, i.e., jobsites, to distribute organizing literature. Freedom of employees to communicate with one another on the jobsite is viewed as essential to their rights to organize; thus, property rights do not always prevail. But, the Supreme Court has made it plain that employer property rights are significant and due some protection. *See NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956) (reversing order of NLRB).

Because no weight was given to property rights, the balance that the NLRB struck here was erroneous. No judicial precedent supports giving property rights such short shrift. Moreover, Congress has never indicated any intention to ignore complete a property owner's interest in its personal property. Nor can it be maintained that the company's rule deprived its employees of any right to identify themselves with the union. This is a case where an employer required employees to wear a distinctive piece of employer-owned safety equipment, prohibited them from placing any sort of insignia on that equipment, enforced that rule without regard to the content of the insignia, and placed absolutely no prohibition on the display of union insignia on employee clothing.

As a matter of law, I believe the NLRB's evaluation of the relative strength of the competing interests was wrong, unsupported, arbitrary and irrational; and I agree with the administrative law judge who tried this case and with the Chairman of the NLRB, who dissented from the Board's decision, that the no-decal-on-helmets rule is not an unfair labor practice. Accordingly, Malta's termination of Mr. Lambert's employment was justified. I would decline to enforce the NLRB order to the extent that it deals with Mr. Lambert's case.

NLRB v. International Union of Operating Engineers Local 501, AFL-CIO

806 F.2d 1405 (9th Cir.), December 29, 1986—
275 NLRB 735

On petition to enforce Board Order

Before Tang and Brunetti, Circuit Judges, and Burns,* District Judge

Tang, Circuit Judge: The NLRB petitions for enforcement of its order that the International Union of Operating Engineers Local 501 ("Union"), violated Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(1(B) (1982), by fining one supervisor-member and expelling two others as discipline for continuing to perform their usual supervisory duties during a lock-out. The Union contends that the supervisor-members were doing bargaining unit work, that expulsion of members does not violate Section 8(b)(1)(B) because it does not affect the employer in its selection of collective bargaining representatives, and that an order of reinstatement violates the Union membership's first amendment right of association.

BACKGROUND

The MGM Grand Hotel, Inc. employed approximately 42 operating engineers in its Las Vegas hotel and casino to maintain and operate hotel equipment, including air conditioning, heating, boiler room, electrical and refrigeration equipment. The operating engineers were represented by the International Union of Operating Engineers Local 501.

The collective bargaining agreement between MGM and the Union expired on April 1, 1983. MGM locked out the engineers from May 15 to June 1, 1983 and the Union established a picket line during that period. During the lock-out, the chief engineer, John Fairclough, and two assistant chief engineers, Bill Hunter and John Bucholtz, continued to perform their supervisory duties as directed by MGM. The Union charged and tried all three for violating the Union's constitution by working behind the picket line. The Union expelled Hunter and Bucholtz from Union membership and fined Fairclough $1,000.

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[4] Occupational Safety & Health Act, Pub.L. 91-596, 84 Stat. 1590 (1970); *see also* 29 U.S.C.A. sec. 655 (1985). The NLRBhas upheld no-decal-on-helmets rules on safety grounds. *See Andrew Wire Corp.*, 189 N.L.R.B 108 (1971).

* Honorable James M. Burns, Chief United States District Judge for the District of Oregon, sitting by designation.

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On June 29, 1984, the NLRB issued a complaint that the Union's discipline of the supervisor-members violated Section 8(b)(1)(B) of the NLRA. After a hearing, the ALJ found, on March 12, 1985, that the Union had committed an unfair labor practice ("ULP"), based on his determination that the chief and assistant chief engineers performed supervisory functions only, and not bargaining unit or rank-and-file work during the lock-out. The NLRB affirmed the ALJ's findings and conclusions and adopted his recommended Order on June 21, 1985.

DISCUSSION

An NLRB order will be enforced if the Board's findings are supported by substantial evidence and if the Board correctly applied the law. *NLRB v. IBEW Local 46,* 793 F.2d 1026, 1028 (9th Cir.1986). The NLRB's interpretation of the NLRA is entitled to deference and this court will uphold it if it is reasonably defensible. *Id.* However, we will not rubber-stamp administrative decisions which are inconsistent with the statute or which frustrate its underlying policy. *Id.* (citing *NLRB v. IBEW Local 952,* 758 F.2d 436, 439 (9th Cir.1985)).

The analysis of a Section 8(b)(1)(B) violation charged on the basis of union discipline of supervisor-members proceeds as follows:

(1) Are the disciplined members supervisors?

(2) If so, were they performing more than *de minimus* rank-and-file work? (If so, there is no ULP.)

(3) If not, did the sanctions indirectly restrain or coerce the employer?

In this case, the Union concedes that the members are supervisors within the meaning of Section 2(11) of the NLRA and that they are representatives of MG for purposes of collective bargaining within the meaning of Section 8(b)(1)(B). The questions at issue, then, are whether these members performed rank-and-file work during the lock-out, and even if they did not, whether the sanctions had the effect of indirectly restraining or coercing the employer's selection of bargaining representatives.

I. Did the supervisors perform bargaining unit work?

The Board found that Fairclough, Hunter and Bucholtz performed only supervisory duties during the lock-out. Ordinarily the question of what duties were performed requires a factual determination by the Board of the nature and quantity of work performed by supervisory members. *See, e.g., Florida Power & Light Co. v. IBEW Local 641,* 417 U.S. 790, 805, 94 S.Ct. 2737, 2745, 41 L.Ed.2d 477 (1974))"*FP & L*"). This, however, is not a case in which the Union argues that the supervisor-members crossed the picket line to perform rank-and-file work during the lock-out as was contended in *FP & L. Id.* at 796, 94 S.Ct. at 2740. Rather, the Union argues that the supervisor-members always performed rank-and-file work, *i.e.,* that they did nothing different during the lock-out.

The Union makes two essentially legal arguments that the work the supervisors did during the lock-out was necessarily bargaining unit work. One argument is that the chief and assistant chief engineers perform some duties identical to those of the senior watch engineers, who are bargaining unit employees, and thus the chief and assistant chief engineers' duties are bargaining unit duties. The ALJ noted the overlap in duties but concluded those duties of the watch engineers, which are the same as the duties of the chief and assistant chief engineers, are not bargaining unit work. He concluded that in practice, the distinguishing feature of bargaining unit work is use of the tools of the trade. The watch engineers work with tools, the chief and assistant chief engineers do not.

No factual evidence was offered that Fairclough, Bucholtz and Hunter actually performed bargaining unit work according to the ALJ's definition. At the trial by the Union on the charges, the three members were merely found guilty of being in the MGM facility during the lock-out.

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The ALJ's interpretation of the practice on the job is supported by substantial evidence as all three supervisors testified at the hearing that they did not normally work with tools while watch engineers did, and that during the lock-out they were told by

MGM management officials to perform their supervisory duties and not to touch any tools.

The Union relies exclusively upon the contract description of the senior watch engineers' duties (Article 16.02(b)), and the logical inference that since the chief and assistant chief engineers do some of the same tasks, they must necessarily be viewed as performing bargaining unit work at all times. While this is a logical interpretation, so is that of the Board, and we sustain the Board's interpretation.

The Union's second argument that the supervisors did bargaining unit work is that because they were members of the bargaining unit, any work they did was, by definition, bargaining unit work. The Union is essentially arguing that the Union cannot violate Section 8(b)(1)(B) by disciplining a member and that if employers want to command the undivided loyalty of their supervisors they can forbid them to belong to unions. It urges that when, as here, an employer permits supervisory personnel to be Union members, it must accept the reality that those supervisor-members must demonstrate loyalty to the Union or face discipline. This is a legitimate and reasonable view of the balance of interests anticipated by the NLRA. *See FP & L,* 417 U.S. at 807–813, 94 S.Ct. at 2746–2749 (Congress' solution to the problem of conflicting loyalties of supervisors was to give the employer the option of insisting that they not participate in a labor union. *Id.* at 812, 94 S.Ct. at 2748).

The weight of authority since *FP & L,* however, supports the Board's view that there are some situations in which sanctions against supervisor-members may violate Section 8(b)(1)(B). *See American Broadcasting Companies, Inc. v. Writers Guild,* 437 U.S. 411, 98 S.Ct. 2423, 57 L.Ed.2d 313 (1978) ("*ABC*"). A union cannot insulate itself from such an ULP charge through the semantic argument advanced here. The *ABC* Court found that members of a union, who would benefit from a union-negotiated contract, could perform strictly supervisory functions which would not be viewed as bargaining unit work merely because they were members of the bargaining unit.

II. Did the sanctions coerce or restrain the employer in the selection of its representatives?

The Union points out that the Board made no findings on the effect of the Union discipline, and argues that it therefore failed to meet the requirement of *ABC,* 437 U.S. at 430, 98 S.Ct. at 2434, that the Board must "inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B)." We disagree.

The ALJ found and the Board affirmed that the three supervisor-members were representatives of their employer for collective-bargaining and grievance-adjustment purposes within the meaning of Section 8(b)(1)(B). The ALJ also found that these supervisors performed only supervisory duties during the lock-out which did not materially differ from their regular routine, and that the Union expelled these supervisors merely because they were found in the employer's facility during the lock-out. The Board has consistently held that discipline of a supervisor constitutes a restraint or coercion of the employer within the meaning of Section 8(b)(1)(B). *See, e.g., Operating Engineers Local Union 501* (*Peterson Manufacturing Co.*), 269 NLRB 685, 687 (1984); *Local 28, Bricklayers & Allied Craftsmen* (*Sal Masonry Contractors, Inc.*), 265 NLRB 744, 746–47 (1982); *Columbia Typographical Union No. 101* (*The Washington Post Co.*), 242 NLRB 1079, 1080 (1979).

In this case we hold that the Board, in reviewing and adopting the ALJ's findings and order, made sufficient inquiry, under *ABC,* into whether the sanction affected the supervisor-members in a manner that coerced or restrained the employer in violation of Section 8(b)(1)(B). *See NLRB v. International Union of Operating Engineers Local 501,* 580 F.2d 359, 360 (9th Cir.1978) (per curiam) (discipline of a supervisor-member performing only supervisory work is an ULP under Section 8(b)(1)(B)).

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The Union also argues that the sanction of expulsion cannot, as a matter of law, restrain or coerce an employer in selection of bargaining representatives because an ex-union member is not subject to union influence in any way. This argument has logical force but little legal support because the cases do not differentiate among various types of sanctions. In *ABC* the Court considered an argument that the adverse effects of union sanctions could be avoided by resignation from the union. 437 U.S. at

436-37, 98 S.Ct. at 2437-38. It noted that the logical end of this argument would mean that "sanctioning supervisor-members for the manner in which they perform their grievance-adjusting function . . . would never be a violation because the supervisor could, at the employer's request, escape from union threats and sanctions." *Id.* at 437, 98 S.Ct. at 2438. The Supreme Court was unwilling to accept a view so contrary to the Board's construction of the Act. Likewise, we are in no position to override the Board's view that a union-ordered expulsion does no more to alleviate the impermissibly coercive effects of the sanction than would an employer-ordered resignation.

III. Does the reinstatement order violate first amendment rights of Union members?

The Union contends that forced reinstatement of the expelled members will force Union members to associate with persons expelled "for thwarting the basic foundation of the Union itself." It argues that such forced association violates first amendment freedom of association because the right to define the constituent membership of a group is central to the freedom. *See, e.g., Democratic Party v. Wisconsin,* 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981). In the labor-management context the Supreme Court has indicated that the test for first amendment violations requires a balancing of the interests served by the restriction on associational freedom and by the absence of restriction. *NLRB v. Associated General Contractors,* 633 F.2d 766, 772 n. 9 (9th Cir.1980) (citing *NLRB v. General Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547 (1969)), *cert. denied,* 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981).

Reinstatement is the routine Board remedy in ULP cases based on union expulsion of supervisor-members. *See, e.g., Peterson Manufacturing Co.,* 269 NLRB at 689. The Board uses this remedy "because where a union has been found guilty of violating Section 8(b)(1)(B) by expelling a supervisor-member it is obvious that the only meaningful remedy is to restore the status quo ante by ordering the union to rescind its illegal action." *Id.* The routine use of the remedy does not, however, answer the question of its constitutionality.

The Union thinks the significant first amendment freedom essential to the integrity of the union is sacrificed without any perceived furtherance of the legitimate policy concerns served by Section 8(b)(1)(B). The Board argues that reinstatement serves the fundamental policy of Section 8(b)(1)(B) of assuring supervisor loyalty to management with only the minimal impact on freedom of association of precluding the unjust expulsion of members originally included in the union. [1]

We conclude the balance of interest test tips in favor of this remedy because the general associational freedom protected

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by the first amendment is subject to the limitations necessary to effectuate the policy of the NLRA. *See, e.g., Railway Employees' Department v. Hanson,* 351 U.S. 225, 238, 76 S.Ct. 714, 721, 100 L.Ed. 1112 (1956) (Union shop agreement requiring financial support of a collective bargaining agency by all who received the benefits of bargaining does not violate the first amendment.); *Railway Mail Association v. Corsi,* 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945) (Union may be prohibited by state law from denying membership on the basis of race without infringing on constitutional rights of members to exercise selection of members.); *York County Fire Fighters Assocation v. York County,* 589 F.2d 775, 778 (4th Cir.1978) (County may prohibit supervisors from belonging to a union and "a first amendment right to associate may be validly limited where the limitation is necessary to a substantial and legitimate state interest.").

The Petition for Enforcement is GRANTED.

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[1] In so stating it, the Board has misstated the policy rationale of § 8(b)(1)(B). *See FP & L,* 417 U.S. at 811-13, 94 S.Ct. at 2747-49.

M. W. Kellogg Constructors, Inc. v. NLRB

NLRB v. M. W. Kellogg Constructors, Inc.

NLRB v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 250, AFL-CIO

806 F.2d 1435 (9th Cir.), December 30, 1986—273 NLRB 1049

On petition to review and cross-application to enforce Board Order

Before WALLACE, and SCHROEDER, Circuit Judges, and THOMPSON, * District Judge

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* Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

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WALLACE, Circuit Judge: Section 8(a)(3) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer by "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(b)(2) of the NLRA makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." 29 U.S.C. § 158(b)(2). However, section 8(f) exempts from section 8(a)(3) a construction industry agreement that "provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area." 29 U.S.C. § 158(f)(4). This case concerns whether a series of layoff and overtime decisions made by an employer, M.W. Kellogg Constructors, Inc. (Kellogg), falls within the terms of section 8(f). The National Labor Relations Board (Board) determined that it did not. We conclude that we cannot sustain the Board's order.

I

Kellogg is a general contractor and employer in the construction industry. Local 250 is a union of plumbers and pipefitters affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Union). Kellogg is a party to a national collective bargaining agreement between the National Constructors Association, of which it is a member, and the Union. This agreement provides that certain practices and terms of the local agreement should control so far as they are not inconsistent with the national agreement. Local 250 supplied workers to Kellogg on a construction project, pursuant to national and local collective bargaining agreements.

The project was staffed through Local 250's hiring hall and, pursuant to provisions of the local agreement, Local 250 maintained a "book system" of employment preferences. Book 1 consisted of employees who, within the past three years, had 3,000 hours of employment in Local 250's geographical jurisdiction under a collective bargaining agreement covering pipefitting. Books 2 and 3 encompassed those with 3,000 hours of the requisite employment within progressively wider geographical boundaries, and Book 4 was for those with fewer than 3,000 hours of employment. The local agreement provided for preferences in referral for hiring, with greatest preference going to those in Book 1. The parties agree that this practice is lawful pursuant to section 8(f). Neither the local agreement nor the national agreement made any explicit provision for preferences in selection for overtime assignments or for layoffs.

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During much of the construction on the project there was a shortage of Book 1 journeymen pipefitters. Local 250 therefore referred to Kellogg a number of pipefitters and plumbers registered in Books 2, 3 and 4 who were "travelers." Travelers are members of Union locals who leave the area of their home locals to travel to other areas in search of work. The Constitution of the Union requires a traveler to obtain a "travel card" from his home local and to deposit it with the local union within whose jurisdiction he seeks to work. Travelers who deposited cards with Local 250 usually were not qualified for Book 1.

Layoff and overtime decisions resulted in a discernible pattern of preferences for employees who were members of Local 250 over nonmember travelers. This pattern was coupled with statements by Kellogg and Local 250 officials suggesting that local hands were being favored over travelers as a matter of company and union policy. Some travelers believed they were being unfairly discriminated against and filed a charge. An administrative law judge (ALJ) interpreted statements by supervisory employees and Local 250 officials to indicate that Kellogg intentionally discriminated against travelers because they were not members of Local 250. Kellogg was thus deemed guilty of an unfair labor practice under sections 8(a)(1) and (3) of the NLRA. The ALJ concluded, however, that Local 250 had not "caused" this discrimination, because he believed Kellogg had adopted the practice of discriminating against travelers without any explicit acts of inducement by Local 250.

The Board reversed the ALJ's conclusions as to causation by Local 250. *M.W. Kellogg Constructors,* *Inc.*, 273 N.L.R.B. No. 134 at 7-11 (1984) (Board dec.), 118 L.R.R.M. 1616. The Board concluded that section 8(f)(4) did not apply, and that both Kellogg and Local 250 had committed unfair labor practices. *Id.* at 2, 7. Kellogg applies for review of the Board order, No. 85-7078. The Board cross-applies for enforcement against Kellogg, No. 85-7167, and applies for enforcement against Local 250, No. 85-7170. We have jurisdiction to review the Board's final order pursuant to 29 U.S.C. §§ 160(e), (f).

The Board's order should be enforced if it is " 'a proper application of the law and is supported by substantial evidence on the record as a whole.' " *NLRB v. Laborers' International Union, Local 300*, 613 F.2d 203, 209 (9th Cir.1980) (*Laborers'*), *quoting Loomis Courier Service v. NLRB*, 595 F.2d 491, 494 (9th Cir.1979) (footnotes omitted). The Board's factual determinations must be upheld if there is "a choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); *see Laborers'*, 613 F.2d at 210. We grant Kellogg's petition for review and deny enforcement of the Board's order both as to Kellogg and as to Local 250.

II

Kellogg contends that the evidence does not support the conclusion that it intentionally discriminated against travelers because they were nonmembers of Local 250 in violation of section 8(a)(3). Kellogg argues that the pattern of preferences for Local 250 members amounts to nothing more than the application of the four-book system to overtime and layoff decisions as well as to hiring. The Board admits that an agreement to use the four-book system of preferences for layoff and overtime decisions would be legal under section 8(f)(4). Such an agreement need not be in writing, or expressed explicitly in the collective bargaining agreement, in order to be effective under section 8(f)(4). *Cf. Certified Corp. v. Hawaii Teamsters, Local 996*, 597 F.2d 1269, 1272 (9th Cir.1979) (collective bargaining agreements need not be in writing).

The Board concluded that Kellogg did not rely on the books in making overtime and layoff assignments. Rather, these decisions were, according to the Board, "based only on each employee's status as a local member or traveler, not on their [*sic*] book dispatch priority." Board dec. at 6 n. 8, 118 L.R.R.M. at 1619 n. 8. Kellogg and Local 250 argue that even if this is true, section 8(f)(4) should apply because the overtime and layoff decisions *paralleled* those that would be authorized by section 8(f)(4) had the decisions been made pursuant to the priorities laid out in the four-book system. Because application of the concededly legal four-book preference system to overtime and layoff decisions would have resulted in substantially the same decisions as were actually reached, Kellogg and Local 250 both contend that the Board's finding of an 8(f)(4) violation is based entirely in "semantics" and can have no substance.

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A.

Kellogg and Local 250 argue that the motive underlying adoption of an 8(f)(4) agreement is irrelevant and, therefore, we should not consider whether the agreement was adopted because it would tend to benefit local union members over travelers. From this they apparently extrapolate that the motivation for employment decisions themselves is irrelevant if a proper section 8(f)(4) agreement could have led to the same results.

Other circuits perhaps have looked beyond whether specific criteria are permissible and have focused on the intended *effects* of an agreement to conclude that it is invalid under section 8(f)(4) if it operates to benefit union membership. *See Ward v. NLRB*, 462 F.2d 8, 9 n. 1, 11-12 (5th Cir.1972) (section 8(f)(4) agreements are lawful if "in their practical operation and effect they do not discriminate against employees on the basis of union affiliation"; defense of geographical preference rejected because "the Union was interested in jobs for local people only to the extent that such local people were members of the Union within its territorial jurisdiction"); *NLRB v. Local 269, International Brotherhood of Electrical Workers*, 357 F.2d 51, 56-57 (3d Cir.1966) (*Local 269*) (also focusing on effects, to hold that section 8(f)(4) agreements may not be used "as a guise for achieving illegal discrimination"). Kellogg and Local 250 point out that an agreement based on considerations authorized by section 8(f)(4) often will have a substantial disparate impact on travelers, because they are less likely to have as much experience in the area as most of the local union members.

The very purpose of section 8(f)(4), however, was to immunize certain agreements and practices from unfair labor practice charges under section 8(a)(3). We therefore conclude that an agreement is not necessarily excluded from section 8(f)(4) merely because its *effect* may be to advantage local union members and to disadvantage travelers and other nonmembers of the local union. Nor does an agreement fall outside section 8(f)(4) on the ground that a union and employer adopted the agreement because of its disparate impact between local union members and nonmembers. A contrary ruling would be absurd, since it would mean section 8(f)(4) applied only where a section 8(a)(3) violation would not lie in any event.

All Congress demanded with section 8(f)(4) was that appropriate objective standards be adopted. Thus, where a facially valid referral agreement is uniformly applied, we will not consider the motives underlying its adoption. *See Laborers',* 613 F.2d at 207; *NLRB v. International Association of Bridge Workers, Local 75,* 583 F.2d 1094, 1097 (9th Cir.1978). We thus construe statements in the legislative history that section 8(f)(4) agreements must be applied in a nondiscriminatory fashion, S.Rep. No. 187, 86th Cong. 1st Sess. 28, *reprinted in* 1959 U.S.Code Cong. & Ad. News 2318, 2345 (subsection authorizes use of "objective criteria which shall be applied without discrimination"), to mean that where such agreements are adopted they must be applied uniformly, without reference to whether any given individual is a union member. *Cf. Laborers',* 613 F.2d at 207–09 (hiring hall provisions must be applied in a nondiscriminatory fashion).

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B.

None of this aids Kellogg or Local 250. The Board concedes that they could legally have agreed to apply the four-book system of preferences, despite its effect of benefiting local union members and disadvantaging travelers. The Board does not condemn their motivations in adopting an agreement regarding overtime and layoffs. The Board contends rather that the agreement they did adopt and execute fails to come within the terms of section 8(f)(4), because it provided for decisions to be made not on the basis of any protected ground, but on the basis of union membership alone.

Section 8(f)(4) protects employer-union agreements to "provide for priority in opportunities for employment based upon length of service with [an] employer, in the industry or in the particular geographical area." If Kellogg's employment decisions were not made pursuant to such an agreement, then they are not protected by section 8(f)(4). Section 8(f)(4) provides only a limited exception to section 8(a)(3) liability, and we cannot extend its scope beyond what Congress authorized. *See Robertson v. NLRB,* 597 F.2d 1331, 1335–36 (10th Cir.1979); *Fruin-Colnon Corp. v. NLRB,* 571 F.2d 1017, 1021 (8th Cir.1978); *NLRB v. United Association of Journeymen, Local 633,* 424 F.2d 390, 392–93 (6th Cir.1970) (*Local 633*). Considering statements in the legislative history that discrimination in the *application* of 8(f)(4) agreements cannot be tolerated, we certainly cannot extend section 8(f)(4) to protect agreements that provide for discrimination on the basis of union membership alone. *See Local 633,* 424 F.2d at 393; *cf. Local 269,* 357 F.2d at 57 ("Preconditioning the hiring of employees upon union membership is an unfair labor practice in all industries, including the building and construction industry.").

The fact that Kellogg *could have* made substantially the same overtime and layoff decisions pursuant to the four-book system is irrelevant if *in fact* the decisions were made on the basis of other, prohibited considerations such as union membership. *See Laborers',* 613 F.2d at 208; *NLRB v. Inland Empire Meat Co.,* 611 F.2d 1235, 1238 (9th Cir.1979); *see also Townsend & Bottum, Inc.,* 722 F.2d 297, 299 n. 4, 302 (6th Cir.1983).

The relevant question, then, is not whether Kellogg and Local 250 could have adopted a valid 8(f)(4) agreement to apply the four-book system to layoffs and overtime. The question is whether they actually did adopt and apply the four-book system to layoff and overtime selections. If Kellogg and Local 250 instead discriminated on account of union membership, as the Board found, they cannot immunize their conduct by citing section 8(f)(4) and the four-book system of hiring preference as a post hoc rationalization for prohibited conduct. Because the true basis of the layoff and overtime decisions is a question of fact, *see Local 357, International Brotherhood of Teamsters v. NLRB,* 365 U.S.

667, 675, 677, 81 S.Ct. 835, 839, 840, 6 L.Ed.2d 11 (1961), we must uphold the Board's finding if supported by substantial evidence on the record considered as a whole.

III

Before discussing the substantial evidence question, we first address the contention of Kellogg and Local 250 that the ALJ and Board misallocated the burden of proof in this unfair labor practice case. They contend that because this case turns on the applicability of section 8(f)(4) it was improper for the Board to apply the shifting burden of proof adopted in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980) (*Wright Line*), *enforced*, 662 F.2d 899 (1st Cir.1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982); *see also NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–03, 103 S.Ct. 2469, 2473–75, 76 L.Ed.2d 667 (1983); *Airport Parking Management v. NLRB*, 720 F.2d 610, 613 (9th Cir.1983). Apparently they believe that the ALJ first concluded that the evidence that disproportionately more travelers **1441** than Local 250 members were laid off and disproportionately fewer received overtime established a prima facia case that section 8(a)(3) was violated, and that *Wright Line* therefore shifted to Kellogg and Local 250 the burden of proving that the layoff and overtime decisions were made on the basis of valid section 8(f)(4) considerations. On the contrary, it is apparent from his opinion that the ALJ first evaluated whether there was a violation of 8(a)(3), reading that section in conjunction with section 8(f)(4). Only after he concluded that the 8(f)(4) defense was invalid, and that Kellogg had committed discriminatory practices unlawful under section 8(a)(3), did he apply *Wright Line* to the question of whether those discriminated against would have been laid off or denied overtime on the basis of other valid considerations, such as relative skill or competence. The Board adopted the ALJ's application of *Wright Line*.

The argument advanced by Kellogg and Local 250 also raises substantial questions regarding the parties' relative burdens in cases where an 8(f)(4) defense is raised. Because section 8(f)(4) provides that certain conduct by definition shall not be considered to violate section 8(a)(3), Kellogg and Local 250 seem to contend that where the employer or union is engaged in the construction industry, an initial element of the General Counsel's showing of an 8(a)(3) violation in every case must be proof that an alleged unfair labor practice was not protected by a valid 8(f)(4) agreement. We disagree. The existence, terms, and application of such an agreement are peculiarly within the knowledge of the party charged with an unfair labor practice. Thus, the burden of first raising section 8(f)(4) must lie with the party claiming its protection. The General Counsel need not, as a preliminary matter, disprove the existence of a defense which a party might never raise.

Only after section 8(f)(4) is invoked by a party is the General Counsel required, in order to satisfy the burden of showing the elements of an unfair labor practice, to disprove reliance on a valid 8(f)(4) agreement. This does not mean, however, that the party may prevail merely by suggesting that a section 8(f)(4) agreement exists. Because the existence and terms of an agreement, and the degree of the employer's reliance upon it, are peculiarly within its knowledge, a party invoking section 8(f)(4) must come forward with evidence regarding the agreement. *See Local 633*, 424 F.2d at 392 (requiring "specific affirmative testimony" that a valid section 8(f) agreement existed and was followed); *cf. Snow v. NLRB*, 308 F.2d 687, 695 (9th Cir.1962).

We do not understand the decision by the Board to deviate from these principles. In this case the General Counsel produced evidence that there was a disproportionate pattern of preferences for Local 250 members, and that Kellogg foremen and Local 250 officials made statements suggesting that travelers were being discriminated against. This was sufficient to support the finding of 8(a)(3) and 8(b)(2) unfair labor practices under traditional analysis. The charged parties interposed the defense of section 8(f)(4), thus placing on the General Counsel the burden of proving that a valid 8(f)(4) agreement was not relied upon. The Board concluded that the General Counsel carried this burden, so that section 8(f)(4) did not apply.

IV

The Board based its findings that the four-book system was not adopted or followed primarily upon statements made by Kellogg foremen and union stewards to the effect that "local hands" would receive overtime but "travelers" would not, and that "travelers" would be laid off before "local hands." We agree with both Kellogg and the Board that the statements were sufficient to establish the existence of an unwritten agreement or understanding between Kellogg and Local 250 with respect to the order of preferences for layoffs and overtime. Kellogg foremen told travelers that their selections were based on union demands or policy. It is clear,

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too, that application of the agreement had the practical effect of favoring Local 250 members over travelers. What is more difficult is to determine the *substance* of that agreement. Was it an agreement to favor Local 250 members as such, as the Board concluded? Or was it an agreement to apply the four-book system of priorities as Local 250 and Kellogg seem to contend?

Kellogg and Local 250 claim that under the four-book system of preferences, the ultimate result would be that Local 250 members would be the first to get overtime, and travelers would be the first to be laid off. Thus, they say, the statements by company and union officials, that only "local hands," or "Local 250 members" would get overtime, and that "travelers" would be selected for layoffs, were manifestly true statements describing the effect of application of the four-book system. From this perspective, the statements do not suggest that union membership itself was an operative consideration in making layoff and overtime selections. Rather, say Kellogg and Local 250, they were a shorthand form of expression describing the practical effect of decisions conforming to the four-book system. *But cf. Pennypower Shopping News, Inc. v. NLRB,* 726 F.2d 626, 629–30 (10th Cir.1984) (when the employer makes ambiguous statements from which employees may reasonably infer that they are being discharged because of protected activity, "the burden of the ambiguity must fall on the company").

Kellogg cites the ALJ decision for the proposition that "[a]t all relevant times Book I was composed *almost entirely* of Local 250 members and Books II, III and IV were composed *entirely* of travelers." ALJ dec. at 6 (emphasis added). As a result, it argues "local hand" and "Local 250 member" were synonymous with Book 1 status, and merely provided a convenient mode of expression which evidenced no intent to discriminate on the basis of local union membership as such.

If the facts were as Local 250 and Kellogg thus contend, the situationally ambiguous statements relied upon by the ALJ and Board might be insufficient to demonstrate discrimination on account of local union membership. However, in making this argument, Kellogg seriously misstates the ALJ's findings. The ALJ found that those who qualified for Book 1 "were *usually* members of the Respondent Union," and that those "who qualified for the remaining three categories, Books 2, 3 and 4, were *usually* either travelers or nonmembers of a [Union] local." ALJ dec. at 6 (emphasis added). Obviously, if the identity of Book 1 with Local 250 members, or of Books 2 through 4 with travelers, breaks down, there is little foundation for the argument that "travelers" and "local hands" were innocently descriptive words demonstrative of no intent to discriminate with respect to local union membership itself.

Once Kellogg and Local 250 interposed the section 8(f)(4) defense, it was imperative for the General Counsel to carry the burden of disproving reliance on the four-book system. Neither the Board nor the ALJ made any explicit finding as to the effect of the workforce composition on the meaning of the words "traveler," "local hand," or "Local 250 member," on this particular job. In the absence of any such finding, we are not in a position to review the Board's conclusion that there was discrimination based upon union membership and to determine whether it is supported by substantial evidence in the record considered as a whole. Thus, we are unable to determine whether the General Counsel carried the burden of disproving reliance on the four-book system pursuant to a valid 8(f)(4) agreement. We therefore remand this case so the Board may be afforded the opportunity to make appropriate findings as to whether the General Counsel satisfied the burden of demonstrating that the statements relied upon signified prohibited discrimination rather than innocent employment decisions.

In the event requisite findings of discrimination are made, back pay should be awarded only for losses resulting from unlawful discrimination. *See NLRB v. Plumbers & Pipefitters Local Union No.*

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403, 710 F.2d 1418, 1420–21 (9th Cir.1983). Nothing in the Board's order should preclude the union and employer from entering into a valid agreement pursuant to section 8(f)(4) covering future layoffs and overtime.

PETITIONS FOR REVIEW GRANTED; ENFORCEMENT DENIED; CASE REMANDED TO THE BOARD.

NLRB v. Seligman and Associates, Inc., and its Wholly Owned Division, Scott Management Company

808 F.2d 1155 (6th Cir.), December 30, 1986–273 NLRB 1216

On petition to enforce Board Order

Before ENGEL, KENNEDY and MILBURN, Circuit Judges

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ENGEL, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order requiring Seligman & Associates, Inc., to pay backpay to two former employees, to pay the medical expenses of a third former employee, and to post notices describing the remedial action ordered. *Seligman & Assoc., Inc.,* 273 N.L.R.B. 1216 (1984). We enforce the order as to the payment of medical expenses and the posting of notices; we remand the determination of backpay for recomputation based on our conclusion that the two former employees willfully failed to seek comparable employment to mitigate their losses.

A division of Seligman, Scott Management Co., operates a number of apartment complexes in the Detroit, Michigan area. On January 24, 1979, the Board found that Seligman had committed unfair labor practices by, among other things, discharging David and Susan Younce in retaliation for protected activity, in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), and discharging Clarence Goold because of his union activity, in violation of section 8(a)(1) and (3), 29 U.S.C. § 158(a)(1), (3) (1982). *Seligman & Assoc., Inc.,* 240 N.L.R.B. 110 (1979). The Board ordered Seligman to offer its unlawfully discharged employees reinstatement to their former positions, to make them whole, and to post notices. *Id.* This court granted judgment enforcing that order. *Seligman Assoc., Inc. v. NLRB,* 639 F.2d 307 (6th Cir.), *cert. denied,* 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981). The present enforcement petition arises out of a supplemental decision and order by the Board specifying the amount of backpay due David and Susan Younce, the amount of medical compensation due Clarence Goold, and the contents of the required notice.

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David and Susan Younce had been employed by Seligman as apartment complex caretakers at Seligman's Eureka Apartments. They received salaries as well as housing at the complex as compensation. Following their termination they continued to occupy their townhouse apartment until they received a notice to quit the apartment on October 26, 1976. Two days later, Susan Younce filed an unfair labor practice charge with the Board. Seligman's attorney, Irwin Alterman, investigated the charge and recommended to Seligman that they settle the claim by offering the Younces caretaker positions at another apartment complex some 30 to 50 miles distant, with backpay.[1] Seligman agreed and its attorney contacted Board agent Whiteman to convey the settlement proposal.[2] Whiteman contacted Susan Younce and, according to her testimony as credited by the ALJ, asked her, "If Mr. Seligman offered you your job back with backpay, would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman responded, "You know you could get your backpay without taking your job back," and Younce replied, "Fine." Following this conversation, Whiteman informed Seligman's attorney that the Younces did not want their jobs back. The Younces later received a notice from Seligman requesting that they report to the Utica Green apartment complex for work. They did not respond.

On the fifth of sixth of November, while her husband and three children were ill, Susan Younce contacted Scott Seligman directly, told him of her family's illness, and asked if they could remain in the apartment as paying tenants. Seligman replied that they could, provided she drop her unfair labor practice claim. On November 8, Susan Younce called Whiteman to tell him that she wanted to drop the charge. Whiteman advised against doing so, and informed her that if she nevertheless wanted to relinquish the claim, she would have to do so in writing. She next called Scott Seligman again, who advised her to obtain a withdrawal request form from the Board and to go to his attorney's office to sign a lease.

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[1] Seligman contends that the change of location was compelled by conflicts between the Younces and the resident manager at Eureka.

[2] At oral argument, Seligman's attorney stated that they employed the Board agent as an intermediary in order to avoid any inference of coercion against the Younces.

On November 11, the Younces received another eviction notice. The next day, Susan Younce met with Seligman's attorney at his office. After discussing her desire and attempts to drop the charges, the attorney informed Younce that she would have to sign an affidavit describing her attempts to withdraw the charges. He then dictated both an affidavit and a withdrawal letter which, after some changes in style, Younce signed.

The ALJ credited Susan Younce's testimony throughout the hearing, including the following account of her meeting with Seligman's attorney:

> I was supposed to go there to get a lease and instead, I got these [the affidavit and withdrawal letter]. . . . Now I'm a little bit calm about it, but when this was taking place I was nervous and upset and I don't think I was in the right [frame of] mind to really know what I was doing. I went to [Alterman's] office for a lease and I ended up having to do all this. I felt pressured in [his] office when I wrote it for one thing, and I said, "Yes, it is okay," and I signed it just to get out of there.

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In its supplemental decision and order, the Board accepted the ALJ's determination that: (1) Seligman had extended only a hypothetical reinstatement offer to the Younces; (2) the reinstatement offered was not to their former positions, but to similar positions at a different location and for different management; and (3) Seligman must bear the cost of any confusion in the reinstatement offer resulting from its use of a Board agent as an intermediary with the Younces. It further concluded that Susan Younce was intimidated at her meeting with Seligman's attorney and that her statements made then that she did not desire reinstatement were not binding. It accordingly determined that Seligman's backpay obligation to the Younces was not tolled and that the Younces were entitled to backpay in the amount of $27,557.96.

The Board further ordered Seligman to pay directly to the hospital and doctor the medical expenses incurred by Clarence Goold, but never paid by him. Finally, the Board ordered that the notices to be posted by Seligman include references to the remedies afforded the Younces, Goold, and six other former employees.

Seligman argues that the Younces declined valid reinstatement offers, that they suffered a willful loss of earning following their discharge, and that the Board erred in calculating their backpay. Seligman further contends that it owes nothing to the hospital and doctor for Goold's medical treatment because the hospital and doctor are now barred from collecting on those debts. Finally, Seligman maintains that the notices should contain no reference to the remedies afforded the Younces and Goold under the order or to the remedies afforded six other employees whose claims were settled.

CLARENCE GOOLD

First, we have little difficulty enforcing the Board's order directing Seligman to reimburse the hospital and doctor for Goold's medical treatment, even though those charges might now be subject to a statute of limitations defense were Goold sued for their collection. In his dissent, Board member Robert B. Hunter noted that as of the date of the Board's opinion, Goold had not been required to pay the bills incurred in 1976 and 1977. He noted that Seligman had excepted only to the payment of the medical expenses directly to Goold, which might result in a windfall to him, since there was no assurance that he would ever be obligated to pay those creditors. The dissenting member would therefore order respondent to indemnify Goold if any collection action on the bills were instituted. In effect, the dissenting Board member would only have required Seligman to hold Goold harmless from liability rather than to pay the bill. The Board ordered payment of those bills directly to the providers of the services.

We are furnished no evidence, other than of the passage of time, that the payment of these bills may be subject to an effective statute of limitations defense. The passage of time does not act to extinguish the debt, of course, but may under an applicable statute of limitations bar legal action to recover it. Since the delay or failure to pay the bill is at least arguably a result of Seligman's unlawful refusal to honor the debt in the first place, respondent is in a poor position to take advantage of its own improper conduct. Even assuming the statute of limitations applied and there was no tolling under state law, the debt can remain upon the books and have an adverse effect upon the employee's ability to obtain future medical services from those providers or from others who may be aware that previous providers had not been paid. Thus, the unpaid debt, even if uncollectible legally, can still have an adverse effect

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upon Goold attributable to the respondent's 8(a)(3) and 8(a)(1) violations. The Board's ruling here is consistent with the Supreme Court's holding that the "make whole" remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964). The Board's order with reference to Clarence Goold is therefore enforced in full.

DAVID AND SUSAN YOUNCE

Seligman raises the same argument here that it presented to both the ALJ and the Board. Seligman first argues that the Younces received and rejected a valid offer of reinstatement which tolls the accrual of backpay. It next contends that even if its offer was invalid, the Younces are estopped from seeking backpay because the offer was invalidated through an error by the Board in transmitting the offer and, since this error was not disclosed to Seligman, Seligman believed it had been a valid offer. It further notes that the Younces unequivocally repudiated any desire for reinstatement and that, based upon its good faith belief that it had made a valid offer, Seligman relied upon this repudiation in not correcting any technical deficiencies in the offer actually made. Third, Seligman claims that the Younces suffered a willful loss of earnings by refusing reinstatement to a different position and failing to seek similar available employment. Finally, Seligman maintains that the ALJ made errors in calculating the backpay due the Younces.

In *Morvay v. Maghielse Tool and Die Co.,* 708 F.2d 229 (6th Cir.), *cert. denied,* 464 U.S. 1011, 104 S.Ct. 534, 78 L.Ed.2d 715 (1983), our court discussed the requisites of a reinstatement offer that will terminate backpay accrual:

> The purpose of an offer to reinstate is to "undo the employer's wrong by restoring the employees to the position they would have occupied before the wrong occurred." *Ridgely Mfg. Co. v. NLRB,* 510 F.2d 185, 188 (D.C.Cir.1975). Therefore, an offer is insufficient to terminate back pay liability; if it is conditional upon an employee's reapplying of his job; if it does not restore seniority or other benefits accrued by the employee; if the job which he is offered is temporary; if it is conditioned upon the employee relinquishing his unfair labor practice claim; if the employee has insufficient time to accept the offer; or if it is conditioned upon the union steward resigning. Respectively, *Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB,* 497 F.2d 1200 (9th Cir.1974); *Ridgely Mfg. Co., supra; Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB,* 547 F.2d 598 (D.C.Cir.1976); *NLRB v. Midwest Hanger Co.,* 550 F.2d 1101 (8th Cir.1977); *NLRB v. Murray Products, Inc.,* 584 F.2d 934 (9th Cir.1978); and *Associated Truck Lines, Inc. v. NLRB,* 653 F.2d 241 (6th Cir.1981). However, reasonable conditions accompanying the offer do not invalidate it. *Ridgely Mfg., supra* (condition that employee follow rules and regulations of the company was unreasonable only because it was a pretext to suppress employee's union activities). And, finally, to terminate an employer's back pay liability, the reinstatement offer must be clear and actually communicated to the discharged employee. *Kenston Trucking Co.,* [*v. NLRB,* 544 F.2d 1165 (2d Cir.1976)], *supra.*

Id. at 232. In *Morvay,* the court noted that the company had offered reinstatement to the unfairly discharged employee's former position and the employee understood that he would be restored to the position he occupied before his wrongful discharge. In spite of other conditions on reinstatement, our court found the offer sufficient to terminate the accrual of backpay.

In the present case, Seligman did not extend an offer of reinstatement to the Younces' former position, but rather to a position at another complex some 30 to 50 miles distant, a position that the Board found was not comparable. Seligman argues, though, that the position at Utica Green was the same or substantially equiv-

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alent to the Younces' former position and therefore satisfied its obligation to offer reinstatement.

Although it is generally stated that an employer must offer unfairly discharged employees their former positions or substantially similar ones, the First and Tenth Circuits have held that the employer does not really have an option:

> Generally, when employees are unlawfully discharged and the NLRB orders reinstatement to their former or substantially equivalent positions, the employer does not have a choice of offering either the former or an equivalent position. If the former position still exists, he must offer that one.

NLRB v. Jackson Farmers, Inc., 457 F.2d 516, 518 (10th Cir.1972); *see also NLRB v. Draper Corp.*, 159 F.2d 294, 297 (1st Cir.1947); *Chase Natl. Bank*, 65 N.L.R.B. 827, 829 (1946).

We need not determine whether our circuit will follow the lead of the First and Tenth Circuits, however. The Board here in unequivocal language required Seligman to offer the Younces "reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent jobs." *Seligman & Assoc., Inc.*, 240 N.L.R.B. 110, 123 (1979). There is neither any showing nor any finding that the position at Eureka had been filled by the time Seligman communicated its conditional offer of reinstatement. Under such circumstances, Seligman's offer of reinstatement to a position at another complex did not satisfy the Board's order, the validity of which has already been upheld and cannot be relitigated here. The conditional offer of alternative employment, therefore, could not have tolled Seligman's backpay obligation.

Given the Younces' subsequently demonstrated willingness to move and the absence of any particular evidence of ties to the immediate vicinity of the Eureka Apartments, we are not prepared to say whether, had the Eureka Apartment post already been filled, the offer of a position at Utica Green might not have been substantially equivalent, or sufficiently so to have satisfied Seligman's obligation. It may well have been true also that Seligman and its attorneys in good faith believed that because of the past record of relations between the Younces and the building manager, it was in the best interest of all parties, including the Younces, that they reenter employment with. Seligman where potential personality conflicts might not exist. The difficulty is, however, that the option should have been that of the Younces as the injured party and not of Seligman, and that Seligman's offer, coming on the heels of admitted violations of the Act, could very likely be seen by Seligman's other employees as grudging compliance at best and, at worst, as punitive. An employer may not transfer employees for purposes of discouraging membership in a legal organization. *NLRB v. White Motor Company*, 404 F.2d 1100, 1102 (6th Cir.1968). Reinstatement to another location after termination because of protected activity, absent a dominant legitimate business reason, would achieve the same result as a transfer to discourage union membership.

Even if an offer of reinstatement to the same position at another apartment complex would have satisfied Seligman's obligation, the Board contends that the offer actually conveyed to Susan Younce was hypothetical in nature and therefore was not a valid good faith offer of reinstatement. The ALJ and the Board credited Younce's testimony that Agent Whiteman relayed Seligman's offer in the following manner: "If Mr. Seligman offered you your job back with backpay, would you take it?" The Board concluded that this offer was hypothetical in nature and consequently insufficient to toll the accrual of backpay. *Seligman & Assoc., Inc.*, 273 N.L.R.B. 1216, 1217.

As noted above, our court in *Morvay*, 708 F.2d at 232, discussed the reasons for and requisites of valid offers of reinstatement. It did not state there, however, whether an offer as phrased by Agent Whiteman would be valid.

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The validity of an offer should, if possible, be determined from the face of the offer and from the perspective of whether the offer reasonably puts strikers on notice that they were being offered reinstatement. *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 530 (3d Cir.1977). If the language of an offer is ambiguous, the court must look to the surrounding circumstances. *NLRB v. Consolidated Dress Carriers, Inc.*, 693 F.2d 277, 279 (2d Cir.1982); *Kenston Trucking Co. v. NLRB*, 544 F.2d 1165, 1167 (2d Cir.1976). "Essentially . . . the validity of an offer depends on the situation in which the offeree finds himself as a result of the discrimination against him." *NLRB v. Murray Prods., Inc.*, 584 F.2d 934, 940 (9th Cir.1978). Moreover, a reviewing court must defer to the Board's expert determinations. *Patternmakers' League of North Am. v. NLRB*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1978); *National Business Forms, Inc. v. International Printing Pressmen & Assistants' Union*, 457 F.2d 737, 741 (6th Cir.1972). This deference applies both to findings of fact and construction of the Act. *Baker Mfg. Co. v. NLRB*, 759 F.2d 1219 (5th Cir.1985).

The fact that the offer is phrased as a question does not necessarily render it invalid. *Kenston Trucking*, 544 F.2d at 1167. However, the offer must still indicate the availability of the former or a comparable position. Seligman's offer did not convey that there was a job available, unlike the offer in *W.C. McQuaide*, 552 F.2d at 529, where the employer stated, "If you want your previous job, which is available, contact me as soon as possible." *Id.* at 529. Whiteman's comments in relaying Seligman's offer did not "establish[] unequivocally that . . . there [was] a position [and] that the job [was] immediately available." Whiteman's comments were more like those made in *National Business Forms*, 457 F.2d at 739, where the employer sent out letters stating, "If you wish to be considered as an applicant for reinstatement, please complete the enclosed form and return it to us." The Sixth Circuit there enforced the Board's order, which determined that the letters did not constitute valid offers sufficient to toll backpay liability. *See also Corrugated Partitions West, Inc.*, 275 N.L.R.B. No. 126 (June 28, 1985) (The question, "Are you willing to come back to work for us if we need you?" did not constitute an unequivocal offer of reinstatement.). See also *Wen Hwa Ltd.*, 208 N.L.R.B. 828, 837 n. 25 (1974), stating that a question put to an employee as to whether he would return to work if offered reinstatement does not present a specific, unequivocal offer of reinstatement.

Seligman argues that the offer it conveyed to Board agent Whiteman was not hypothetical, and that it cannot be made to suffer the detrimental effects of Whiteman's error when he conveyed the offer to the Younces. However, when faced with the choice of placing the burden of Board errors on either a wrongfully discharged employee or her former employer, the Supreme Court has chosen to burden the employer. It has held that the Board does not err when it places the full cost of an unfair labor practice on the employer who committed it, even when the cost of backpay is greatly increased by the Board's own deplorable delay in processing the charge. *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969).

> Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full back-pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 180 (C.A. 2d Cir.1965). This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.

Id. at 264–65, 90 S.Ct. at 420–21.

Even if Whiteman violated some duty by conveying Seligman's offer as hypothetical, that mistake, like the wrongful delay in *Rutter-Rex*, would have worked to the Younces' detriment as much as to Seligman's. The Board did not exceed its authority or abuse its powers in charging the consequences of any mistake to Seligman rather than to the Younces. This result comports with the rule that an offer of reinstatement, to terminate backpay liability, must be actually communicated to the discharged employee, *Morvay*, 708 F.2d at 232, and simply places the burden of ensuring actual communication of the offer upon the wrongdoer. Under normal rules of agency, the errors of Whiteman in this regard would be attributable to Seligman, which selected Whiteman as its agent for the limited purpose of communicating its offer.

The most difficult issue raised by Seligman is whether Susan Younce's refusal of the offer as conveyed by Board agent Whiteman or her subsequent repudiation of any desire to seek reinstatement tolled Seligman's backpay obligation by obviating the need for Seligman to make a valid reinstatement offer. The Board held that "only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled." *Seligman & Assoc., Inc.*, 273 N.L.R.B. 1216, 1217 (1984).

Two circuits have applied this rule. *Heinrich Motors, Inc.*, 403 F.2d 145 (2d Cir.1968); *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir.1980). In *Heinrich*, the court quoted the Board's reasoning that the discharged employee's statement to the Board compliance officer that he did not desire reinstatement with the Company did not operate as a waiver because such statements,

> "may reflect only a momentary state of mind that is subject to change; prior to an offer of reinstatement, such statements are in the nature of answers to a hypothetical question; and the discriminatee's expression may have been made in the heat of dissatisfaction with his treatment by [the employer]."

403 F.2d at 150; *Sandia*, 639 F.2d at 627–28 (quoting the same language). [3]

In *Consolidated Freightways v. NLRB*, 669 F.2d 790 (D.C.Cir.1981), however, the D.C. Circuit in an opinion of Judge Wald remanded to the Board a case in which the Board failed to consider the employee's reasons for rejecting a possibly invalid offer of reinstatement. The court stated that a line of Board precedent makes it necessary to inquire into an employee's reason for refusing an offer of reinstatement to determine whether the employee would have refused the offer even if it were valid. The court held:

> In view of the Board's failure to reconcile its decision in this case with its precedent, and its failure to explain its reasons for abandoning any inquiry into the reasons why a conditional offer is refused, we have no choice but to remand this case to the Board to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is

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> proper. *See generally Road Sprinkler Fitters Local No. 669 v. N.L.R.B.*, 600 F.2d 918, 923 (D.C.Cir.1979); *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1326 (D.C.Cir.1972); *Burinskas v. N.L.R.B.*, 357 F.2d 822, 827 (D.C.Cir.1966).

Id. at 798 (footnote omitted).

The Board has previously held that for an employee's statement rejecting reinstatement to absolve the employer of its obligation to offer reinstatement, the employee must be put to a true test of deciding whether to accept reinstatement and must reveal an unequivocal rejection of the offer. *Lipman Bros., Inc.*, 164 N.L.R.B. 850, 855 (1967). Moreover, an employee is under no obligation to decide whether to accept reinstatement until an unconditional offer of reinstatement is made. *Leeding Sales Co., Inc.*, 155 N.L.R.B. 755, 757 (1965). Consequently, the Board has stated that a waiver of the right to reinstatement, absent a valid offer of reinstatement, "does not manifest an 'unequivocal resolve not to accept reinstatement.' " *Top Mfg. Co.*, 254 N.L.R.B. 976, 977 (1981) (quoting *Lyman Steel Co.*, 246 N.L.R.B. 712, 714 (1979)). The Board has also uniformly held that an offer of reinstatement must be specific, unequivocal, and unconditional in order to toll the backpay period. *See, e.g., Jones Plumbing, Inc.*, 277 N.L.R.B. No. 47 (November 13, 1985) (citing *L.A. Water Treatment*, 263 N.L.R.B. 244, 246 (1982)). The Board's decisions, although not always models of clarity, are similarly consistent with its statement in *Lyman Steel Co.*, 246 N.L.R.B. 712, 714 (1979), that "it does not effectuate the policies of the Act to terminate the employee's backpay rights prior to the time a genuine offer is made, since a statement of waiver absent such an offer does not manifest an 'unequivocal resolve not to accept reinstatement.' "

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[3] A different rule apparently applies to strikers, even those unlawfully discharged after the strikes begins. *See Top Mfg. Co.*, 254 N.L.R.B. 976, 977 (1981); *Marlene Ind. Corp.*, 255 N.L.R.B. 1446, 1449 n. 12 (1981), *enforcement denied on other grounds*, 712 F.2d 1011 (6th Cir.1983); *Garrett Railroad Car & Equip., Inc. v. NLRB*, 683 F.2d 731, 741–42 (3d Cir.1982); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 756 (7th Cir.), *cert. denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981); *NLRB v. Trident Seafoods Corp.*, 642 F.2d 1148, 1149–50 (9th Cir.1981); *NLRB v. Mars Sales & Equip. Co.*, 626 F.2d 567, 575 (7th Cir.1980); *J.H. Rutter-Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 242–43 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); *but see NLRB v. Laidlaw Corp.*, 507 F.2d 1381, 1382 (7th Cir.1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975).

In *Hribar Trucking Inc.*, 166 N.L.R.B. 745, 756 n. 19 (1967), *enforced*, 406 F.2d 854 (7th Cir.1969), *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enforced*, 340 F.2d 607 (1st Cir.1965), and *Research Designing Service, Inc.*, 141 N.L.R.B. 211, 216–17 (1963), the Board did not state that the refusal of an invalid offer would toll backpay or waive reinstatement, but rather held that the rejection of offers that appeared valid, at least to the offeree, could nonetheless reveal an unequivocal resolve not to accept reinstatement. Under such circumstances, where the employee was not aware of any improper conditions attached to the offer, it cannot be said that she was not put to a true test, and consequently, that her rejection was not unequivocal on that basis alone. In *Research Designing* the Board also observed that the employees involved had rejected their offers for other reasons, but this observation was apparently intended to show that the employees were unaware of the improper conditions attached to the offer; it was not an inquiry into their reasons for rejecting an invalid offer. Only in *L. Ronney & Sons Furniture Mfg. Co.*, 97 N.L.R.B. 891, 892 (1951), *enforced*, 206 F.2d 730 (9th Cir.1953), did the Board hold that an employee's failure to respond to a conditional offer, coupled with a comment that she preferred her new job, constituted a waiver of reinstatement and backpay. The Board there held that since the employee did not object to the unlawful condition attached to the offer, "It thus appears she would not have accepted the Respondent's offer, even had it been unconditional." *L. Ronney* was not followed by the Board in *Atlantic Maintenance Co.*, although the dissent in *Atlantic* argued that it controlled. *Atlantic Maintenance Co.*, 134 N.L.R.B. 1328, 1329 n. 1 (1961), *enforced*, 305 F.2d 604 (3d Cir.1962).

In a strong dissent from the majority decision of the Board here, member Hunter concluded that the award of backpay for the Younces should have been tolled as of November 11, 1976 when, he concluded, they voluntarily rejected employment with the respondent:

> In view of the Younces' clear and unequivocal rejection of employment, in my opinion, it is not necessary to determine whether the Board agent, on behalf of the Respondent, communicated a proper reinstatement offer, an inquiry pursued by the judge. Rather, I believe, it is sufficient that the record clearly shows

> that Susan Younce had been apprised of what reinstatement meant before she gave the rejection to the Respondent. Contrary to my colleagues in the majority, I would not require an employer in this situation to simply extend a futile offer of reinstatement literally only 'for the record.'

Seligman & Assoc., Inc., 273 N.L.R.B. at 1218.

There is certainly substantial evidence to indicate that Susan Younce was knowledgeable about her rights and that she did not want her job back. We need not decide what might have been our position on review had the dissent of Board member Hunter been the view of the majority. Likewise, we need not speculate as to what might have been our decision had we been the finders of fact. The Board majority found that "based on [Susan] Younce's credible testimony, . . . the circumstances of the 11 November meeting between Younce and Alterman were such that she did not voluntarily renounce reinstatement." The Board credited her testimony that she had gone to see respondent's attorney, Alterman, under the threat of immediate eviction from the parties' apartment, which was a direct consequence of the company's discrimination against her. She also stated that she felt intimidated by Alterman's demand at the meeting that she sign a letter and affidavit withdrawing the unfair labor charge if she wished to obtain a lease. The Board majority further credited Mrs. Younce's testimony that she felt so pressured and nervous that she did not know what she was doing, and that she just wanted to "get out of there." *Id.* at 1217.

Since the offer of reinstatement was conditional and was not for the Younces' former position, and further since there is no proof whatever that the same job was not available, we conclude that substantial evidence supports the Board's findings that Susan Younce's conduct at that period did not amount to a waiver of the parties' right to reinstatement.

We do not find this holding to be inconsistent with the D.C. Circuit's ruling in *Consolidated Freightways v. NLRB*, 669 F.2d 790, for the Board thoroughly discussed the circumstances surrounding the Younces' refusal of the conditional offer and the reasons why it determined that the Younces' refusal was equivocal. It has thus performed the task that in *Consolidated Freightways* it had been directed to undertake. The reasoning of the dissent may have more appeal for some, but this affords no basis for us to intrude upon the Board's authority and expertise.

Finally, the respondent contends that the Younces failed to make reasonable efforts to find new and substantially equivalent employment. Seligman argues that the Younces' refusal of employment at the Utica complex constituted a rejection of equivalent employment and consequently shows their willful loss of earnings. Seligman also argues that the Younces failed to make a diligent search for employment, noting that they did not always buy a newspaper and citing Susan Younce's testimony that they did not specifically focus on apartment complex manager or caretaker jobs in the Detroit area. Seligman also contends that the Younces' relocation to northern Michigan and then to Wisconsin, combined with automobile problems and the need for child care, unnecessarily complicated the search for a job.

The Board adopted the ALJ's findings and conclusions:

> [T]he record indicates through the backpay specification and additional testimony that following their unlawful discharges the Younces obtained employment with approximately 20 different employers between them and unsuccessfully sought employment with many others. The record reflects no willful loss of employment with regard to these jobs. Inasmuch as the law requires only a reasonable effort to find employment, I find that the record reflects that the Younces met that burden during the period following their discharge by Respondent.

ALJ op. at 9 (Joint Appendix at 87).

In *NLRB v. Westin Hotel,* 758 F.2d 1126 (6th Cir.1985), our court summarized the **1165** well-established law governing the defense of willful loss of earnings:

> The Board's exercise of its discretion in formulating backpay awards is subject to a limited amount of scrutiny by the judiciary. . . . In addition, it is beyond peradventure that the defense of willful loss of earnings is an affirmative defense, with the burden of proof resting upon the employer. . . .
>
> Further, a wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage. . . . The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market. . . .
>
> Finally, it must be remembered that the Board's conclusion as to whether an employer's asserted defenses against liability have been successfully established will be overturned on appeal only if the record, considered in its entirety, does not disclose substantial evidence to support the Board's findings. . . .
>
> The general rule in labor cases is that "an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [lost] . . . and is suitable to a person of his background and experience" . . . .

Id. at 1129–30 (citations omitted).

The Board relies heavily upon our decision in *Westin Hotel* as justifying its refusal to accept Seligman's contention that the Younces failed to search diligently for comparable employment. While as we stressed in *Westin* above, the defense of willful loss of earnings is an affirmative defense with the burden of proof resting upon the employer, we conclude that unlike the employer in *Westin,* Seligman here succeeded in establishing by competent unchallenged proof that the Younces had deliberately refused to seek comparable and equivalent employment opportunities and that such work was in fact available at all relevant times. Further, we find in the record no reasonable basis for their failure to pursue those opportunities, which is sufficient to impose the resulting loss upon the defending employer.

It should at the outset be plainly understood that the Younces cannot be charged with failure to mitigate their damages simply because they refused the offer of alternative employment at respondent's Utica Green apartment complex located some 30 to 50 miles from the Eureka Apartments at which they had worked. To hold that they were bound to accept such alternative employment from the former employer when their original position still remained open would effectively negate the legal requirement that the employer comply with the order of reinstatement previously entered. At the same time, in our view, no excuse exists for the employees' refusal to seek other comparable employment in the vicinity when there is undisputed proof that such employment existed. It was error for the Board to have refused to take such evidence into account given its undisputed nature.

While we have held that Susan Younce's testimony concerning her November 11 conversation with Seligman's attorney was not sufficient to constitute a waiver of a reinstatement offer, we nevertheless think it is entirely appropriate to consider the circumstances in their entirety and in connection with the remaining testimony of the parties and other evidence concerning the Younces' subsequent efforts to find other employment generally.

The settled law concerning a discriminatee's duty to mitigate damages by seeking other employment, and the burden placed upon the employer to make an affirmative showing of such failure before its liability for backpay can terminate is chronicled in an exhaustive opinion of the D.C. Circuit, *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C.Cir.1972). As the cases cited therein at pages 1317–21 make plain, to be entitled to backpay, an employee must

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make "reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged, and is suitable to a person of his background and experience." *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 773 (1956), *enforcement denied,* 242 F.2d 697 (6th Cir.) (discharged employee must make efforts to find other employment even if not substantially equivalent), *cert. denied,* 355 U.S. 821, 78 S.Ct. 28, 2 L.Ed.2d 37 (1957). *See also NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir.1966), cited favorably by our circuit in *NLRB v. Robert Haws Co.*, 403 F.2d 979, 981 (1968), and by the D.C. Circuit in *NLRB v. Madison Courier, Inc.*, 472 F.2d at 1318. Our circuit's holding in *Westin,* 758 F.2d 1126, did not disturb that rule. There we recognized that "a wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage." The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market. *Id.* at 1130 (citations omitted). As the recited facts in *Westin* demonstrate, the employee there did in fact search for substantially equivalent employment in the Detroit area. She sought employment in a number of positions within a ten-mile radius of her home, and the Board credited her testimony that she did not seek further employment at a hotel cocktail lounge of comparable quality to that of the Westin because of her previous job-seeking experience and because she was apprehensive of being refused employment until she was first cleared of any charge of wrong-doing in connection with her discharge by Westin. No similar circumstances are found in the record here. On the contrary, the employer had, immediately upon conferring with its lawyer, concluded that the Younces had been wrongfully terminated. There was nothing to indicate that the Younces' background and experience did not fully qualify them for employment comparable to their former position with Seligman. The undisputed proof showed that there were ample similar employment opportunities in the Detroit area.

In support of its assertion that the Younces willfully failed to mitigate damages, Seligman presented the testimony of Brian Holland, which was received without objection and without cross-examination. Holland testified that he had gone both to the Macomb County Community Library and the Farmington Hills Library, and there examined microfilms of *The Detroit News, The Detroit Free Press,* and other papers in search of the classified ads in those papers since 1976 or 1977, and in consequence he had prepared Respondent's Exhibit No. 6, which was thereafter received into evidence without objection. This evidence included photostatic copies of microfilms of the classified ads of *The Detroit News* and *The Detroit Free Press* starting in November, 1976, and running to March, 1983. The witness testified that he had sought to obtain at least one ad for each month demonstrating employment opportunities available to caretaker couples. He testified that there were "10 to 20, 5, 3" in some editions. He further testified that the classified ads offered the same or similar employment to the claimants' former position at Eureka. While the particular exhibit has not been included among the materials before us, it is plain from the record that those exhibits were carefully examined, and after simply verifying the source of the records, the Board's attorney, Mr. Ciaramitaro, agreed to their admission. Seligman's attorney then asked the witness, "Do I understand that without reading them all into evidence, it would be a fair statement to say that in each of these editions there are ads seeking to employ caretaker couples?" The witness answered in the affirmative, and the identified exhibit was then received by the judge into evidence. In addition to the extensive evidence relied upon by dissenting Board member Hunter in which the Younces appeared to have notified the Board agent that they did not want to work for Seligman anymore, the employees testified extensively to their activities thereafter in seeking employment. The following testimony of Susan Younce, taken from the record, is undisputed:

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> Q: Did you look in the newspaper for an ad?
>
> A: Sure, we've looked in the paper all the time for jobs.
>
> Q: Did you look for any apartment complex manager jobs?
>
> A: No. I didn't want to get involved in that.
>
> Q: So would it be fair to say that you never tried to get a job, you and your husband, as an apartment couple after you left Eureka?
>
> A: For a while I would say.
>
> Q: You just testified you didn't want to get in.
>
> A: I didn't want to get involved in that again.
>
> Q: So you didn't look for that type of job again, did you?
>
> A: Not in Michigan. In Wisconsin I did.
>
> Q: Would it be fair to say that while you were in Michigan after you left Eureka until the time you got to Wisconsin, you never looked for a job as a caretaker couple like you had at Eureka?
>
> A: Right.

* * * * * *

According to the Younces' testimony then, they never looked for a job as a caretaker couple from the time of their discharge until the time they got to Wisconsin, approximately four years after their unlawful termination on October 7, 1976. This testimony was reiterated in Susan Younce's later testimony:

> Q: Now, let me ask you a question: Do I understand it clearly that you and your husband did not look for a caretaker couple job from the time you left Eureka until the time you went to Wisconsin? Is that a fair statement?
>
> A: It is fair to the best of my knowledge.
>
> Q: Well, you didn't look for one, did you?
>
> A: Not that I can remember, no.

* * * * * *

And yet later:

> Q: . . . One thing is certain, you and your husband since you left Eureka never made an application as a caretaker couple at another apartment complex?
>
> A: Not to my knowledge.
>
> Q: To your knowledge, did you examine some of the ads in the newspaper after you left Eureka?
>
> A: Did I look in the ads for jobs?
>
> Q: Yes.
>
> A: Yes, we've done that quite a bit.
>
> Q: Did you ever see ads for caretaker couples that were in the newspaper at the time from the time you left Eureka?
>
> A: I don't remember. I really don't.
>
> Q: If they were there, you would have ignored them anyway? You didn't want to work in a complex?
>
> A: How can you say that?
>
> Q: You tell me.
>
> A: I'm not saying I would have refused a job. I'm just saying I was not looking for a job as a caretaker couple.
>
> Q: You did not look for a job as a caretaker?
>
> A: No, I wasn't out searching for a job as a caretaker.
>
> Q: So as a matter of fact, if there were ads in the paper, you wouldn't even have looked at those ads, would you?
>
> A: Sure. I look at all kinds of ads.
>
> Q: I mean for a caretaker couple.
>
> A: Specifically just go through all the papers and see if there's any caretaker jobs, no. I didn't do that.
>
> Q: You didn't look for a caretaker couple because you weren't interested in taking that kind of work any more. Isn't that true?
>
> A: Sure.

In *Westin* it was apparent that the discharged employee did in fact seek comparable employment, and the only question was whether her failure to seek it in particular places would show a willful failure. We held to the contrary and recognized, as we do even now, the broad range of discretion accorded the Board in determining this issue. It is true that the Younces testified as to numerous jobs which they did take from time to time as they traveled throughout Michigan and Wisconsin, and it is also true that the administrative law judge credited earnings accumulated in that period against backpay otherwise due. We do not believe, however, that on the proofs before us, David and Susan Younce's refusal to seek comparable and substantially equivalent employment when it was so clearly available can be characterized as anything other than willful. It is plain that they were seeking a substantial change in lifestyle, one which was inconsistent with continuing the type of employment from which they had been discharged. A Board policy that would compel an employer, however wrongful the employer's original conduct, to underwrite such activity indefinitely under these circumstances does not promote the purposes of the act, nor does it comport with the uniform definition of the duty to mitigate that has been employed consistently by both the Board and the several circuits which have considered the problem.

In short, we conclude that the existing award of backpay must be denied enforcement and the cause remanded to the Board for recomputation by taking into account our determination that the Younces willfully failed to seek other comparable employment in mitigation of their losses. While it would be possible for us to endeavor to determine what would have been a reasonable time for the Younces to wait after rejecting the offer of alternative employment made by Seligman, *see, e.g.*, dissent of Judge Wellford in *Westin*, 758 F.2d at 1132, we are of the opinion that judgment should be in the first instance exercised by the Board but in conformity with our determinations here.

THE NOTICES

With respect to the posting of notices, Seligman indicated that the Regional Director had agreed to amend the notice and order to reflect that the respondent had offered reinstatement to all discriminatees except Susan and David Younce. The Board does not refute this claim, but in its brief urges approval of the language finally settled upon by the Board, which includes the names of Seligman's other employees whose discrimination charges had been settled and who had refused unconditional offers of reinstatement. Counsel for the Board observed: "The Company has given no reason, however, why it should not inform its employees of its violations of the Act, as found by the Board and this Court, or of the remedies given for those violations. Rather, such notice would serve the statutory purpose of assuring all of the Company's employees 'of an unhampered right in the future to determine their own labor affiliations' (*NLRB v. Falk Corp.*, 308 U.S. 453, 462–463, [60 S.Ct. 307, 312, 84 L.Ed.2d 396] (1940)), and accordingly the notice posting requirement is well within the Board's broad remedial discretion." Brief for the NLRB at 41 n. 20.

We agree with the Board that it has wide discretion in determining the language and scope of appropriate notices to be posted. We therefore enforce the posting requirements of the Board's order, but with the understanding that the Board retains its discretion to amend the notice in the manner agreed upon by the Regional Director.

Enforcement is granted in part, denied in part, and the cause remanded to the Board for further proceedings consistent with this opinion.

ORDERS WITHOUT DECISIONS

Airlines Transportation Co.; NLRB v., 800 F.2d 1136(T) (3d Cir.), July 30, 1986, enfg. 277 NLRB 288.

American Marine Decking Systems v. NLRB, 804 F.2d 145(T) (9th Cir.), October 29, 1986, enfg. Case 21—CA—23715.

Ashkenazy Property Management Corp. (see L'Ermitage Hotel)

Associated Machine v. NLRB, 782 F.2d 1051(T) (9th Cir.), January 21, 1986, affg. 271 NLRB 367.

Austin Continental Industries; NLRB v., 808 F.2d 837(T) (7th Cir.), December 19, 1986, enfg. 276 NLRB 1484.

Burgess, Cecil v. NLRB, 790 F.2d 83(T) (4th Cir.), May 14, 1986, review denied 274 NLRB 1213.

Butchers' Local 120 (see Food & Commercial Workers Local 120)

CATV Service Co. v. NLRB, 786 F.2d 1145(T) (3d Cir.), February 24, 1986, enfg. 275 NLRB No. 109.

Cedar Falls Health Care Center v. NLRB, 808 F.2d 840(T) (8th Cir.), November 4, 1986, affg. 276 NLRB 1300.

Chemical Workers (TNS, Inc.) v. NLRB, 806 F.2d 269 (D.C. Cir.), December 2, 1986, reversing and remanding Case 10—CA—17709.

Chesterfield Cablevision, Inc. v. NLRB, 790 F.2d 888(T) (4th Cir.), May 23, 1986, enfg. 275 NLRB No. 196.

Continental Telephone (see Electrical Workers IBEW Local 543)

Crest Floors & Plastics v. NLRB, 785 F.2d 314(T) (9th Cir.), February 20, 1986, enfg. 274 NLRB; rehearing denied April 9, 1986.

Drake, Harry v. NLRB, 788 F.2d 2(T) (2d Cir.), January 31, 1986, review denied 258 NLRB 687.

Ducane Heating Corp. v. NLRB, 785 F.2d 304(T) (4th Cir.), February 6, 1986, enfg. 273 NLRB 1389.

Duroyd Mfg. Inc. v. NLRB, 788 F.2d 4(T) (2d Cir.), February 21, 1986, enfg. 276 NLRB 144.

Electrical Workers IBEW Local 543 (Continental Telephone) v. NLRB, 786 F.2d 1174(T) (9th Cir.), March 10, 1986, enfg. 274 NLRB 1452.

Elevator Sales & Service, Inc. v. NLRB, 804 F.2d 1247(T) (3d Cir.), October 17, 1986, enfg. 278 NLRB 627.

Fairfield Daily Republic v. NLRB, 782 F.2d 1052(T) (9th Cir.), January 7, 1986, affg. 275 NLRB; rehearing and rehearing en banc denied April 22, 1986.

Fairfield Publishing Co. (see Fairfield Daily Republic)

Fifth Roc Jersey Associates; NLRB v., 800 F.2d 1137(T) (3d Cir.), July 11, 1986, enfg. 276 NLRB 925.

Fleur Du Lac; NLRB v., 792 F.2d 1122(T), June 18, 1986, enfg. 273 NLRB 93.

Food & Commercial Workers Local 88 (Stretcher's Markets) v. NLRB, 786 F.2d 1170(T) (8th Cir.), February 24, 1986, affg. 275 NLRB 475.

Food & Commercial Workers Local 120; NLRB v., 804 F.2d 1252(T) (9th Cir.), November 14, 1986, enfg. 275 NLRB 1376.

Food & Commercial Workers Local 568 v. NLRB, 122 LRRM 2368 (D.C.Cir.), April 9, 1986, vacating and remanding 268 NLRB 805.

Gateway Inn (see Holiday Inn & Gateway Motel)

Glenn Machine Works; NLRB v., 805 F.2d 1032(T) (5th Cir.), November 5, 1986, enfg. 277 NLRB 658.

Glover Bottled Gas Corp.; NLRB v., 801 F.2d 391(T) (2d Cir.), August 20, 1986, enfg. 275 NLRB 658; cert. denied February 23, 1987.

Granco, Inc. (see Thriftway Supermarket)

Greater Lebanon Hotel Enterprises (see Quality Inn-Lebanon Valley)

Hamilton Standard Independent Security Officers Assn.; NLRB v., 788 F.2d 6(T) (2d Cir.), March 7, 1986, enfg. 275 NLRB No. 195.

Harry Hoffman & Son Printing; NLRB v., 795 F.2d 1005(T) (2d Cir.), June 23, 1986, enfg. 278 NLRB 671.

Harry M. Stevens Services; NLRB v., 793 F.2d 1288(T) (5th Cir.), June 25, 1986, enfg. 277 NLRB 276.

Headquarters Plaza Hotel (see Fifth Roc Jersey Associates)

Hoboken Shipyards, Inc. v. NLRB, 122 LRRM 2368 (4th Cir.), April 22, 1986, enfg. 275 NLRB 1507.

Holiday Inn & Gateway Motel; NLRB v., 794 F.2d 678(T) (8th Cir.), April 3, 1986, enfg. 274 NLRB 687.

Holoyoke Water Power Co.; NLRB v., 793 F.2d 18 (1st Cir.), May 13, 1986.

IMCO/International Measurement & Control Co.; NLRB v., 808 F.2d 837(T) (7th Cir.), December 23, 1986, enfg. 277 NLRB 962.

Iron Workers Local 15; NLRB v., 805 F.2d 391(T) (2d Cir.), October 14, 1986, enfg. 278 NLRB 914.

Iron Workers Local 601; NLRB v., 122 LRRM 2576 (4th Cir.), May 27, 1986, enfg. 276 NLRB 1273.

Kenner Printing Co.; NLRB v., 788 F.2d 5(T) (2d Cir.), February 4, 1986, enfg. 274 NLRB 935.

Kou Fu, Inc. (see Peng Teng)

L'Ermitage Hotel; NLRB v., 796 F.2d 479(T) (9th Cir.), July 28, 1986, affg. 268 NLRB 744.

Lincoln Hills Nursing Home; NLRB v., 799 F.2d 754(T) (7th Cir.), August 29, 1986, denying enf., remanding 268 NLRB 996.

Lou Stretcher's Super Markets (see Food & Commercial Workers Local 88)

Martin-Brower, Co.; NLRB v., 784 F.2d 402(T) (11th Cir.), February 4, 1986, enfg. 273 NLRB 803.

McLean Roofing Co.; NLRB v., 794 F.2d 679(T) (8th Cir.), April 24, 1986, enfg. 276 NLRB 830.

Med West Health Care Management Corp. (see Cedar Falls Health Care Center)

Montgomery Ward & Co.; NLRB v., 785 F.2d 316(T) (9th Cir.), February 21, 1986, enfg. 273 NLRB 1226.

Mountain Tire Co.; NLRB v., 808 F.2d 1517(T) (3d Cir.), December 15, 1986, enfg. 278 NLRB No. 105; rehearing denied January 15, 1987.

Murbro Parking, Inc.; NLRB v., 788 F.2d 5(T) (2d Cir.), February 19, 1986, affg. 276 NLRB 52.

Nurminco, Inc. (see University Health Care Center)

O.K. Machine & Tool Corp. v. NLRB, 805 F.2d 391(T) (2d Cir.), October 10, 1986, vacatur denied 279 NLRB 474.

Olnick, Robert (see Fifth Roc Jersey Associates)

Olster, George R. v. NLRB, 784 F.2d 1132(T) (D.C. Cir.), February 14, 1986, affg. 273 NLRB 494.

Ozark Properties, Inc. (see Holiday Inn & Gateway Motel)

Pemberton Manor; NLRB v., 808 F.2d 54(T) (5th Cir.), December 10, 1986, enfg. 279 NLRB No. 112; rehearing denied January 21, 1987.

Peng Teng; NLRB v., 802 F.2d 443(T) (2d Cir.), September 12, 1986, enfg. 278 NLRB 350.

Pete O'Dell & Sons Steel Erectors; NLRB v., 803 F.2d 1181(T) (4th Cir.), October 27, 1986, enfg. 277 NLRB 1358.

Peterson Painting, Inc. v. NLRB, 804 F.2d 1253(T) (9th Cir.), November 14, 1986, enfg. 277 NLRB 926; rehearing denied December 17, 1986; cert. denied June 22, 1987.

Pottsville Bleaching & Dyeing Co.; NLRB v., 800 F.2d 1136(T) (3d Cir.), June 10, 1986, enfg. 275 NLRB 1236.

Quality Inn-Lebanon Valley; NLRB v., 806 F.2d 253(T) (3d Cir.), November 7, 1986, enfg. 278 NLRB No. 2.

Radio Broadcasting (see Teamsters Local 115)

Redok Enterprises; NLRB v., 811 F.2d 607(T) (6th Cir.), December 11, 1986, enfg. 277 NLRB 1010.

Ryder/P.I.E. Nationwide (see Teamsters Local 745)

Seligman & Associates; NLRB v., 819 F.2d 1142(T) (6th Cir.), December 30, 1986, enfg. in part, denying in part, remanding 273 NLRB 1216.

Spencer Trucking Corp.; NLRB v., 792 F.2d 140(T) (4th Cir.), June 9, 1986, enfg. 274 NLRB 1444.

Suter, J. L. (see Pemberton Manor)

Teamsters Local 115; NLRB v., 800 F.2d 1136(T) (3d Cir.), June 19, 1986, enfg. 275 NLRB 1547.

Teamsters Local 115 (Radio Broadcasting) v. NLRB, 802 F.2d 448(T) (3d Cir.), September 9, 1986, denying enf. 277 NLRB 1112.

Teamsters Local 745 (Ryder/P.I.E. Nationwide); NLRB v., 798 F.2d 1411(T) (5th Cir.), August 29, 1986, enfg. 275 NLRB 599.

Teamsters Local 911; NLRB v., 794 F.2d 682 (9th Cir.) July, 1, 1986, enfg. 275 NLRB 980.

Thriftway Supermarket; NLRB v., 808 F.2d 835(T) (4th Cir.), December 11, 1986, enfg. 276 NLRB 1450.

Thrifty Oil Co.; NLRB v., 792 F.2d 1122(T) (9th Cir), June 20, 1986, enfg. Case 21—CA—21918; rehearing and rehearing en banc denied September 8, 1986.

Unifirst Corp.; NLRB v., 810 F.2d 1160(T) (2d Cir.), December 29, 1986, enfg. 280 NLRB 41.

Uniglass Industries v. NLRB, 800 F.2d 1128(T) (2d Cir.), April 17, 1986, enfg. 276 NLRB 345; cert. denied October 14, 1986.

United Hydraulic Services; NLRB v., 121 LRRM 2464 (4th Cir.), January 21, 1986, enfg. 271 NLRB 107.

University Health Care Center v. NLRB, 786 F.2d 1170(T) (8th Cir.), February 21, 1986, affg. 274 NLRB 764.

Victor Valley Community Hospital; NLRB v., 792 F.2d 144(T) (9th Cir.), June 9, 1986, enfg. 274 NLRB 870.

Wilson, Judith J. v. NLRB, 796 F.2d 476(T) (4th Cir.), June 17, 1986, dismissing Case 9—CA—22245.

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